



SPEAK UP

Speak Up Report 2017

Transparency International Ireland is an independent, non-profit and non-partisan organisation. Our vision is of an Ireland that is open and fair – and where entrusted power is used in the interests of everyone. Our mission is to empower people with the support they need to promote integrity and stop corruption in all its forms.

www.transparency.ie

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The TI Ireland and TLAC teams 2017: Front row from left to right: Kelly McCarthy, Ethan Shattock, Stephanie Casey. Back row from left to right: Oilbhe Madden, Judy O'Loan, Evelyn Doherty, Susheela Math, Donncha Ó Giobúin, John Devitt.

INTRODUCTION

This report draws from anonymised data collected from over 850 people who approached Transparency International (TI) Ireland's Speak Up helpline for information, referral or support between May 2011 and December 2016. Some data from the period between January and December 2016 has been presented to show changes in patterns since the publication of the Speak Up Report 2015.

This is the second Speak Up report to be published. It highlights the types of concerns our clients are reporting, the processes that people believe are abused, and the sectors and institutions they consider to be vulnerable to corruption and other forms of wrongdoing. This data can be used to analyse corruption risks and we outline a number of recommendations to help address these risks in the final section. The report also analyses the implementation of the Protected Disclosures Act 2014 (PDA or 'Act') and proposes reforms that would help address some of its shortcomings.

We also publish the findings from the Integrity at Work Survey 2016 which, for the first time, measures the attitudes and experiences of Irish private sector employees and employers to whistleblowing. We hope that the survey and the report will be useful to policy makers, business and civil society leaders, law enforcement agents, regulators and employers in identifying red flags for future intervention.

We hope this report will help inform future dialogue on how we can work together towards an Ireland that is open and fair, and where power is used in the interests of everyone.

About the Speak Up helpline and the Transparency Legal Advice Centre

The Speak Up helpline was launched by TI Ireland in May 2011 to provide support to witnesses, whistleblowers and victims of corruption and other wrongdoing. Since then, it has provided information, and referral services to over 900 people. Our team has also provided advocacy support to clients including Garda whistleblowers Maurice McCabe and John Wilson, helping counter the narrative of these courageous people as 'troublemakers'.

Since the introduction of the PDA, we have noticed a 115% increase in the number of callers reporting concerns arising during the course of their work. This increase created much greater demand for legal advice and in 2016 the Transparency Legal Advice Centre (TLAC) was launched to provide free legal advice to workers making disclosures of wrongdoing.

The Team

The helpline is coordinated by Judy O'Loan of TI Ireland and protected disclosure cases are referred to the Managing Solicitor of TLAC. Judy is supported by a small team of volunteers who generously give up their

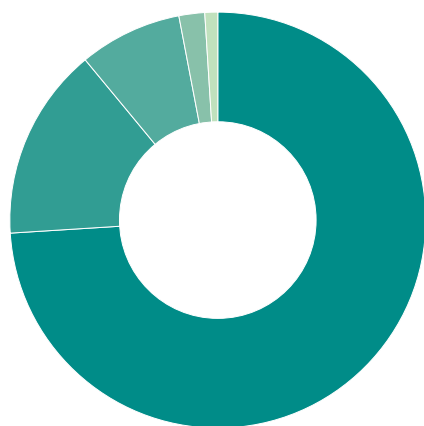
time to operate the helpline and who offer a 'triage' service to help identify the support that TI Ireland or TLAC can offer to callers. The team is also supported by Stephanie Casey, Programme Manager and John Devitt, TI Ireland Chief Executive who are leading a new initiative titled Integrity at Work which is aimed at sign-posting Irish workers to the helpline and promoting safer working environments for people to speak up.

How we work on cases

TLAC and TI Ireland do not attempt to investigate the issues that have been brought to our attention but instead ensure that every client has the information or advice they need to report their concerns (directly with the organisation concerned/through their employer if possible and/or through relevant bodies).

Speak Up callers are referred to TLAC for free legal advice where appropriate. A solicitor-client relationship is established and each TLAC case is dealt with in confidence with legal professional privilege. Given that the aim of the law centre is to provide advice to as many clients as possible, it does not litigate on their behalf.

Client Support



Action taken	Total	Percentage
Basic Information/Advice	708	74.76%
Referred to Agency	138	14.57%
Referred to Legal Advisor	75	7.92%
Advocacy Support	24	2.53%
Complaints Submitted to Authority	9	0.95%

The largest number of clients contacting the Speak Up helpline have received basic information and advice on reporting channels and potential remedies for their concerns. More than 14% of clients have been

referred to the relevant agency, while just under 8% of clients have been referred to a legal advisor – an increasing number of these are now being referred to TLAC for free legal advice. In rare circumstances (2.5%), TI Ireland has also provided advocacy support or representation to clients. Nine separate reports have been submitted directly to the authorities since 2011.

Integrity at Work

Integrity at Work (IAW) is a multi-stakeholder initiative aimed at facilitating supportive working environments for people to speak up and act with integrity. Employers who become members of the initiative sign a pledge that commits them to prevent the penalisation of workers and act on any concerns that are raised. In addition, employees will be sign-posted to external sources of support including, where appropriate, access to free legal advice from TLAC, via the Speak Up helpline. If workers reporting concerns about an IAW member organisation have suffered penalisation or feel that their concern has not been responded to appropriately, they can bring this to the attention of the TI Ireland Speak Up helpline. With the worker's permission, TI Ireland can then report back to the employer on any systemic issues that might arise from the worker's concerns as well as any recommendations for remedial action. Integrity at Work was launched by the Minister for Public Expenditure and Reform, Paschal Donohoe TD, in September 2016.

Acknowledgements

We are very grateful for the support of the Public Interest Law Alliance who have provided free legal support and have facilitated pro bono legal services from firms including William Fry, McDowell Purcell and Eversheds, and the many solicitors who have supported our clients over the years – including Moran and Ryan. The essential support we provide could not be offered without the financial assistance of voluntary contributions from the public and our institutional donors. Funding for TLAC, the Speak Up helpline and IAW is currently provided by the Department of Public Expenditure and Reform and the Department of Justice and Equality. Additional funds have been granted by the Public Interest Law Support Fund.

We also want to thank the many volunteers who have given their time and skills to TI Ireland and TLAC. The Speak Up helpline could not be run without their support. We would like to thank the following volunteers for their dedication and support since 2015:

Margaret Ameho, Jade Bakare, Jenny Dilley, Conor Duff, Ani Karibian, Sara Kaufhardt, Morgan Lawson, Gor Marojan, Camilla Mear, Maude Ní Bhrolcháin, Eamonn O'Keeffe, Sarah O'Keeffe, Taiwo Olatunji, Colm Parnell, Meghan Van Portfliet, Lucianna Ravasio, Zora Tokhi, and Silke Volckaert.

SUMMARY

Whistleblowing and the Protected Disclosures Act

While the Speak Up helpline offers support and advice to all members of the public on reporting wrongdoing, TI Ireland has focussed most of its resources on developing expertise and resources to promote whistleblowing based on the understanding that whistleblowers are more likely to uncover and expose corruption and relevant wrongdoing than anyone else.

TI Ireland launched TLAC in 2016 to provide free legal advice to whistleblowers in Ireland. It is estimated that TLAC clients were offered between €220,000 and €260,000 in free legal advice during the first year of operation. The experiences of its clients have also been informative in helping identify legal and practical obstacles to disclosing wrongdoing. To that end, much of this report (see Section 6) deals with the PDA and how it is being implemented.

The report looks at a number of rulings under the Act and draws attention to potential shortcomings in the legal framework and offers proposals for further reform. Among these proposals are the need to amend out-dated sectoral whistleblower protection laws, and to reverse the burden of proof onto employers to show that any alleged detriment to a whistleblower was not a direct consequence of their disclosure.

The Integrity at Work Survey

As the courts are beginning to interpret the PDA, employers are also only beginning to understand their own legal obligations. The Integrity at Work Survey 2016 shows that very few employers are aware of the law and even fewer workers know about the protections that the PDA offers. The survey also suggests that only one third of employers had a whistleblowing policy in place. All of this points to the need for further education and promotion of the Act in the workplace. It is hoped that TI Ireland's new Integrity at Work programme, which is aimed at promoting safer working environments for people to speak up, will help meet this demand.

The Integrity at Work Survey also found that more than one in ten employees (the equivalent of 160,000 people) had claimed to have reported wrongdoing during their careers. Remarkably, only 21% of those who say they reported wrongdoing suffered as a result and 28% of those who reported said they benefitted. This finding is consistent with that of research on the

Australian public sector that indicates that whistleblower retaliation is not as common as high-profile cases would suggest.¹ Nonetheless, it should be noted that despite the relatively low percentage of reprisal, the Integrity at Work's Survey's findings suggest that an estimated 33,000 workers claim they have suffered some detriment for reporting wrongdoing.

Whistleblower Reprisal

The Speak Up Report 2015 told the stories of some whistleblowers and the devastating impact that reprisal had on their lives and careers. The cost in terms of public distrust towards democratic government and the chilling effect that one example of whistleblower reprisal can have on others should also not be underestimated.

The number of calls from whistleblowers as a proportion of all calls to the Speak Up helpline increased from 15% to 27% between 2014 and 2016. While there was only a small increase in reports of whistleblower retaliation across all sectors (up to 13% of all calls this period compared to 9% in 2015), the health service witnessed an increase in reported whistleblower reprisal (from 20% to 44% of all calls from health sector workers) during 2016. Whistleblower reprisal was also the most reported issue in the health sector in 2016. This should be a cause of concern for the health service, particularly since whistleblower reprisal against healthcare professionals is believed to pose serious risks for patient safety.²

The Need for Action

The lack of action in response to disclosures, and the mistrust this engenders, can be as much a problem as whistleblower reprisal. Many of the calls received in 2015 and 2016 related to a failure to act on the part of organisations – especially regulatory and law enforcement agencies. Failure to investigate allegations of wrongdoing is the fifth most reported issue across all sectors, and the most reported issue by callers about An Garda Síochána. The Shelbourne College case and concerns surrounding the Independent Review Mechanism are covered here (see pages 16 and 21) and also demonstrate the need for better communication with the witnesses and victims of crimes.

The belief that too little is being done in response to disclosures is underlined by the Integrity at Work Survey results that show that organisations need to work on assuring their staff that reports of wrongdoing will be acted upon and whistleblowers will be protected. Although 93% of Irish employers state that a report of wrongdoing would be acted upon and their staff would not suffer as a result of doing so, less than half of all employees said they felt safe reporting a concern or believed that their reports would be acted on by their employer.

¹ See Whistleblowing in the Australian Public Sector, A.J. Brown (ed), 2008, <http://press-files.anu.edu.au/downloads/press/p8901/pdf/book.pdf?referer=465> Page 168

² See Freedom to Speak Up: An Independent Review into Creating an Open and Honest Reporting Culture in the NHS, Robert Francis, 11 February 2015, Page 4

Sectors in the Spotlight

As controversies surrounding An Garda Síochána (the police service) continued through 2016, there was a notable increase in complaints about the Gardaí to the helpline. Concerns about Garda activity became the subject of the largest number of complaints from the public during the year. Although whistleblowing has become synonymous with the Gardaí among some members of the public according to the Integrity at Work Survey, the conduct of criminal investigations was the most common source of concern among callers about the Gardaí to the helpline in 2016. In addition to increased resources and trained staff to investigate corruption and white-collar crime, TI Ireland has called for better communication and a more customer service-based approach to both witnesses and victims.

The health sector generated the second largest number of calls to the helpline during 2015 and 2016 and the most common concern raised by callers was whistleblower reprisal. The experience of the 'Grace' whistleblowers demonstrated the risk of retaliation against health-service staff who speak up and the need to put in place measures aimed at supporting whistleblowers. The Speak Up report notes that the Health Service Executive (HSE) is using different whistleblowing policies based on two pieces of legislation.³ It suggests that revised guidance to workers removes any reference to 'good faith' reporting and makes it clear that staff can make protected disclosures under the PDA instead of the Health Act 2007.

The Banking and Finance sector appears in the top three most complained about sectors for the first time. The largest number of complaints to the Speak Up helpline were made about retail-bank lending practices and the conduct of 'vulture funds'. The report also notes that there was a relatively large number of protected disclosures made by workers directly to the Central Bank. The regulator was criticised during 2016 and 2017 for its response to the disclosures of whistleblower Jonathan Sugarman, and came under further scrutiny when a newspaper report found that its whistleblower hotline was unmanned for some time.⁴ Despite the controversies, the Central Bank offers relatively clear guidance on its website on how to disclose wrongdoing. However, this report also highlights the potential confusion caused by different whistleblower procedures and protections set out in the Central Bank (Supervision and Enforcement) Act 2013) and the PDA.

General Recommendations

Although this report proposes reform of the PDA and sector-specific measures, protecting whistleblowers is not enough to stop wrongdoing on its own. Several recommendations are aimed at stopping corruption across the public and private sectors. These include calls for the swift passage of both the Criminal Justice (Corruption) Bill 2012 and the Public Sector Standards Bill 2015. It also suggests that a unitary anti-corruption agency and/or an inter-agency task-force be established which would allow law enforcement agencies and other state bodies to more proactively share intelligence and prosecute offences. Additionally, it is recommended that agencies such as the Standards in Public Office Commission be granted powers to investigate allegations of breaches of the Ethics Acts without a prior complaint.

TI Ireland also repeats its call from 2015 for local authorities to be compelled to publish and report on their compliance with statutory Fraud and Anti-Corruption Alert Plans as well as to be provided with anti-corruption and ethics training. In addition, all public officials and representatives should be provided with ethics training and guidance. Resources should also be invested in educating the public on the risks and costs associated with economic crimes and corruption and ways in which they can take action against it. Finally, TI Ireland repeats its call for a ban to be introduced under the Public Sector Standards Bill on public officials receiving gifts or entertainment above a token value, and a requirement that liabilities be disclosed as part of any register of interests.

Stopping corruption requires a comprehensive strategy aimed at promoting transparency, strengthening institutions, enacting and enforcing laws to hold the corrupt to account, and protecting those who speak up. In addition to lobbying for a range of measures aimed at stopping corruption, TI Ireland has dedicated much of its time to protecting whistleblowers. However, since 2014 there has been a 115% increase in the proportion of whistleblowers seeking advice from the Speak Up helpline and TLAC. Demand for support from TLAC and IAW has increased to the point where there is now a two-month waiting list for free legal advice and the IAW programme is already reaching capacity. These initiatives will need significantly increased funding if they are to continue their vital work in supporting whistleblowers and the organisations they work for.

3 HSE "yet to apologise" to whistleblowers in Grace case, RTÉ, 15 June 2017, <https://www.rte.ie/news/2017/0615/882965-pac-grace/>

4 See Central Bank whistleblower hotline went unanswered, Irish Independent, 26 January 2017, <http://www.independent.ie/business/personal-finance/central-bank-whistleblower-hotline-went-unanswered-35399044.html>

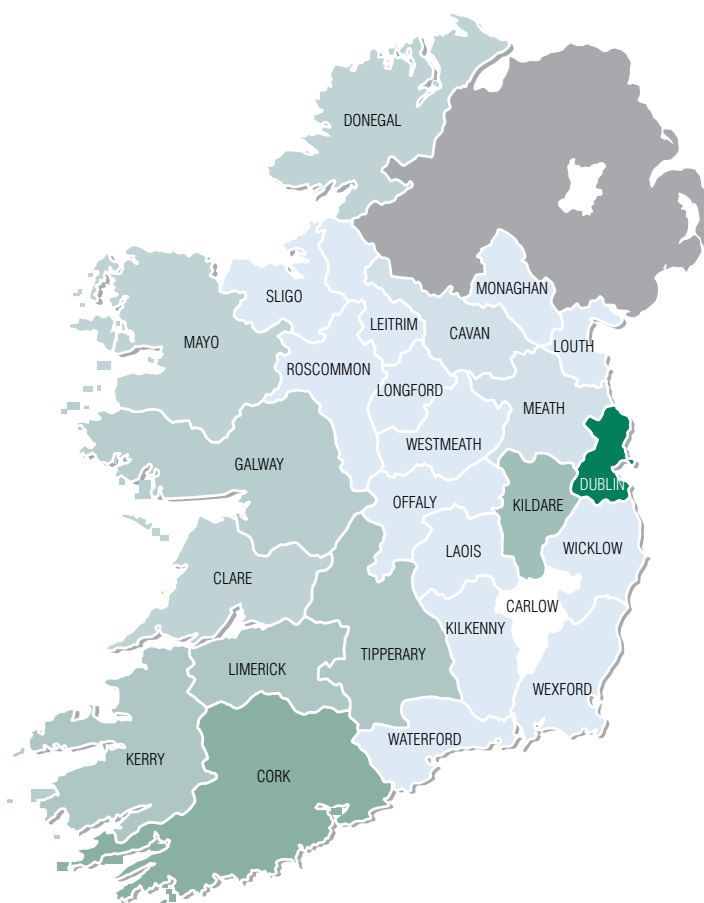
WHO IS SPEAKING UP?

Victims, Whistleblowers and Witnesses

During 2014, 42% of callers were categorised as witnesses, 38% of callers were categorised as victims and 15% of callers were categorised as whistleblowers (i.e. those who had reported wrongdoing at work).⁵ This is double the figure from 2012, when just 8% of callers were categorised as whistleblowers.

From January 2015 until 31 December 2016, TI Ireland had 327 additional calls to the helpline and the number of whistleblowers continued to increase. During this time frame, 27% of calls were from whistleblowers, 24% were from witnesses, and 39% were classified as victims. This suggests that the enactment of the PDA, which came into effect in July 2014, has had an impact on the number of whistleblowers calling the helpline. Factors such as continued media coverage of whistleblowing cases may have also contributed to this increase.

Not all callers felt comfortable disclosing their location. Of the callers that did tell us where they live, however, the pattern of calls followed the trends of the previous years, and the largest numbers of calls came from the two most populated areas of the country: Dublin and Cork.



Region	Number	Percentage
Dublin	50	34.01%
Cork	22	14.97%
Kildare	15	10.20%
Galway	8	5.44%
Tipperary	6	4.08%
Limerick	6	4.08%
Kerry	6	4.08%
Clare	4	2.72%
Donegal	4	2.72%
Mayo	4	2.72%
Cavan	3	2.04%

Region	Number	Percentage
Meath	3	2.04%
Monaghan	2	1.36%
Leitrim	2	1.36%
Louth	2	1.36%
Waterford	2	1.36%
Sligo	2	1.36%
Wexford	2	1.36%
Kilkenny	1	0.68%
Westmeath	1	0.68%
Laois	1	0.68%
Offaly	1	0.68%

⁵ Based on data from 24 January 2015 to 31 December 2016. Unless otherwise specified, this time period has been used throughout this report



Demographic Profile

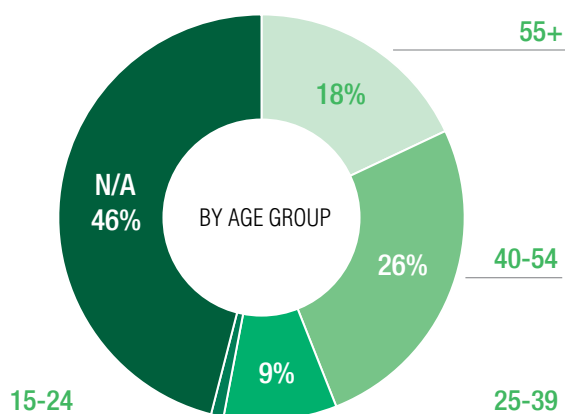
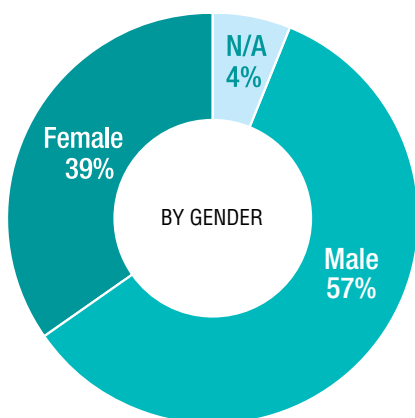
Gender of Speak Up Clients/Callers

Most Speak Up clients up to the end of 2016 were men, although the proportion of male clients fell slightly from 59% to 57% from the start of 2015. A number of economic and social factors, such as profession and length of service, may explain the disparity between the number of male and female callers to the helpline and would justify further analysis.⁶

Age Profile of Speak Up Clients/Callers

Many callers did not disclose their age but, of those who did, the most common age-bracket was 40 to 54. This has been the trend since 2012, with percentages varying slightly.

Gender and Age Profile of Clients/Callers to 2017



6 See http://www.transparency.org/whatwedo/publication/policy_position_01_2014_gender_equality_and_corruption_what_are_the_linkage

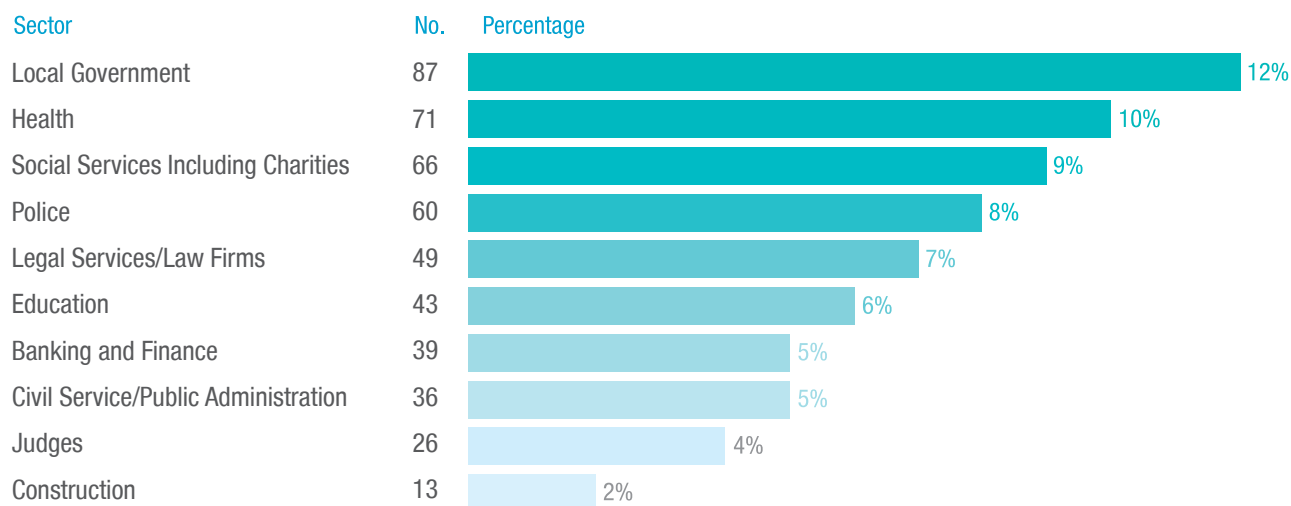
WHAT ARE SPEAK UP CLIENTS CALLING ABOUT?

There has been a significant increase in calls regarding An Garda Síochána during 2016. This might be partly due to the ongoing media coverage of whistleblowers in this organisation, which could have prompted people to report alleged failures to investigate reported crimes. For more information and analysis on these statistics, see the Spotlight on Sectors section on page 18. A growing number (9%) of callers have declined to share information on the industry they worked in.

Sectors

The 2015 analysis, covering the period from May 2011 to January 2015, found that the ten most complained-about sectors were:

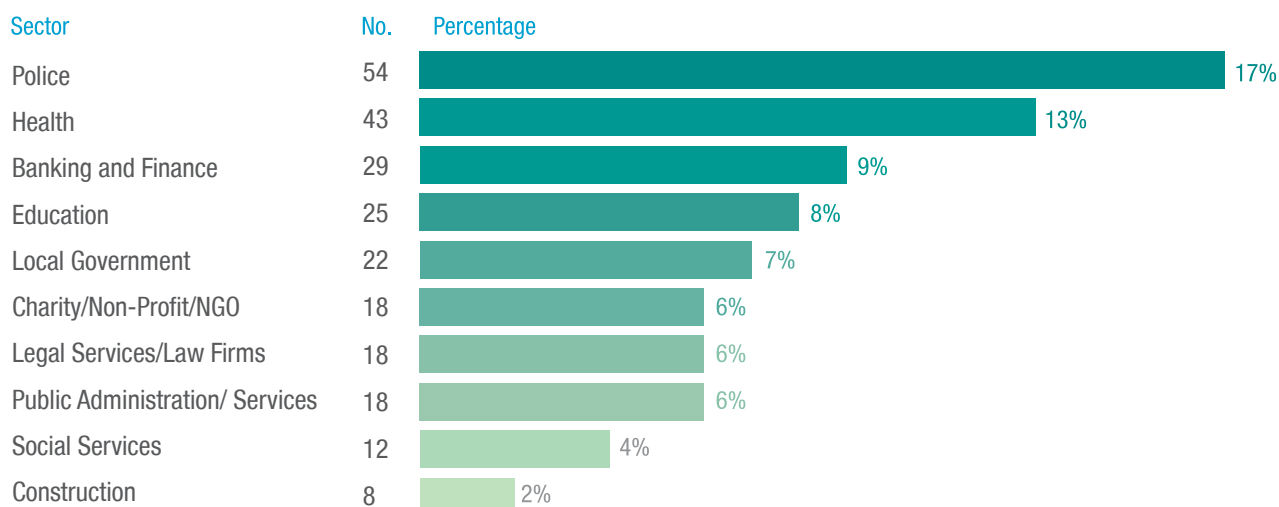
Most Reported Sectors to 2015⁷



⁷ Cases can be included under more than one category of problem sector.

The most reported sectors from January 2015 to the end of December 2016 were:

Most Reported Sectors to 2017



It might be impossible to determine how problematic any one sector is in absolute terms and difficult to establish whether any one category is more affected by wrongdoing than another. However, this headline data points to a lack of public trust in State institutions in Ireland. While an increase in trust has been observed globally in 2016 by the public relations firm, Edelman, in their annual Trust Barometer, Ireland remains

near the bottom of this list with less than half of the population saying they trust public institutions.⁸ With declining public trust considered to be a key factor in the rise of anti-democratic populism and social tensions, the number of complaints about wrongdoing in public life should be of interest to decision makers across the public, private and non-profit sectors.⁹

Determining the Risk of Corruption

The risk of corruption can be determined by a combination of factors. It can be calculated as a function of incentive, opportunity and inclination which is limited by external oversight (the possibility that a person will be held to account for his/her behaviour) and the individual's and society's own commitment to living by ethical values (integrity). In other words:

$$\text{Corruption} = \frac{\text{Incentive} + \text{Opportunity} + \text{Inclination}}{\text{Transparency} + \text{Accountability} + \text{Integrity}}$$

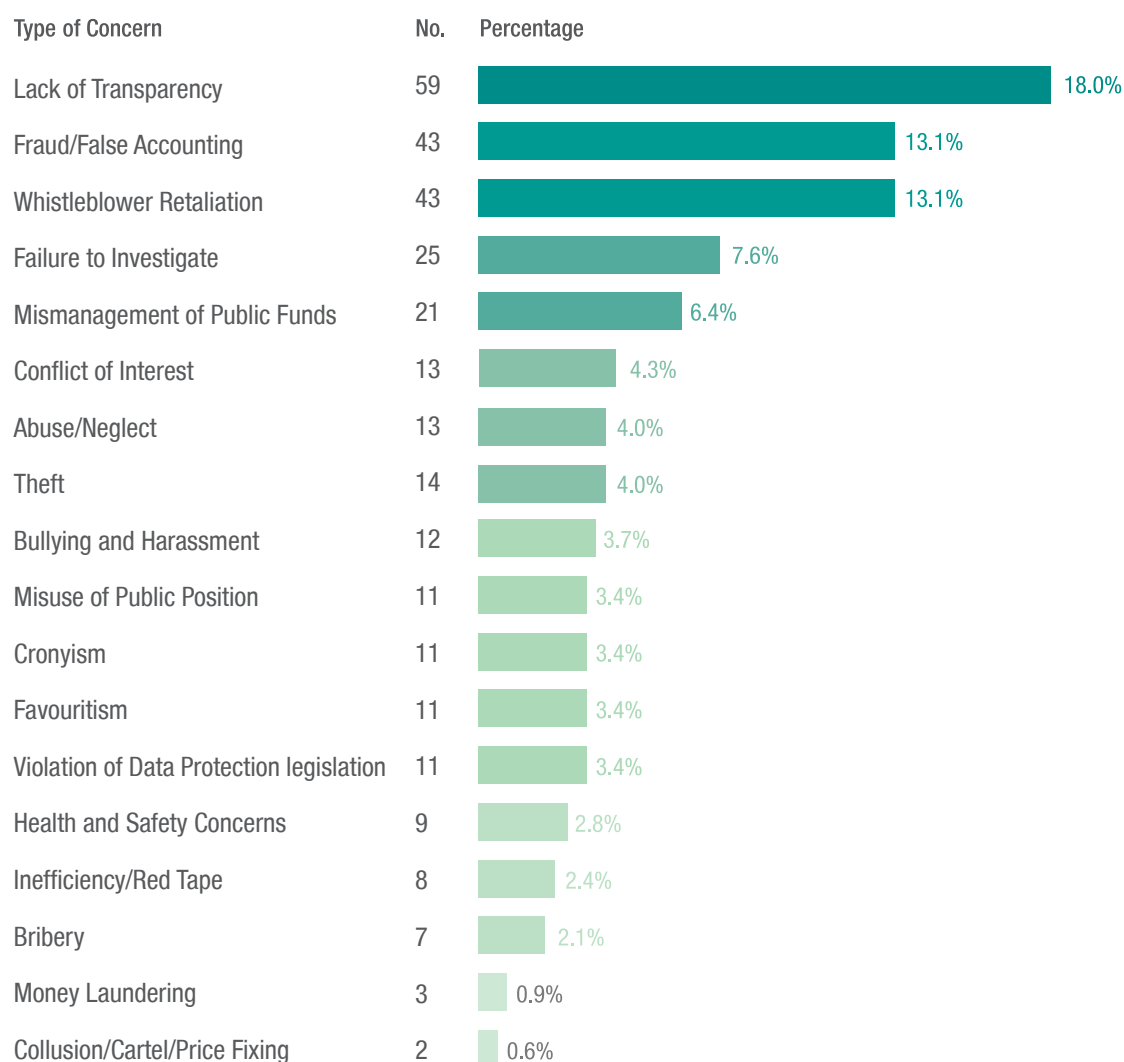
It usually follows that the biggest risk of corruption lies where there are significant financial incentives and little chance of being detected. The risks are increased where institutions and laws are ill-equipped to prevent corruption or hold the corrupt officials to account.

8 Edelman, '2016 Edelman Trust Barometer', *Edelman* <<https://www.edelman.com/insights/intellectual-property/2016-edelman-trust-barometer/>>. See National Integrity Systems Country Study - Ireland, (Dublin: Transparency International Ireland, January 2009) and National Integrity Systems Study Addendum 2012 (Dublin: Transparency International Ireland, October 2012) <<http://transparency.ie/sites/default/files/TI%20Country%20Study%20Addendum2012.pdf>>

9 Edelman, 'The Fall of Trust, the Rise of Populist Action', <https://www.edelman.com/post/fall-of-trust-rise-of-populist-action/>

The types of concerns raised with the helpline team from the beginning of 2015 to the end of 2016 have included:

Type of Concerns reported by Speak Up clients/callers



In 2016, the most common allegation levelled at institutions was a lack of transparency. This has manifested in a number of ways. In Local Government, clients have accused councils of providing too little information when making planning decisions or in failing to publish adequate information about contracts for works and services. The majority of callers who have reported a lack of transparency in An Garda Síochána

complained about a lack of clarity over why the Gardai do not investigate some reports (see page 19).

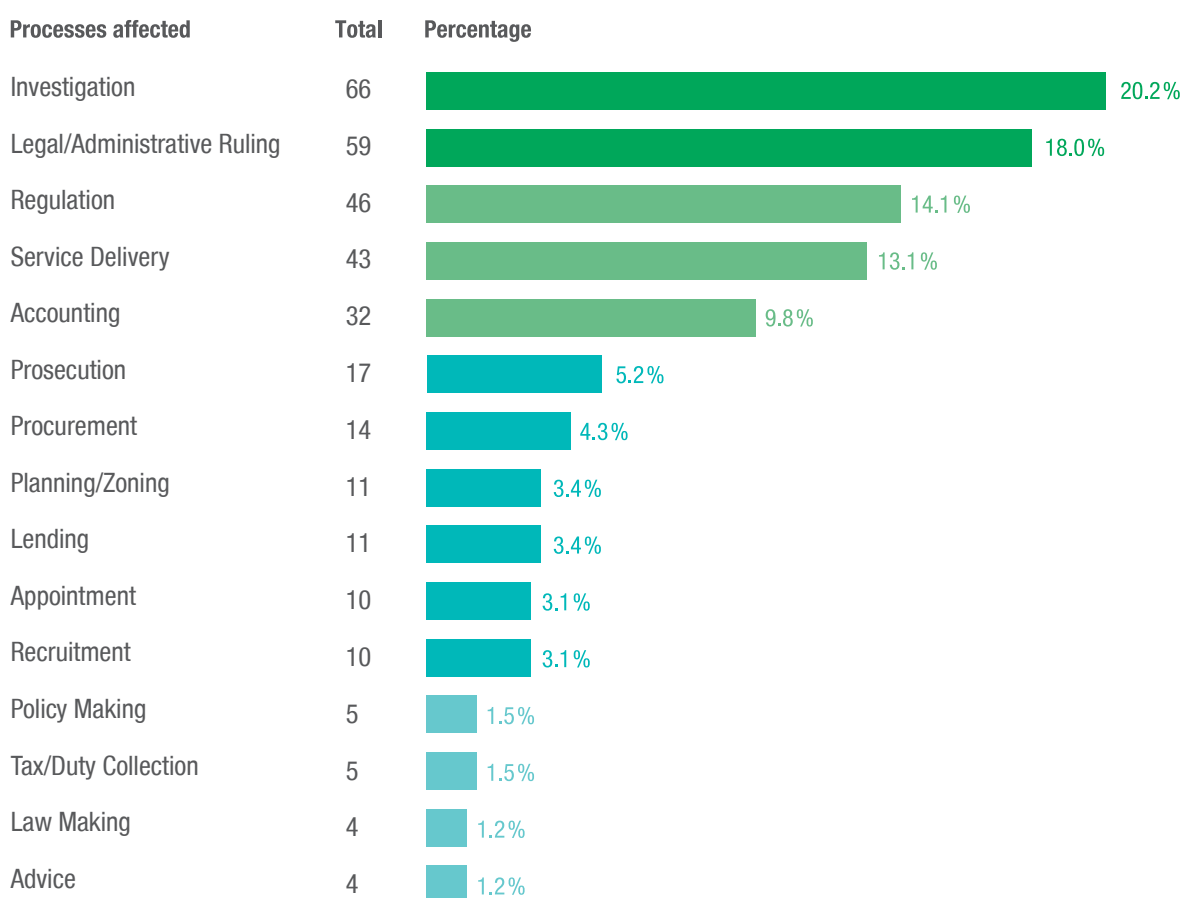
Fraud and False Accounting continues to be an issue across all sectors. From 2011 to 2015, 15.8% of callers alleged this type of wrongdoing. While the ratio dropped to just 13.1% to the end of 2016, it was still the second most widely-reported type of alleged wrongdoing during the year.

Processes believed to have been affected

The largest number of complaints relating to specific procedures or processes from the beginning of 2015 to the end of 2016 came from callers alleging that their reports of wrongdoing had not been adequately investigated by the relevant authorities. The proportion of such calls more than doubled from 9.6% to 20.2% during 2015 and 2016.

Delays in investigating reports of wrongdoing; the manner in which investigations have been undertaken; and/or refusals to open a formal investigation or prosecute, continue to cause dissatisfaction among a large number of Speak Up clients.

Processes Affected





CASE STUDY: MONEY PAID TO COLLEGE LOST

Among the callers to the Speak Up helpline reporting such concerns was a student from India who advised that he lost almost €5,500 when Shelbourne College in Dublin closed its doors in November 2014. The Indian student was one of 150 from countries including Pakistan, Nepal, and Vietnam who had paid for education courses in Ireland but were subsequently denied visas and could not attend. The student reported that their fees ought to have been returned to the students but believed that the directors of the college left Ireland without settling its debts. It was estimated the amount lost by the Indian student was equivalent to four years' average annual wage in India.¹⁰

The Irish Council for International Students (ICOS) reported its concerns about the management of the students' fees to the Office of the Director of Corporate Enforcement (ODCE) and the Garda Bureau of Fraud Investigation (GBFI). ICOS and TI Ireland also sought updates from the authorities on the students' behalf.¹¹

Although the Indian student provided information to the authorities on the suspected whereabouts of one of the company directors, communication on progress with the investigations was limited. The Indian student was only informed on the status of the investigation into his missing fees in August 2017, further to intervention by TI Ireland. The company that traded as Shelbourne College was struck-off the register of companies and dissolved in April 2016.¹² The government implemented policy reforms following the Shelbourne College scandal and other scandals of a similar nature.¹³ During 2014, 10 colleges closed their doors and over 3,000, mainly non-EEA, students were left without the education programmes for which they had paid.¹⁴

10 Based on figures from 2014. See <https://tradingeconomics.com/india/wages>

11 The GBFI has been called the Garda National Economic Crime Bureau (GNECB) since 2016

12 See http://collegetclosures.icosirl.ie/?page_id=1014#Shelbourne

13 The Government's Policy Statement on Reform of the International Education Sector and Student Immigration System of May 2015 can be accessed here: <https://www.education.ie/en/Publications/Education-Reports/Reform-of-the-International-Education-Sector-and-Student-Immigration-System-Government-Policy-Statement.pdf>

14 Reform of the International Education Sector and Student Immigration System, Government Policy Statement, May 2015, <https://www.education.ie/en/Publications/Education-Reports/Reform-of-the-International-Education-Sector-and-Student-Immigration-System-Government-Policy-Statement.pdf>



SPOTLIGHT ON SECTORS

The top three most reported sectors from the beginning of 2015 to the end of 2016 were the Police, Health services, and Banking and Finance. This section looks at the potential reasons for the increase in calls related to these three sectors and potential remedies to some of the concerns reported by callers.

Top Reported Sectors

Sector	Total	Percentage
Police	54	17%
Health	43	13%
Banking and Finance	29	9%
Education	25	8%
Local Government	22	7%
Charity/Non-Profit/NGO	18	6%
Legal Services/Law Firms	18	6%
Public Administration/Services	18	6%
Social Services	12	4%
Construction	8	2%

An Garda Síochána

The controversy surrounding the treatment of Garda whistleblowers has continued to the point where the term whistleblowing is synonymous with 'Garda' among many respondents to the Integrity at Work Survey (see page 41). The controversy is unlikely to end any time soon. In addition, a Commission of Investigation into the allegations of a smear campaign against Garda whistleblowers was announced in February 2017 which has pushed the issue back into the public spotlight (see also page 28).

Although whistleblowing has been a recurring theme among callers to the Speak Up helpline in 2016, the largest number of complaints to the helpline arose

from alleged failures by gardaí to investigate crimes. Last year, TI Ireland drew attention to the way in which some complaints or reports were handled by statutory agencies including An Garda Síochána. The number of complaints surrounding investigations increased during 2015 and 2016. Among the allegations Speak Up clients made include official neglect in the handling of evidence and shortcomings in statement and note-taking by gardaí. These issues were also highlighted in the relatively large number of complaints made to GSOC arising from Garda investigations¹⁵ and the O'Higgins Commission findings into allegations of Garda misconduct in the Baileboro District.¹⁶

¹⁵ See https://www.gardaombudsman.ie/docs/publications/AnnualReports/GSOC_AR16.pdf, Page 11

¹⁶ See http://www.justice.ie/en/JELR/Commission_of_Investigation_Certain_Matters_relative_to_the_Cavan_Monaghan_Division_of_the_Garda_S%C3%ADoch%C3%A1na_Final_Report.pdf/Files/Commission_of_Investigation_Certain_Matters_relative_to_the_Cavan_Monaghan_Division_of_the_Garda_S%C3%ADoch%C3%A1na_Final_Report.pdf

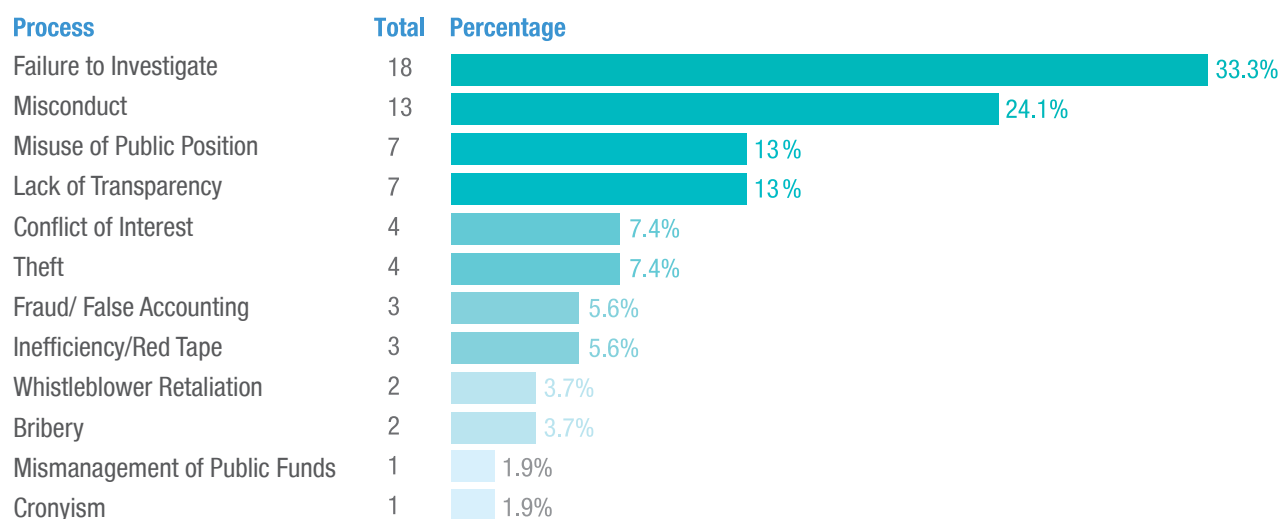
The alleged refusal of the GBFI (now the GNECB) to investigate without a victim statement even where there is a witness, was also addressed in the Speak Up 2015 report.¹⁷ The reliance on a victim statement poses a significant challenge to uncovering fraud and corruption. For example, if a public body is perceived by the gardaí to be the victim of fraud and the fraud is committed by senior management of the same public body, it is unlikely that the gardaí will investigate unless senior management of the public body reports the offence. In such circumstances, an anonymous tip-off is unlikely to be acted upon and an unreasonable burden is placed on more junior members of staff to gather and share evidence of wrongdoing or to present themselves as witnesses. Even then, there is little guarantee that a thorough investigation will be carried out.

It is not clear why such an approach might be taken by the gardaí and explanations for not fully investigating concerns sometimes pose more questions than they answer. However, it appears that the GNECB has insufficient resources to proactively gather intelligence on crimes other than money-laundering.¹⁸ Even then, it has been claimed that resourcing appears to be inadequate.¹⁹ The provision of professional training and the direct recruitment of specialist staff into the GNECB and other units are also needed to effectively investigate fraud-related offences.²⁰ However, basic procedures such as note-taking also need to be

improved and carefully monitored across the service. The O'Higgins Commission found 'a lack of proper recording and note taking' in nearly all cases involving allegations of Garda malpractice examined.²¹ In addition, it drew attention to the need for templates to cover all possible breaches of Garda discipline and suggested that continuing professional development be implemented in respect of the Garda PULSE system (see page 28).

Communication with witnesses, victims and the public is also important. Fraud and corruption-related offences are notoriously complex and time-consuming. It can take five years or more to bring a fraud case to trial and, in the intervening period, witnesses and victims can be left without any information on whether a case is under active investigation. The Garda Inspectorate has advised on the need for a more customer service-based approach to dealing with the public. This approach should also apply to how gardaí communicate with witnesses and whistleblowers. Gardaí should be able to clearly and consistently explain the steps of an investigation or why an investigation is not taking place to a witness or victim of a crime. Witnesses and victims may not always be happy with the outcome of an investigation but they are more likely to accept it where procedures are consistently followed and the process is clearly explained to them.

Type of Concern reported about the Police



¹⁷ See page 14, Speak Up Report 2015

¹⁸ The Financial Intelligence Unit which is embedded within the GNECB is responsible for processing Suspicious Transaction Reports submitted under Irish money laundering legislation. <http://www.garda.ie/Controller.aspx?Page=19255&Lang=1>

¹⁹ White-collar crime reports going unread amid 'endemic' lack of resources, The Irish Times, 2 June 2014, <https://www.irishtimes.com/news/crime-and-law/white-collar-crime-reports-going-unread-amid-endemic-lack-of-resources-1.1817109>

²⁰ See page 3, Report of the Garda Síochána Inspectorate, 2015, www.gsinsp.ie/en/GSINSP/1286-ChangingPolicinginIreland_Low-Full.pdf/Files/1286-ChangingPolicinginIreland_Low-Full.pdf

²¹ Commission of Investigation (Certain Matters relative to the Cavan/Monaghan Division of the Garda Síochána), page 347, http://www.justice.ie/en/JELR/Commission_of_Investigation_Certain_Matters_relative_to_the_Cavan_Monaghan_Division_of_the_Garda_S%C3%ADoch%C3%A1na_Final_Report.pdf





CASE STUDY: BLIND JUSTICE

Another caller advised that she had reported financial fraud within a company to the Garda National Economic Crime Bureau (GNECB)²² but was told that one complaint was not sufficient for an investigation to be commenced and that this would only happen if others also reported the same wrongdoing. When she took the complaint to the ODCE she claims that she was told that they did not have the resources to investigate the complaint and dismissed it, without offering assurances that it would be logged for future reference.

TI Ireland noted in 2015 that State agencies can be slow to address allegations of cover-ups or failures to investigate wrongdoing. This is no less an issue where investigations into the death of Irish citizens are concerned. In order to address the many allegations of Garda misconduct arising in the wake of the Guerin Report, the Minister for Justice and Equality established an Independent Review Mechanism (IRM) to examine allegations of Garda misconduct or inadequacies in the investigation of allegations of serious criminal offences including murder. It was understood that the function of the IRM, made up of a panel of barristers, was to undertake a preliminary examination of the allegations and make recommendations on the need for further investigation. A number of individuals whose cases were being examined by the IRM contacted TI Ireland to advise that they were unhappy with the process followed by the IRM. Their concerns included:

- an absence of publicly available terms of reference for the IRM;
- the lack of a formal invitation to victims to submit documentation and/or oral evidence to the IRM panel;
- confusion over the evidence which was made available to the panel;
- and an indeterminate reporting timescale.

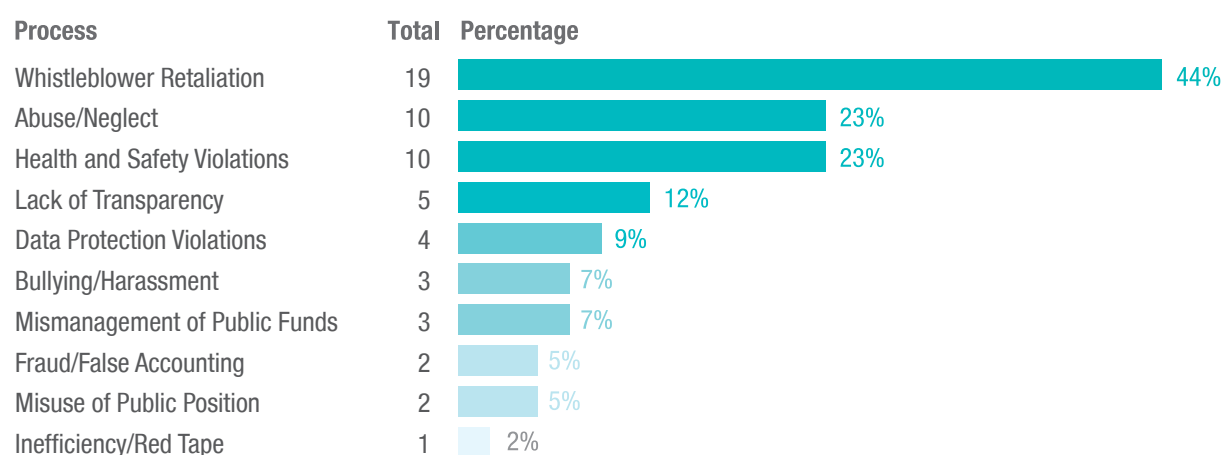
TI Ireland highlighted these issues to the Department of Justice and Equality and explained that trust was already at a low ebb for these individuals, given their past experiences and the wider allegations of Garda misconduct. It asked for a transparent framework to be put in place, to increase the public's confidence in the IRM process and the justice system. Few changes took place, however, and many individuals contacted the Speak Up helpline to advise that they were not satisfied with the Minister for Justice's decisions that no further investigation be undertaken.

22 The GBFI has been called the Garda National Economic Crime Bureau (GNECB) since 2016

Health Sector

The health sector has been one of the most complained-about sectors since the Speak Up helpline was established. During 2015 and 2016, it was the second most complained-about sector by callers to the helpline. Additionally, several stories of alleged corruption and neglect reported by health sector whistleblowers made news headlines during 2016.

Type of Concern reported about the Health Sector



For example, RTÉ investigated procurement practices at several hospitals during the summer of 2015 and reported that employees at two Dublin hospitals accepted gifts and holidays from suppliers in exchange for orders or commercially sensitive information on competitors.²³ A whistleblower at St. Vincent's University hospital had raised concerns over procurement practices a year before the RTÉ investigation. However, it was reported that the information was not shared with the hospital itself.²⁴

A case of alleged neglect reported by another whistleblower in the HSE also dominated headlines in 2016.²⁵ Two whistleblowers alleged that there was sexual abuse in a foster home but that the HSE ignored the reports and left the child known as 'Grace' in the home for over 17 years. The whistleblowers described the treatment they experienced in the HSE after making a disclosure as threatening, with one claiming that there was misinformation spread about her to discredit her.²⁶

This trend is not unique to Ireland. According to Public Concern at Work, the largest number of whistleblowers approaching its advice line work in the UK's National Health Service (NHS) and report high levels of intimidation by staff and management.²⁷

A review of the treatment of whistleblowers was conducted by Sir Robert Francis QC (known as the Francis Report) and published in February 2015. It noted a 'culture of fear, blame, defensiveness and 'scapegoating' when concerns were raised'.²⁸ Over 19,000 health workers were surveyed as part of the study which found that more than a third of staff had reported wrongdoing at the NHS. A large number of NHS workers also found themselves blacklisted from future employment opportunities, even where they had won unfair dismissal claims and had received apologies from their employers.²⁹

23 Give and Take, RTÉ Investigations Unit, 30 September 2016, <https://www.rte.ie/news/investigations-unit/2015/0806/719497-give-and-take/>

24 St Vincent's Group wants all evidence relating to claims by whistleblower, Irish Independent, 18 July 2015, <http://www.independent.ie/irish-news/courts/st-vincent-s-group-wants-all-evidence-relating-to-claims-by-whistleblower-31385963.html>

25 Report into Grace foster abuse scandal highlights raft of issues around HSE investigation, Irish Examiner, 1 October 2016, <http://www.irishexaminer.com/breakingnews/ireland/report-into-grace-foster-abuse-scandal-highlights-raft-of-issues-around-hse-investigation-762042.html>

26 Whistleblower in 'Grace' case claims HSE lied to discredit her, The Irish Times, 3 November 2016, <https://www.irishtimes.com/news/politics/whistleblower-in-grace-case-claims-hse-lied-to-discredit-her-1.2852563>

27 Whistleblowing: The Inside Story, Public Concern at Work and University of Greenwich, <http://www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf>

28 Robert Francis, Freedom to Speak Up: An Independent Review into Creating an Open and Honest Reporting Culture in the NHS, 11 February 2015 http://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf.

29 Whistleblowers being blacklisted by NHS as staff records state they were dismissed even after being cleared at tribunal, The Telegraph, 20 August 2016, <http://www.telegraph.co.uk/news/2016/08/20/whistleblowers-being-blacklisted-by-nhs-as-staff-records-state-t/>

It is not clear why whistleblowers appear to be more likely to suffer reprisal in the health service than in any other profession or sector. It is clear however, that where they do, patient safety is placed at risk. Whistleblowers are the most likely to encounter and draw attention to harmful practices in health services. The protection of whistleblowers and promotion of whistleblowing can therefore be a matter of life and death.

Among the many recommendations made by the Francis Report was the need to introduce clear processes and guidance for employees and management in the health service.³⁰ In Ireland, however, staff are still being encouraged to report using anachronistic legislation. While the HSE's website offers some useful resources for potential whistleblowers, its guidance is not based on the PDA but on the Health Act 2007. TI Ireland's Alternative to Silence report has suggested that the Health Act narrows the circumstances for reporting externally, requires that whistleblowers report in 'good faith' and places an unfair burden on workers to establish the truth of their reports.³¹

In addition, the HSE's protected disclosures policy sits alongside its 'Good Faith Reporting Policy' which makes a false distinction between protected disclosures and 'good faith reports'.³² Neither the HSE guidance nor the Health Act define 'good faith' but it can be interpreted to mean that the motivation of a worker will be considered when determining whether their disclosure is protected. The requirement to report in good faith has been recognised as having a chilling effect on whistleblowers and was abandoned in the UK and removed from the draft bill that became the PDA in 2014. All workers,

Victims can now seek compensation

Partly owing to lobbying by TI Ireland, third parties – such as employers of whistleblowers – are now able to seek compensation for damages arising from protected disclosures. An example of the need for this type of protection is highlighted in the case of 'Anne', an agency nurse who was one of the first callers to the helpline. After reporting abuse of elderly patients to the private care home that she was supplied to, the care home threatened to break off its working relationship with the agency. The agency then dismissed Anne to avoid losing its supply contract with the nursing home. Now, under Section 13 of the PDA, third parties as well as whistleblowers are protected from retaliation. This means that an employer of a whistleblower can potentially sue for damages where it is threatened with the termination of a contract as a result of a worker having made a protected disclosure.

including those employed in Ireland's health services, enjoy the right to report wrongdoing under the PDA and can do so without regard to their motivation or 'good faith'. Revised whistleblowing guidance for HSE staff should draw their attention to this fact.

30 See page 59 of the Francis Report

31 An Alternative to Silence, Transparency International Ireland, January 2010, http://transparency.ie/sites/default/files/2010_Alternative_to_Silence_Ireland_v1.pdf

32 See https://www.hse.ie/eng/staff/Resources/hrppg/Protected_Disclosures_of_Information_in_the_Workplace_.html and https://www.hse.ie/eng/staff/Resources/hrppg/Protected_Disclosures_.pdf



Banking and Finance

Banking and Finance appears in the top three most reported sectors for the first time. The largest number of complaints came from customers and borrowers and related to retail banking and abusive lending practices. A number of complaints were made about the pursuit of mortgage holders by retail banks and hedge funds or private equity funds known as 'vulture funds'. In such cases, clients reported that they had little recourse to the Central Bank for support where they claimed to be facing what they believed were exorbitant interest rates and/or foreclosure by the funds that bought distressed debt from Ireland's retail banks. Unlike retail banks and other credit institutions, vulture funds are generally not regulated by the Central Bank. That said, where vulture funds purchase loan books, the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 requires that they become regulated by the Central Bank as a regulated Credit Servicing Firm or use a regulated Credit Servicing Firm to service the loans.³³ However, it has been suggested that 'it was too early to determine the overall effectiveness of the legislation'.³⁴

Type of Concern reported about the Banking and Finance Sector

Process	Total	Percentage
Lending	11	37.9%
Service Delivery	7	24.1%
Regulation	3	10.3%
Accounting	2	6.9%
Sales	1	3.4%
Appointments	1	3.4%

Four members of staff at financial institutions sought advice on reporting concerns or dealing with retaliation after making allegations of wrongdoing during this period. Their concerns related to the setting of mortgage interest rates, institutional governance, and action taken in response to audit findings. In addition to complaints made to the Speak Up helpline, a large number of protected disclosures have been made directly to the Central Bank over the past two years. It is also noteworthy that more protected disclosures (44) have been made to the Central Bank than were made by healthcare workers to the Health Service Executive (37) over a twelve-month period.³⁵ The Central Bank outlines the number of disclosures, investigations commenced and closed in its annual report of protected disclosures. It claims to have fully investigated all cases during the relevant period. However, it gives no details on how many disclosures were substantiated or any enforcement action taken in response to disclosures.

The Central Bank's response to whistleblowers came under close scrutiny in 2016 as a former compliance manager at the Irish office of Italian investment bank, UniCredit, Jonathan Sugarman, claimed that the Central Bank had failed to act on his allegations of serious breaches of reserve requirements in 2007. Sugarman has reported that he has been unable to find work since making his disclosures.³⁶

The Central Bank claimed that Mr Sugarman's reports were fully investigated.³⁷ Notwithstanding the Central Bank's insistence that it had investigated his disclosures at the time, Sugarman's story recalls the experience of former AIB auditor Eugene McErlean who disputed the Central Bank's account of its response to his reports of over-charging at Ireland's largest bank in 2001.³⁸ The regulator's whistleblowing procedures were criticised further in 2017 when the Irish Independent newspaper reported that the regulator's whistleblower hotline was not manned and its voicemail system was

33 See www.centralbank.ie/consumer-hub/explainers/what-enforcement-powers-does-the-central-bank-have

34 Central Bank signals unease with Department's regulation of 'vulture funds', RTÉ, 22 August 2016, <https://www.rte.ie/news/business/2016/0822/811120-central-bank-signals-unhappiness-at/>

35 See <https://www.centralbank.ie/docs/default-source/Regulation/protected-disclosures-whistleblowing/central-bank-of-ireland-2016-report-on-protected-disclosures.pdf?sfvrsn=2> and <https://www.hse.ie/eng/about/QAVD/HR-Policies-and-Procedures/Protected-Disclosure-Annual-Report-2016.pdf>

36 See Former Unicredit Ireland executive 'lost everything' after blowing whistle, The Irish Times, 3 December 2016 <https://www.irishtimes.com/business/financial-services/former-unicredit-ireland-executive-lost-everything-after-blowing-whistle-1.2891269>

37 See Central Bank Correspondence with Brid Dunne, 20 June 2017, <https://www.centralbank.ie/docs/default-source/tns/about---tns/freedom-of-information/correspondence/ms-brid-dunne-7-june-2017-.pdf?sfvrsn=5>

38 Whistleblower McErlean to get official apology from Regulator, Irish Independent, 5 October 2010, <http://www.independent.ie/business/irish/whistleblower-mcerlean-to-get-official-apology-from-regulator-26687072.html>

not working. The Central Bank reported that it had addressed these concerns immediately after they had been brought to its attention.³⁹

Despite recent controversies, the Central Bank offers relatively clear guidance on its website on how to report wrongdoing. Potential whistleblowers or witnesses are advised on how to report using the PDA, the Central Bank (Supervision and Enforcement) Act 2013 and EU Market Abuse Regulations. That said, the different procedures and levels of protection for financial service workers under these separate regimes is likely to cause confusion – as it does in the health sector.

For example, the two Acts (the PDA and the Central Bank (Supervision and Enforcement) Act 2013) set different thresholds for reporting. Unlike the PDA, Part 5 of the 2013 Act requires that a worker reports concerns in ‘good faith’. The problems caused by the requirement to report in good faith are touched upon earlier. Anonymous disclosures are also not permitted

under section 38 (3) of the 2013 Act. The PDA, on the other hand, is silent on anonymous disclosures and it is assumed that a worker will be legally protected from a detriment so long as they report in a manner laid out in the PDA – even where they do not share their identity.

In addition, the level of protections for whistleblowers under the 2013 Act are not as generous as those provided for under the PDA. A worker who loses their job for reporting under the 2013 Act will only be able to claim the equivalent of two years’ salary in compensation for dismissal. This contrasts with those making disclosures under the PDA who can avail of compensation equivalent to five years’ salary. Given the difficulties many financial services whistleblowers have faced in finding work after a disclosure, the compensation available under the PDA would seem more appropriate for workers in the financial services sector. TI Ireland has recommended that all protected disclosures provisions in sectoral legislation, including the 2013 Act be repealed (see page 35).

39 Central Bank whistleblower hotline went unanswered, Irish Independent, 26 January 2017, <http://www.independent.ie/business/personal-finance/central-bank-whistleblower-hotline-went-unanswered-35399044.html>



SPOTLIGHT ON WHISTLEBLOWING

While not all calls to the helpline are from whistleblowers, nearly 90 people made calls about wrongdoing in connection with their work from the beginning of 2015 to the end of 2016.

Top Whistleblowing Sectors and Issues

Process	Total	Percentage
Health	31	34.4%
Charity/Non-Profit/NGO Sector	12	13.3%
Education	7	7.8%
Social Services	6	6.7%
Banking and Finance	4	4.4%
Police	3	3.3%
Unknown	3	3.3%
Public Administration/Services	3	3.3%
Retail	3	3.3%
Defence	2	2.2%
Local Government	1	1.1%

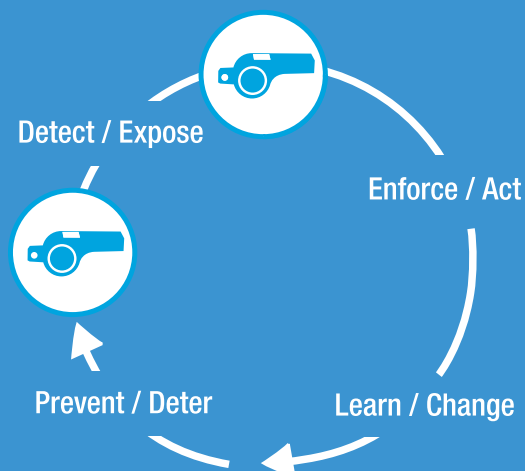
Practices reported

Process	Total	Percentage
Whistleblower Retaliation	39	11.9%
Regulatory Violation	20	7.0%
Fraud/False Accounting	23	6.1%
Mismanagement of Public Funds	16	4.9%
Lack of Transparency	8	2.4%
Abuse and Neglect	8	2.4%
Favouritism	3	0.9%
Theft	3	0.9%
Inefficiency/Red Tape	3	0.9%
Conflict of Interest	3	0.9%
Bribery	2	0.6%
Cronyism	2	0.6%

Why is Whistleblowing Important?

One of the priorities of the Speak Up helpline is to support whistleblowers. Whistleblowing is acknowledged as one of the most effective ways of exposing and stopping wrongdoing.* Many of the cases of corruption, fraud, and sexual abuse that we know about have been exposed by workers who reported these issues to their employers, regulators or the press. In fact, it is believed that more cases of fraud and corruption are exposed by whistleblowers than any other actor – including the police or the media.

* See National Whistleblowers Center, 'Proven Effectiveness of Whistleblowers' http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/NWC_NationalWhistleblowersCenter_Annex2.pdf



More than a third of the calls related to wrongdoing in the health sector, with whistleblower retaliation being the most reported issue across all sectors. It is not clear why the health sector is generating more calls than others. However, the relatively high volumes of calls and anecdotal evidence from the 'Grace' case and the Anna Monaghan case⁴⁰ suggest that there is much more to be done by the HSE and the Department of Health to reassure whistleblowers that they will not suffer the consequences for reporting wrongdoing and that their concerns will be acted upon.

It is also worth noting that the health sector is not the only one to generate a significant number of calls from whistleblowers to the Speak Up helpline. Twelve whistleblowers from the Charity/NGO sector and seven whistleblowers from the Education sector also called the helpline during the period, with mismanagement of public funds and whistleblower retaliation being the most reported issues in these areas.

As the diagram above illustrates, whistleblowing plays an important role in effective enforcement and the prevention of further corruption and wrongdoing. Where wrongdoing has been identified following an investigation, whistleblowers may serve as witnesses in prosecutions, inquests or inquiries. In addition,

because whistleblowers are often the closest witnesses to wrongdoing, they can lend important insights into practices or systems failures that gave rise to the problem in the first place. For that reason, they can play a pivotal part in learning from mistakes and helping prevent wrongdoing in the future. Finally, whistleblowing can have an important deterrent effect. If someone who is inclined to engage in wrongdoing knows that such activity is likely to be reported by his or her colleagues to management, he or she may be less likely to proceed to engage in it.

Encouraging workplace whistleblowing therefore allows organisations to address wrongdoing at an early stage, before it leads to loss of reputation, stakeholder investment and profit. It also aids the prosecution of crimes such as fraud, leading to a healthier economy and society as a whole.

There is growing awareness of the economic and societal benefits of encouraging whistleblowing. However, many whistleblowers have continued to report that blowing the whistle has been a life-changing experience for the worse, with a number of workers having been accused of being disloyal to the people they work with or for.

GARDA WHISTLEBLOWING CONTROVERSIES CONTINUE

Garda whistleblowers Maurice McCabe and John Wilson were vindicated in 2014 by official reports into allegations they had made about systemic abuse of An Garda Síochána's database, PULSE. Their disclosures ultimately led to the end of the widespread abuse of PULSE, contributed to the resignations of the former Garda Commissioner and Minister for Justice, and led to institutional reforms that changed the way in which senior gardai are held to account. Although former Garda Wilson took early retirement because of alleged whistleblower reprisal, Sergeant McCabe was promoted to acting head of traffic division in Mullingar and was invited by the new Garda Commissioner, Nóirín O'Sullivan, to assist in the investigation of allegations that the Garda PULSE database continued to be abused by senior officers.⁴¹

Further allegations made by Sergeant McCabe while serving in the Garda Baileboro district from 2008 became the subject of an official inquiry chaired by Judge Kevin O'Higgins in February 2015. The Commission of Investigation published its report in May 2016. The report found that the majority of Sergeant McCabe's allegations, which focussed on failures or mismanagement in Garda investigations, were true and that he had 'shown courage, and performed a genuine public service at considerable personal cost'.⁴²

However, following the report's publication, it was alleged that legal counsel for the Garda Commissioner was instructed to attack the motivation and credibility of McCabe during the Commission of Investigation.⁴³ The Garda Commissioner denied that there had been any attempt to impugn Sergeant McCabe's character.⁴⁴ TI Ireland responded by calling on the Garda Commissioner to clarify the instructions provided to her legal team and send out an unequivocal message that those speaking up in the police service would have the full support of senior management. TI Ireland also sought a review of how McCabe and other whistleblowers

had been dealt with.⁴⁵ The newly-established Policing Authority also expressed 'deep unease at the organisation and management culture including the environment for speaking out'.⁴⁶

The controversy took another twist in October 2016, when the former head of the Garda press office, Superintendent David Taylor, reported that he had been instructed by Garda management to spread false accusations about Sergeant McCabe.⁴⁷ Meanwhile, McCabe's solicitors filed a Freedom of Information request which found that the false allegations of child sexual abuse against Sergeant McCabe had been stored on the Child Protection Agency's files (Tusla).⁴⁸ The series of events that followed, including conflicting accounts from the Children's Minister and the Taoiseach (Prime Minister), led to calls for the Taoiseach's resignation.⁴⁹ The Garda Commissioner also denied allegations that she knew of the alleged smear campaign against Sergeant McCabe and faced demands for her resignation.⁵⁰

The controversy was defused for a time by the government's announcement that it was establishing a Commission of Investigation into the allegations of a smear campaign and the treatment of other Garda whistleblowers, including Garda Keith Harrison. The Commission, chaired by Supreme Court Judge Peter Charleton, is also due to report on the allegations that Garda management colluded with media to impugn McCabe's character.⁵¹

- 41 Whistleblower Maurice McCabe to head traffic unit, Irish Examiner, 31 March 2015, <http://www.irishexaminer.com/ireland/whistleblower-mauricemccabe-to-head-traffic-unit-321306.html>
- 42 Commission of Investigation (certain matters relative to the Cavan/ Monaghan division of the Garda Síochána), Mr. Justice Kevin C. O'Higgins, p24, http://www.justice.ie/en/JELR/Commission_of_Investigation_Certain_Matters_relative_to_the_Cavan_Monaghan_Division_of_the_Garda_S%C3%ADoch%C3%A1na_Final_Report.pdf/Files/Commission_of_Investigation_Certain_Matters_relative_to_the_Cavan_Monaghan_Division_of_the_Garda_S%C3%ADoch%C3%A1na_Final_Report.pdf
- 43 Garda Commissioner claimed Maurice McCabe was motivated by 'malice', Irish Examiner, 13 May, <http://www.irishexaminer.com/ireland/garda-commissioner-claimed-maurice-mccabe-was-motivated-by-malice-399303.html>
- 44 Garda Commissioner's legal team 'not instructed to impugn' Maurice McCabe, Irish Examiner, 26 May 2016, <http://www.irishexaminer.com/ireland/garda-commissioners-legal-team-not-instructed-to-impugn-maurice-mccabe-401602.html>

- 45 Policing Authority not planning to discuss McCabe transcripts, RTÉ News, 18 May 2016, www.rte.ie/news/2016/0518/789165-ohiggins-commission/andTransparencyInternationalIrelandcallsforGardaInspectoratereviewoftreatmentofwhistleblowers,TransparencyInternationalIreland,20May2016https://transparency.ie/news_events/transparency-international-ireland-calls-garda-inspectorate-review-treatment-whistleblow
- 46 Statement following the Policing Authority Meeting with Garda Commissioner regarding the O'Higgins Report [http://www.policingauthority.ie/Website/PA/PolicingAuthorityWeb.nsf/page/DXMY-AACBP49142927-en/\\$File/Statement_following_the_Policing_Meeting_with_Garda_Commissioner_regarding_the_O'Higgins_Report.pdf](http://www.policingauthority.ie/Website/PA/PolicingAuthorityWeb.nsf/page/DXMY-AACBP49142927-en/$File/Statement_following_the_Policing_Meeting_with_Garda_Commissioner_regarding_the_O'Higgins_Report.pdf)
- 47 Michael Clifford: Blowing the whistle on Garda wrongdoing at the highest level, Irish Examiner, 8 October 2016, <http://www.irishexaminer.com/viewpoints/columnists/michael-clifford/blowing-the-whistle-on-garda-wrongdoing-at-the-highest-level-424761.html>
- 48 Maurice McCabe to sue Tusla over sex abuse file, Irish Times, 10 February 2017, <https://www.irishtimes.com/news/politics/maurice-mccabe-to-sue-tusla-over-sex-abuse-file-1.2970148>
- 49 Zappone contradicts Kenny over knowledge of Tusla controversy, Irish Times, 13 February 2017, <https://www.irishtimes.com/news/politics/zappone-contradicts-kenny-over-knowledge-of-tusla-controversy-1.2974067>
- 50 Garda chief Nóirín O'Sullivan called on to resign, Irish Examiner, 18 May 2016, <http://www.irishexaminer.com/ireland/garda-chief-noirin-osullivan-called-on-to-resign-400123.html>
- 51 A breakdown of the Charleton Tribunal, Irish Examiner, 17 February 2017, <http://www.irishexaminer.com/viewpoints/analysis/a-breakdown-of-the-charleton-tribunal-443136.html>







The PDA in Practice

The introduction of the PDA in July 2014 was an important step forward in providing whistleblowers with protection from retaliation. The legislation covers all workers, regardless of whether they are in the private, public or not-for-profit sectors, and allows a wide range of wrongdoings to be reported. These include crime, health and safety issues, the improper use of public money and concealing wrongdoing.

The PDA sets out a framework of disclosure options, seeks to shield the identity of the whistleblower and minimises the risk of adverse legal proceedings. It also provides remedies if a worker suffers as a result of speaking up. These include a right for employees to claim unfair dismissal and for anyone to sue for damages if they suffer loss as a result of a protected disclosure having been made. A few cases have already been decided under the Act and reported in the media and/or the Workplace Relations Commission (WRC)'s website. The following is a summary of key decisions.

Temporary relief for those who have lost their jobs

Where an employee is claiming unfair dismissal under the PDA, he or she also has the option of seeking an order for interim relief pending final determination of the claim. **Clarke & Dougan v Lifeline Ambulance Service Limited** (2016) was the first reported case of a successful application for such relief. The application was brought by two employees who had been dismissed on grounds of redundancy. They argued that the dismissals in fact arose because they had made protected disclosures to the Revenue Commissioners about Lifeline's tax affairs.

Although the Circuit Court found that it could not make a determination that dismissal was 'wholly or mainly due to the protected disclosure,' it held that the employees had demonstrated 'substantial grounds' for such a contention. This was sufficient to grant an order for interim relief. The employer offered to re-engage the employees but the Court found that the employees' refusal of these offers was reasonable. It ordered the employer to (i) continue paying the men's salaries until the final determination of their claims and (ii) reimburse their legal costs.

This case makes it clear that an employee does not need to prove his or her case at interim stage but simply show that there is a good basis for a claim of unfair dismissal. Similarly, in November 2016 the Circuit Court in Cork granted interim relief in **Catherine Kelly v Alienvault Ireland Limited and Alien Vault Inc.** In that case, the employee had made complaints of health and safety issues in relation to her office's toilets and sewage systems and was dismissed during a telephone call. The employer argued that the decision to dismiss was made before the employee made her complaints about health and safety. The Court, however, found that the employee had a 'stateable case' and that this was enough for it to make an interim order. The order restrained the employer from dismissing the employee or stopping her pay until her unfair dismissal claim was determined.

TI Ireland is aware from its experiences with callers to its Speak Up helpline that blowing the whistle on wrongdoing can lead to serious financial hardship. One of its former clients ended up homeless and resorted to living in his car in 2014 after attempting to blow the whistle on his employer. The above cases illustrate the potential impact of legislation in addressing such issues. In particular, the continued payment of salaries pending a full hearing of an unfair dismissal case (and awarding costs against the employer) can help ease the financial burden on whistleblowers during litigation processes that can be lengthy, complex and very costly.

Compensation for penalisation

In September 2016, the Labour Court granted compensation of €17,500 in the case of **McGrath Partnership v Anna Monaghan**. Ms Monaghan was a care assistant who had made reports to the Health Information and Quality Authority (HIQA) of the alleged abuse of residents at the nursing home at which she worked. She claimed that she was subsequently penalised by being intimidated, bullied, alienated, harassed, victimised and eventually suspended from work.

Ms Monaghan and her employer disputed the reason for her suspension. The Court applied a 'but for' test and found that, had it not been for her communication with HIQA, she would not have been suspended. This case suggests that an employee can seek redress under the PDA for adverse treatment so long as it can be shown that the treatment would not have taken place if the employee had not made a protected disclosure, even if other factors may also be involved.

The limits of the PDA

While the previous cases highlight some of the positive benefits of the PDA for workers, **Donegal Council v Liam Carr** offers a reminder that the Act does not cover every type of report that they may make in the course of their employment. This case was brought by a station officer in the fire service who made a number of disclosures to his line manager, including in relation to the physical fitness of two firefighters to carry out their duties. The Labour Court determined that the disclosures were not protected disclosures because of section 5(5) of the Act. The effect of this provision is to exclude from the protection of the Act reports of wrongdoing relating to matters 'which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer'.

In other words, it appears that the Court took the view that it was part of the station manager's job to monitor issues such as the physical fitness of staff and that there was no suggestion that the firefighters were unfit because of wrongdoing on the part of the fire service. The station officer's reports were therefore not considered to be protected disclosures under the Act.

Similarly, in **Employee v An Employer** (ADJ – 00003371), an insurance company argued that an employee's allegations (including that the company was using another insurance company's products) did not fall within the list of wrongdoings covered by the Act. The WRC did not make a finding on this point because the insurance company also denied that the employee had in fact raised her concerns at all. The WRC found in favour of the employer, noting that:

- a) the employee had failed to produce any evidence of such complaints;
- b) she ordinarily communicated by email with her colleagues on work-related issues;
- c) there was no explanation as to why she had not put these complaints in writing; and
- d) the employer had a whistleblowing policy in place which stipulated that disclosures should be made in writing.

Although the Act does not require protected disclosures to be made in writing, verbal disclosures may be more difficult to prove and, as this case indicates, it is important that workers consider any whistleblowing policy that might be in place before speaking up. These last two cases therefore underline the need for easily accessible legal advice at an early stage in the disclosure process, to ensure that workers are aware of the limitations of the PDA. In particular, they need to know what type of information they can share, as well as how and with whom they can share it.



The need for further legal reform

The PDA provides for a review of the legislation to be undertaken in 2017. The review offers an opportunity to further build upon the progress already made by the Act, by addressing remaining gaps in protection and dealing with practical issues which have arisen since the PDA became law.

The following recommendations for further legal reform draw upon TI Ireland and TLAC's experiences of working with whistleblowers and employers since the law was enacted and we hope they might help inform the review. They seek to ensure that:

- the PDA covers all workers who speak up and all of the information which they hold about wrongdoing;
- workers are able to make protected disclosures to the appropriate authorities, confident that such authorities will take appropriate action; and that
- workers are afforded protections which are sufficiently strong to deal with the risks of blowing the whistle.

1. Protection for all workers who speak up

As explained in our Speak Up Report 2015, volunteers do not have the certainty of knowing that they are protected if they speak up in the workplace. However, volunteers are often well placed to expose wrongdoing, particularly in the charitable and health sectors.

Some organisations have sought to deal with this issue by stating that their whistleblowing policies cover volunteers. While the intentions of these organisations are to be encouraged, extending policies does not have the effect of expanding the application of the PDA. Encouraging those who may not be covered by legislation to nonetheless speak up under a policy can cause confusion and potentially exposes volunteers to risks such as adverse litigation from third parties.

While labour law provisions such as unfair dismissal may not be appropriate in such cases, voluntary or unpaid workers should be explicitly included within the definition of 'worker' within the PDA and provided with statutory protections in relation to disclosure of their identity, the ability to sue for damages and immunity against criminal/civil liability.

Another gap which should be addressed is that, although it affords protection to those who are provided with work experience pursuant to a training course or programme, the PDA excludes work experience 'by an educational establishment [such as a college] on a course provided by the establishment.' While there is no Irish case-law on the meaning of this carve-out, similar wording was interpreted in practice in the United Kingdom as excluding placements organised

by institutions such as universities. In 2015, it was acknowledged there that 'whilst students are on placement they are exposed daily to real situations where they may witness incidents concerning public and patient safety.'⁵² Amending legislation was therefore introduced that year to expand the definition of 'worker' under the Public Interest Disclosures Act 1998 to include student nurses and midwives.⁵³

A similar amendment should be made in Ireland. However, as the above rationale can be applied to other types of placement (such as in mediation services and social work), the PDA should be explicitly extended to cover all students on placement, regardless of their discipline.

2. Obligation to establish and maintain internal procedures for all employers

Section 21 (1) of the PDA obliges every public body to establish and maintain procedures for the making of protected disclosures by workers. However, there is no such obligation on other types of employers. The Integrity at Work Survey shows that only 34% of private sector employers have procedures in place, in contrast to an estimated 94% of public sector employers.⁵⁴ This sectoral approach to implementation of the PDA could place workers in the private and not-for-profit sector at greater risk of retaliation than their counterparts in the public sector. The lack of a legal incentive to adopt whistleblowing procedures may also mean that wrongdoing is less likely to be detected or prevented in private sector and charitable organisations.

The French Parliament enacted whistleblowing legislation in late 2016 which compels employers with more than 50 staff to have protected disclosure procedures in place. Likewise, all publicly-traded US companies have been obliged to have whistleblowing procedures since 2002. The requirements are seen to be in the interests of investors and the wider public. Moreover, there is little evidence to suggest that the requirements pose a disproportionate burden on employers there. It is therefore recommended that section 21 of the PDA be amended to oblige all employers in Ireland with more than 50 staff to establish and maintain procedures for the making of and dealing with protected disclosures.

3. Access to the employment law system

As set out above, the PDA covers defined 'workers' rather than just employees. However, only employees can seek a remedy at the WRC for penalisation for blowing the whistle. Other types of workers must sue for damages through the courts, which can be more expensive and time-consuming. In our Speak Up Report 2015, we recommended that steps be taken to include all workers within the WRC mechanism. This has not happened and Ireland is out of step with the UK, where redress for all workers as defined by law can be sought through the employment tribunal system.

4. All information about wrongdoing should be disclosable

Information about wrongdoing can be disclosed under the PDA only if it came to the worker's attention 'in connection with [his or her] employment'.⁵⁵ The correct interpretation of this phrase would be to include, for example, information that comes to a worker's attention during conversations in the office canteen or kitchen. However, there is currently no case-law on this point.

To avoid any risk of the wording being interpreted unduly narrowly, it should be removed altogether. It is worth noting that there is no such language in similar legislation in the United Kingdom. Alternatively, the PDA should be amended to include a non-exhaustive list of examples covered by the phrase.

Separately, we explained in the Speak Up report 2015 that the public, customers and employers often rely on 'soft law' such as professional codes or ethical guidelines to protect themselves from risks and harmful practices – and that workers should be protected for disclosing breaches of these. Again, as with the position with volunteers, some employers have attempted to deal with the gap in the legislation by extending their policies to cover such wrongdoing. As indicated above, this can lead to a confusing and potentially risky situation in circumstances where a worker may only have the protection of their employer's policy and not the full cover of the Act. A legislative amendment to the list of 'relevant wrongdoing' that can be disclosed under the PDA is the appropriate way of addressing this issue.

52 Sir Robert Francis QC, "Freedom to speak up: an independent review into creating an open and honest reporting culture in the NHS," February 2015, available at http://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf

53 The Protected Disclosures (Extension of Meaning of Worker) Order 2015

54 Survey conducted by Public Affairs Ireland as part of its conference on Protected Disclosures, 29 June 2017, <https://www.pai.ie/2017/07/careful-secrecy-whistleblowing-catalyst-cultural-change/> July 201

55 Assuming that the other applicable conditions in the PDA are also satisfied.

5. Appropriate recipients

Prescribed persons, such as regulators and supervisory bodies, can receive protected disclosures related to the activities they regulate or supervise, provided certain conditions in the PDA are met. However, An Garda Síochána is not currently a prescribed body even though it is responsible for investigating criminal activity. This shortcoming should be addressed as a priority.

Similarly, many disclosures of wrongdoing concern organisations that are now regulated by the Charities Regulatory Authority (CRA). Although there is provision for certain disclosures to be made to the CRA under the Charities Act 2009, the protections are not as extensive as those set out in the PDA and are subject to different criteria. The CRA should therefore be included as a prescribed person under the Act, which was intended to cover all workplace whistleblowing.

6. Responding to a protected disclosure

Research has shown that workers are often reluctant to speak up about wrongdoing if they believe that they will be ignored. The legislation does not, however, compel recipients to act on disclosures or to communicate with those who made them – although section 22 of the PDA obliges public bodies to publish an annual report on the number of disclosures and action taken in response to them.

A legal requirement for prescribed persons to consider whether an investigation is warranted and to communicate this decision with the person making a disclosure, as well as the outcome of any investigation, would help assure whistleblowers that their concerns are being taken seriously.

7. Broaden the definition of protected disclosure

It is not unusual for workers to seek advice from co-workers or managers as they consider making a protected disclosure or to ask questions that imply that wrongdoing may be taking place. Likewise, it is common for workers to indicate that they intend to make a protected disclosure, including by refusing to engage in or cover up wrongdoing. They often do so without sharing relevant information as defined or reporting in a manner specified in the Act and therefore may not be protected. Workers who are believed by their employer or colleague to have made or intended to make a disclosure should be entitled to the protections afforded under the Act.

8. Adverse legal proceedings

Although the PDA contains a wide civil immunity provision to protect whistleblowers from being sued, they are still subject to adverse defamation proceedings.⁵⁶ It is open to a worker to seek to rely on a defence of ‘qualified privilege’ in such cases but instructing a lawyer to put forward the defence can be expensive and there is no guarantee that the worker will ultimately be protected. Consideration should be given to amending the Act to repeal the carve-out for defamation.

Similarly, although a defence is available to whistleblowers in the event that they are prosecuted for having made a protected disclosure, reassurance should be provided by the Director of Public Prosecutions confirming that it will carry out an assessment of the application of the PDA in all relevant cases prior to commencing any criminal proceedings.

9. Burden of proof

Although the ‘but for’ test set out in the Anna Monaghan case is likely to be of assistance to whistleblowers during proceedings for penalisation, proving that a particular measure was taken by an employer as a result of the worker having spoken up about wrongdoing can remain an understandably difficult hurdle. As set out in the 2015 Report, where adverse measures have been taken which appear to be penalisation for having made a protected disclosure, the burden of proof should be on the employer to prove otherwise. This would be similar to the approach adopted in discrimination and sexual harassment cases.⁵⁷

⁵⁶ See section 14 Protected Disclosures Act 2014.

⁵⁷ See section 85A of the Employment Equality Act 1998 and section 38A of the Equal Status Act 2000

10. Sectoral legislation

Prior to the enactment of the PDA, whistleblowing legislation was enacted on a piecemeal basis. The result was that some workers were protected, depending on where they worked, but with different levels of protection in different industries. This was confusing and unfair.

The PDA was intended to address this situation with one, comprehensive law covering workers in all parts of the Irish economy. However, it also left in place the previous legislation. It is understood that this was to guard against repealing legislation which may contain stronger protections than those set out in the Act.

As a consequence, workers in sectors such as health and financial services are faced with two or more frameworks for making a disclosure, with different reporting criteria and protections, and may be unsure as to which regime will be applied to their report. It is therefore recommended that:

- a comprehensive review be undertaken of sectoral protections;
- any sectoral protections that are stronger than those in the PDA be included within that legislation for the benefit of all workers; and
- the sectoral legislation be repealed.

11. Remove the cap on compensation

Workers who have been dismissed for having made protected disclosures can receive a sum equivalent to five years' salary in compensation. However, this is likely to be inadequate in a number of circumstances. This is particularly so for those workers in financial or professional services.

Numerous documented cases have emerged in Ireland and overseas where workers in the banking/financial sector or professions such as audit and compliance have lost employment and have never been able to secure employment of equivalent status. In the absence of financial rewards for disclosures, workers in the banking sector in particular, are unlikely to be incentivised to make protected disclosures if they only stand to recover the equivalent of five years' salary or less.

The five-year cap on compensation should therefore be removed and replaced with a requirement for an employer to pay the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances.⁵⁸

12. Trade Secrets Directive

Finally, it is recommended that the EU Trade Secrets Directive be implemented carefully and in a manner that is consistent with the PDA.

By way of background, concerns were raised that the EU's Trade Secrets Directive would lead to companies taking legal action against whistleblowers for revealing 'trade secrets'.⁵⁹ Following a campaign by European NGOs, an exception was inserted in relation to the revealing of misconduct, wrongdoing or illegal activity provided that the discloser is acting for the purpose of protecting the general public interest. EU Members States must implement the Directive by June 2018.

As set out in the Speak Up Report 2015, a deliberate decision was taken to exclude any 'public interest' test from the Act, on the basis that this could be an unnecessary technical hurdle for whistleblowers. In implementing the Directive, the government should ensure that no such test is reintroduced and that it is made clear that all protected disclosures under the PDA are deemed to be in accordance with the Directive and Ireland's implementing legislation.

⁵⁸ As provided for under The Safety, Health, and Welfare at Work Act 2005, Section 28 (3) c.

⁵⁹ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016L0943>

THE INTEGRITY AT WORK SURVEY

In 2016, TI Ireland asked Behaviour & Attitudes to carry out a survey of Irish employees and employers to gauge attitudes towards and awareness of whistleblowing and the PDA. The Integrity at Work survey was the first national survey to be conducted on this topic in Ireland. Over 800 employees and 350 employers from the private and not-for-profit sectors were included in the survey. It is hoped that the survey will be carried out every two to three years to determine changes in attitudes, awareness and practice around whistleblowing in Irish workplaces.

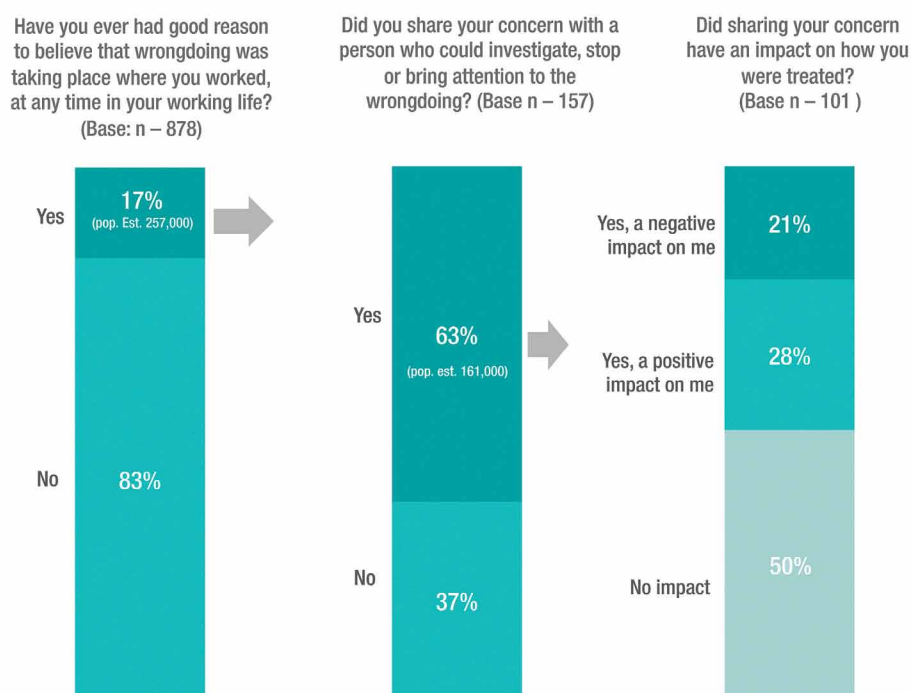
Personal Experiences

One of the most notable findings was that more than one in ten employees had claimed to have reported wrongdoing at work. This would suggest that some 160,000 Irish workers have blown the whistle at some point during their career. Of these, 69% of female and 58% of male respondents said that they had done so. More remarkable still was the claim by 78% respondents who had blown the whistle who said they had not suffered as a result of reporting wrongdoing. Indeed, more respondents (28%) said that reporting wrongdoing had a positive impact on them than those who said they had suffered because they had blown the whistle (21%).

This finding questions the trope of the whistleblower as victim, and might justify further research into perceptions of whistleblowing in the workplace. It is possible that many workers who meet the definition of whistleblower do not self-identify as whistleblowers largely because they do not suffer as a result of speaking up or because their reports (such as on petty fraud or health and safety concerns) are often welcomed by their employers. Additional research into good practice among employers that promote voice and accountability might also help to account for the positive experiences of a high percentage of workers who have spoken up.

Whistleblower: Personal experience of wrongdoing in the workplace

Base: All Employees n = 878



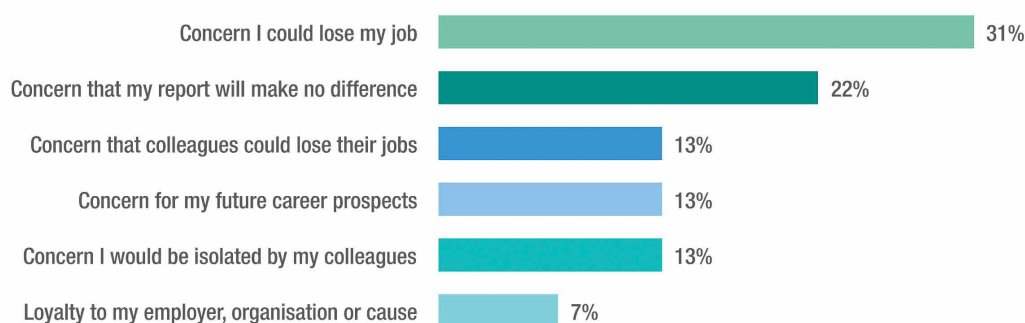
Key barriers to reporting wrongdoing in the workplace

Despite the positive or neutral experience of the majority of those who said they had reported wrongdoing, a significant proportion (21%) claimed to have suffered as a result. A number of high profile cases, such as the Garda whistleblower controversy,

seem to have focussed people's attention on the potential personal cost of speaking up. This is reflected in the relatively high number of people who said that the fear of losing their job (31%), the fear of harm to their career (13%), or of isolation by their colleagues (13%) would deter them from speaking up. Only 7% of respondents said that they would not speak up out of loyalty to their employer, organisation or cause.

Key barriers to reporting wrongdoing in the workplace

Base: All Employees n = 878

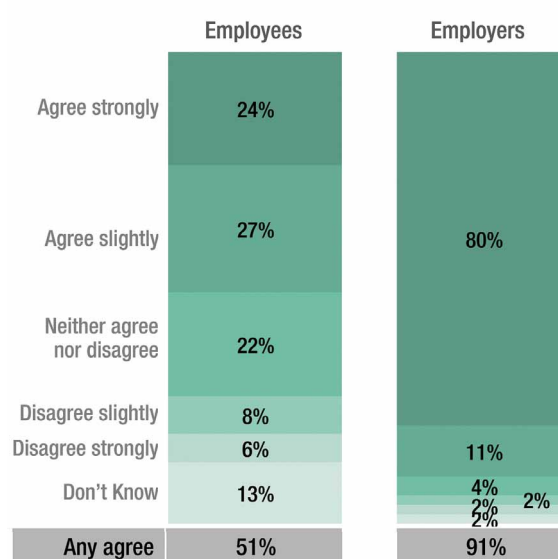


The survey also shows that organisations need to work on assuring their staff that reports of wrongdoing will be acted upon and that they will be protected when they speak up. The second most common reason (22%) respondents cited for not speaking up was the concern that their report will make no difference. And although 80% of employers state that a report of wrongdoing would be acted upon and their staff would not suffer as a result of doing so, only 24% of all employees said they felt safe reporting a concern or believed that their reports would be acted on by their employer.

There seems to be a gap in levels of trust and confidence among employers and employees that wrongdoing will be acted on or that workers will be safe when speaking up. These findings as well as international data show that these are the two most common reasons why people do not speak up when they see wrongdoing.⁶⁰

If employees reported a concern about wrongdoing - confidence that it would be acted upon and they would not suffer as a result of doing so

Base: All Employees n = 878 / All Employers n = 353



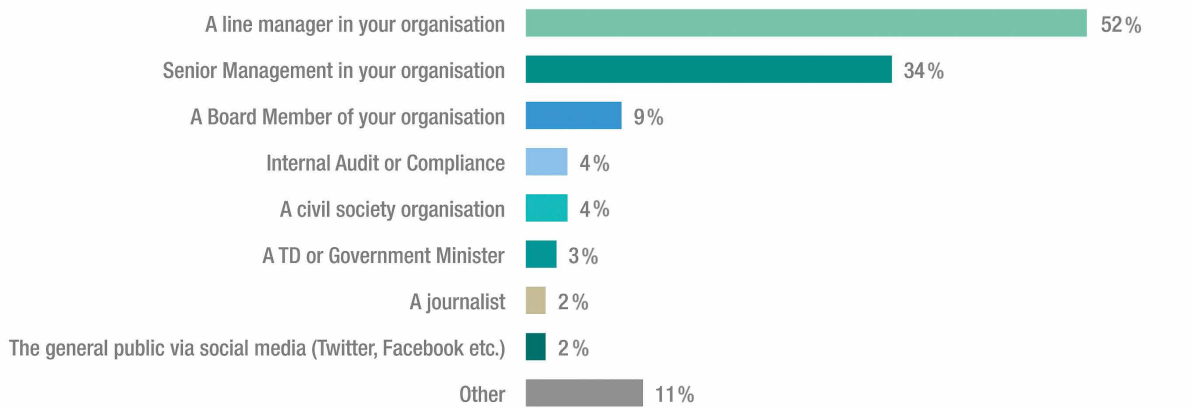
60 See Whistleblowing: The Inside Story, Public Concern at Work and the University of Greenwich, 2013, <http://www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf>

Despite the differing levels of trust in employers' ability to act on concerns or to prevent retaliation against employees who speak up, most respondents say that they would report wrongdoing to someone within their organisation rather than to an external person. More

than 90% of respondents said they would report to their line manager, senior manager or board member within their organisation. Only 5% of respondents said they would report to a TD, Government Minister or a journalist.

With whom would you share your concern

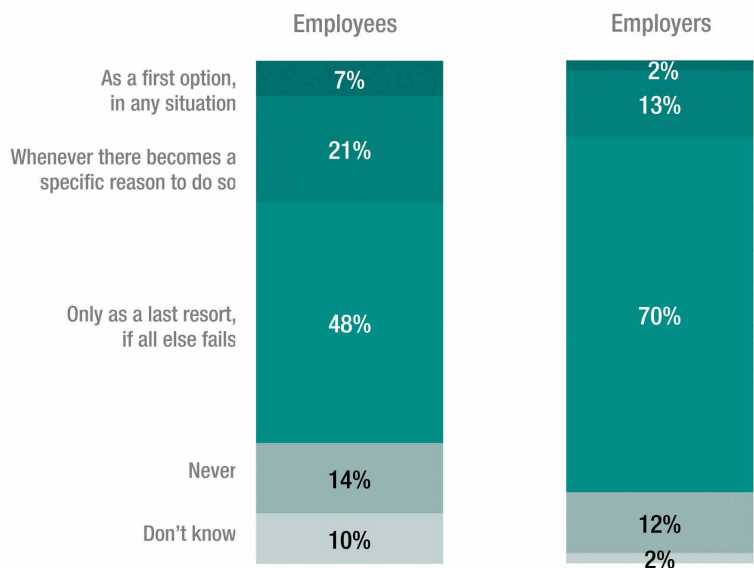
Base: All Employees n = 878



When asked whether someone is justified in sharing information about serious wrongdoing to the media or online, 7% of employees agreed that reporting in such a way was justified as a first option. Almost half of employees said reporting to the media and online should only be considered as a last resort.

Reporting to Journalists, Media or Online

Base: All Employees n = 830/ All Employers n = 353



The likelihood that people will speak up also appears to be heavily influenced by the type and level of protection afforded to them before they report. The most commonly cited factor in convincing people to speak up was the ability to share information without disclosing their identity to anyone (i.e. anonymously). This was closely followed

by the need for reassurance that the organisation they report to would act on their concern or that their identity would not be disclosed to anyone other than the person responsible for acting on their concern. Only 5% of people said that the prospect of a financial reward would influence their decision to speak up.

Key influencing factors for reporting wrongdoing in the work place

Base: All Employees n = 878



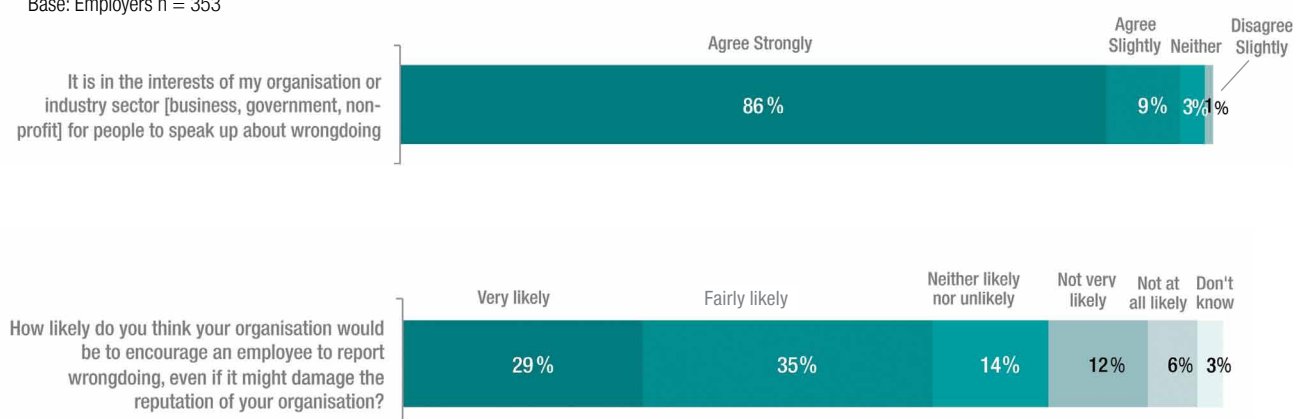
Attitudes to Whistleblowing in Ireland

Another factor in determining whether workers will speak up about wrongdoing is their employers' attitudes towards whistleblowing. On the face of it, it would seem that employers are highly supportive of whistleblowing. When respondents were asked if it is in the interests of their organisation or industry sector for people to speak up about wrongdoing, over 95% agreed strongly or agreed slightly.

However, support for whistleblowing among employers is less certain when employers are asked if they would encourage an employee to report wrongdoing where the disclosure might harm the reputation of their organisation. In such cases, only 64% said they would be either very likely or fairly likely to do so.

Employer Survey: Management Treatment of Whistleblowing

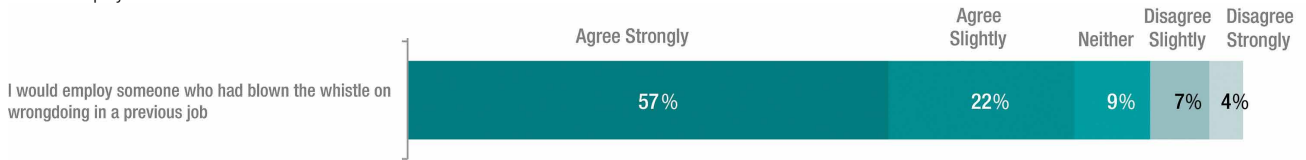
Base: Employers n = 353



The level of ambiguity towards whistleblowing is also apparent from the response of employers when asked whether they would hire someone who had blown the whistle in a previous job. Only 57% of employers said they agreed strongly with the statement indicating that they would do so.

Employer Survey: Management Treatment of Whistleblowing

Base: Employers n = 353

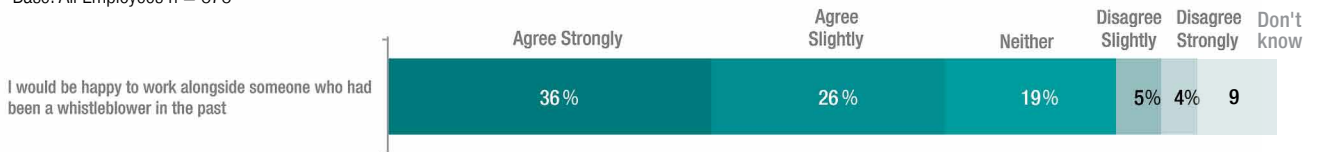


Employer attitudes might be considered equivocal when presented with more challenging scenarios and there is clear room for improvement here.

Nonetheless, employer attitudes appear to be more encouraging than those of many employees who responded to the Integrity at Work Survey. When asked whether they would be happy to work alongside someone who had blown the whistle in a previous job, only 36% of employees agreed strongly.

Employee Survey: Treatment of Whistleblowing

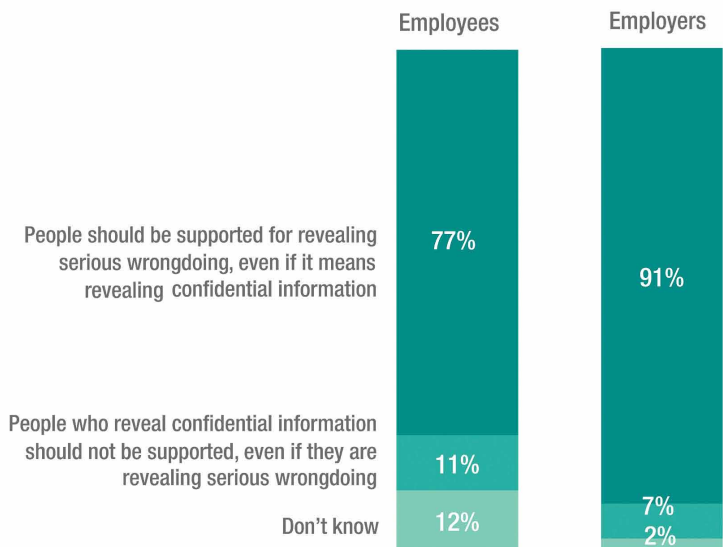
Base: All Employees n = 878



Likewise, significantly more (14%) employers than employees seem to be supportive of people revealing serious wrongdoing.

Whistleblower: Societal Support

Base: All Employees n = 878/All Employers n = 353

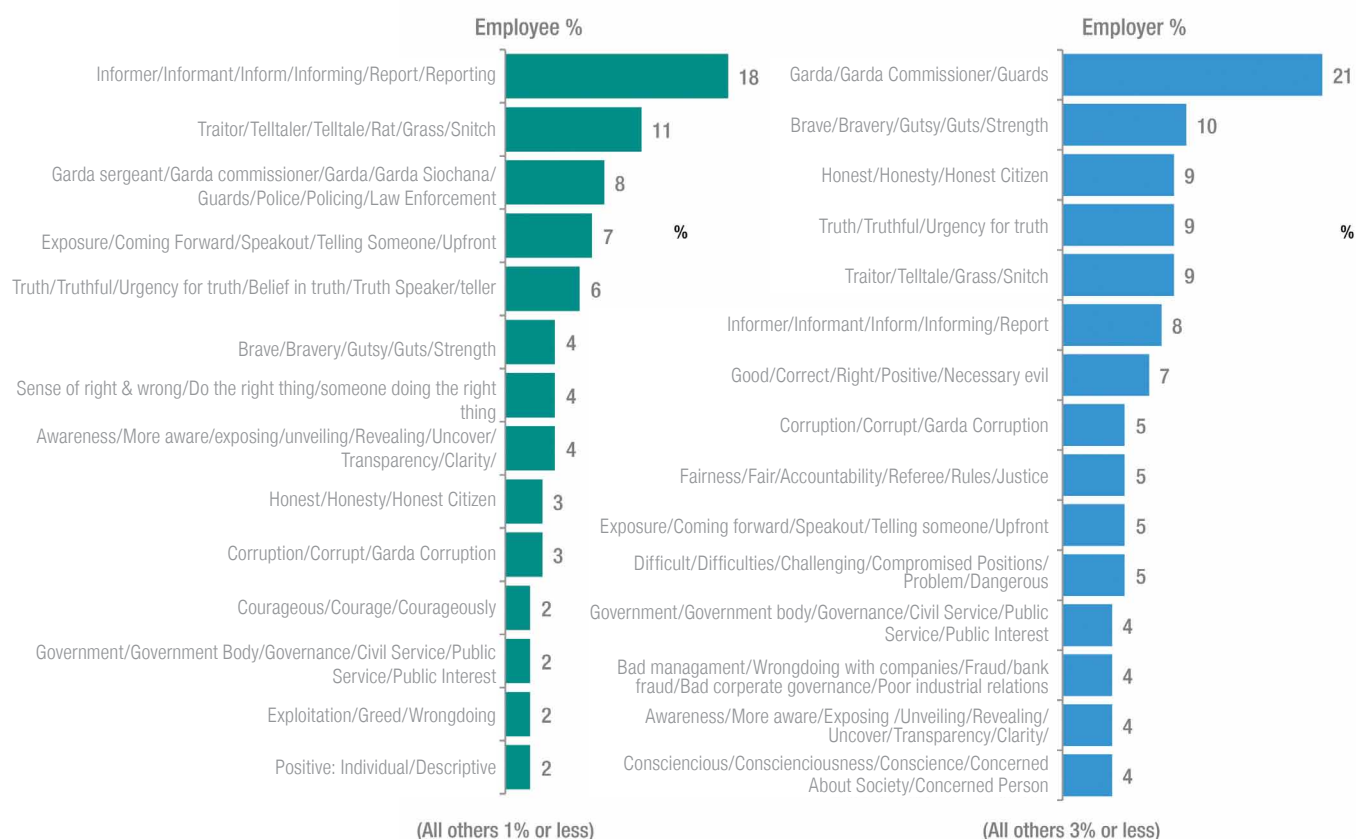


When asked to randomly associate three words with the term whistleblower, the responses of employees were far more negative than those of employers. The top three terms cited by employees were informer/

informant, traitor/rat or snitch, or Garda/Garda Commissioner. The terms Garda/Garda Commissioner, Brave/Bravery/Strength, and Honest/Honesty were the three most commonly cited terms by employers.

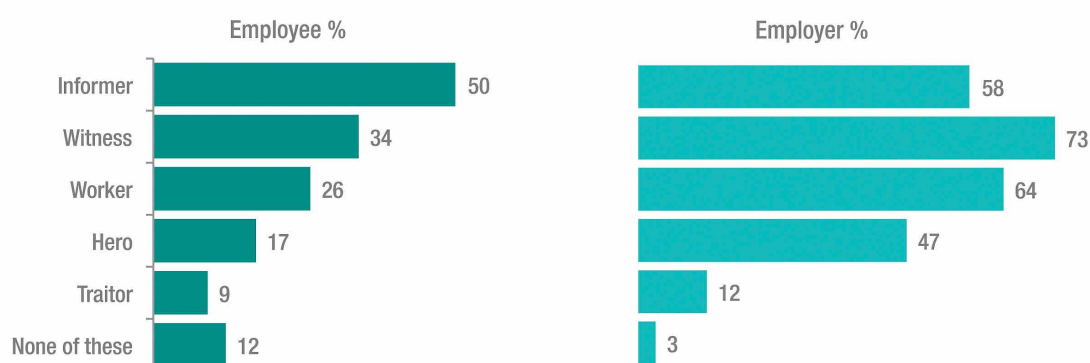
'Whistleblower': What three words immediately spring to mind

Base: All Employees n = 878/All Employers n = 353



Similarly, when prompted, employers were more likely to use positive or neutral terms to describe whistleblowers than employees. For example, 17% of employees associated the term whistleblower with 'hero' in contrast with the 47% of employers that did so.

The findings not only suggest a high degree of ambiguity among employers towards whistleblowers – particularly where there is a potential cost to supporting them - but that more needs to be done to address negative stereotypes of whistleblowing among employees. Time and resources will need to be invested in sensitising employees to the benefits of whistleblowing to them and society as a whole.



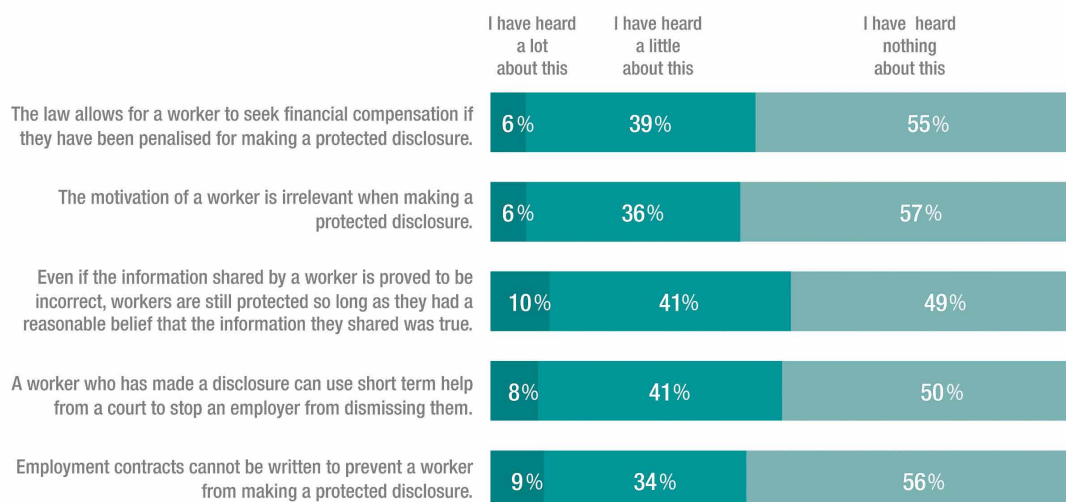
Employer Awareness and Supports

Although employers appear to be generally well disposed towards whistleblowing, they seem to be less aware than they should be of whistleblowing legislation in Ireland. Of the 68% of employers that are aware of the PDA, most are not aware of the specific provisions the legislation contains. For example, 55% do not know that the law allows for a worker to seek financial compensation if they have been penalised for making

a protected disclosure, while 57% do not know that the motivation of a worker is irrelevant when making a protected disclosure. Half of all employers (50%) did not know that a worker who has made a disclosure can now seek a court order to stop an employer from dismissing them on account of having made the disclosure. In addition, 56% of employers did not know that employment contracts cannot be written to prevent a worker from making a protected disclosure.

Employer Survey: Detailed familiarity with Protected Disclosures Act

Base: Employers n = 353



Most employers surveyed also said they did not have any procedures in place to channel reports from their staff or to protect those who speak up.

Systems & Procedures in the work place

All Employers n = 353



Just over 30% of private/not-for-profit sector employers said they had introduced any system to promote whistleblowing in the workplace. Furthermore, only 10% of employers said they had a whistleblowing policy or guidance. Only 16% said they provided

access to a hotline or legal advice to their employees. The findings suggest that employers need as much support and guidance in promoting whistleblowing as their employees.

Conclusions

The Integrity at Work Survey findings indicate that whistleblowing is far more common than we might have considered. They would also suggest that employers are generally well-disposed to whistleblowing – at least in principle – and the majority of those that report wrongdoing do not suffer as a result of their disclosures. Nonetheless, a significant number of those that have spoken up say that their experience was negative (estimated to be over 30,000 people).

It is also worth noting that those whistleblowing cases that receive media coverage invariably arise from mistreatment of workers who have spoken up. It should be little surprise therefore to find that one of the most commonly associated terms with whistleblowing in the survey was ‘Gardaí’. Most employers seem to have been unaware of the reputational risks arising from failing to implement effective whistleblowing procedures and this is reflected in the very small number of organisations that claim to have whistleblowing policies and guidance in place.

Tellingly, the second most common term used by employees to describe whistleblowers was traitor, tell-tale or rat. Much more needs to be done to promote whistleblower procedures but much also needs to be done to sensitise both employers and employees to the benefits of whistleblowing.

CONCLUSIONS AND GENERAL RECOMMENDATIONS

Controversies surrounding the mistreatment of whistleblowers and allegations of abuse of public office are damaging public trust in Irish institutions - even if welcome reforms such as the PDA have been introduced. As the government undertakes a review of the Act, the experience of whistleblowers and employers should be also considered when drafting any amendments to the legislation.

TLAC and IAW help capture and independently analyse the experiences and views of these two groups - a list of TI Ireland's recommended amendments to the PDA based on engagement with employees and employers can be found on page 32 and more detailed submissions have been made by TI Ireland as part of the government review.⁶¹

Although legal reform is essential, so too are the resources and leadership needed to ensure that those reforms make a difference. In its Speak Up Report 2015, TI Ireland pointed out that the PDA will not protect Irish whistleblowers on its own. It followed its report by launching the Integrity at Work programme and the Transparency Legal Advice Centre in 2016 with seed-funding from the Department of Public Expenditure and Reform and Department of Justice and Equality.

IAW offers the best opportunity to raise awareness of the PDA and to change negative attitudes and build on positive perceptions of whistleblowing noted in this report. Likewise, TLAC affords workers the opportunity to seek free specialist legal advice on making disclosures and help in making informed decisions before they speak up. However, a two-month waiting list has grown for free legal advice from TLAC and demand from employers for guidance and support through IAW means that additional organisations cannot be supported without increased resources. TI Ireland will pursue other sources of financial aid for the programme, but continued government support will be essential to sustain the initiative in the short to medium term.

Notwithstanding the importance of the PDA and initiatives such as IAW, it is worth stressing the point that protecting whistleblowers is not enough to stop wrongdoing on its own. The PDA and other new measures including the Regulation of Lobbying Act 2015 represented progress, but there has been little movement in advancing other important anti-corruption legislation through the Oireachtas (Irish houses of parliament) over the past year. The Public Sector Standards Bill 2015 and Criminal Justice (Corruption) Bill 2012, in particular, have been delayed for too long and should be dealt with as a matter of urgency by both the Government and Oireachtas members.

In addition, there is a need to introduce a range of measures that will help prevent, detect and address corruption in all its forms:

⁶¹ See <<https://transparency.ie/resources/submissions>>

1. Proactive intelligence sharing among law enforcement agencies and other state bodies needs to improve if corruption and economic crime are to be properly detected and prosecuted. Either a national anti-corruption agency and/or an inter-agency task force on corruption and economic crime should be established. Such a measure should be introduced as part of a long-term national strategy aimed at preventing corruption and economic crime.
2. Agencies such as the Standards in Public Office Commission and the Health Inspection Quality Authority should be provided with powers and resources to gather intelligence and investigate allegations of wrongdoing with or without a prior complaint from a member of the public.
3. While Local Government auditing standards appear to have improved in recent years, there appears to be little or no promotion by local authorities of their statutory Fraud and Anti-Corruption Alert Plans. Promotion of these and other anti-corruption measures, including training and education, should be included as part of an independent overhaul of the local government ethics framework.
4. More emphasis should be placed on education and awareness-raising on the risks and costs associated with corruption and measures aimed at stopping corruption across Irish society. This should include sustained public-awareness raising initiatives involving civil society organisations; ongoing ethics training and advice for public officials including elected representatives; and continuous research on the efficacy of existing anti-corruption measures.
5. The Public Sector Standards Bill should introduce a ban on any public official receiving gifts or entertainment above a token value during the course of their employment. Any new requirements to make declarations of interest should also cover any liabilities, as well as income and assets of public officials and their families.⁶²

This list is not exhaustive and should be considered along with the many other proposals highlighted in this report to strengthen the PDA. It is also worth considering outstanding recommendations made by TI Ireland and other bodies including the Mahon Tribunal, OECD, Council of Europe and the European Commission when introducing reforms aimed at stopping corruption. However, reform – especially legal reform – should not be seen as an end in itself, but as a means to a more open and fairer society.

For more detailed data, information, analysis and policy recommendations please visit www.transparency.ie/resources.

⁶² The example of Canada and Australia might be followed where the equivalent of €7,000 in liabilities is required to be disclosed by parliamentarians, senior office holders and their families. See <http://www.per.gov.ie/wp-content/uploads/International-Best-Practice.docx>

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