

Presentation to the Oireachtas Joint Committee on Finance, Public Expenditure and Reform by John Devitt, Transparency International Ireland

13 June 2012

Good afternoon. I should begin by thanking the Committee for inviting me to present a number of observations on the General Scheme of the Public Disclosure in the Public Interest Bill. We have been very encouraged by the Minister's statements to the house and this committee that he wishes to see this legislation set a gold standard for whistleblower protection worldwide. Combined with a range of measures aimed at promoting ethics and openness in government, we hope that such reform will send a very positive signal to international observers concerned with standards of governance in Ireland. Given the importance of whistleblowing to the exposure and prevention of corruption, fraud, and malpractice it is critical that this legislation be brought forward with urgency but without haste. It is important we get this right. Before I go any further, I should briefly explain the background to our work on this topic and our forthcoming submission.

Who we are

TI Ireland is the Irish chapter of Transparency International, the independent global anti-corruption organisation. Since 2004 we have been raising awareness, offering training, and undertaking research into measures aimed at stopping corruption in Ireland and overseas. Our work is funded by the Joseph Rowntree Charitable Trust, European Commission projects and membership fees in Ireland. Our work is also carried out with the support of our network of volunteers.

Our work

In 2009, with funding from the Department of Justice, we published the National Integrity Systems Study, an international benchmark and Ireland's first assessment of how institutions and laws work to stop corruption in Ireland. While we made nearly 40 recommendations aimed at making government and business more open and accountable, we decided to concentrate on implementing five key recommendations – one of which was the introduction of robust whistleblower legislation.

Given that over 40 per cent of fraud and corruption cases believed to be exposed by whistleblowers, we believed that prevent and detect wrongdoing in public life.¹ Our work to promote whistleblowing in Ireland continued in 2010 with the publication of a report titled *An Alternative to Silence*, which examined whistleblower legislation in Ireland and nine other EU countries. The report highlighted the confusing patchwork of legislation that provided unequal and largely weak protection against whistleblower reprisal.

A year later, in May 2011, with the help of a small European Commission grant, we launched Western Europe's first free ethics and anti-corruption helpline in Ireland. The pilot service, called *Speak Up*, offers free guidance and information to individuals who are faced with ethical dilemmas or reporting concerns at work as well as victims of wrongdoing. So far we have received around 220 calls from people seeking help or reporting wrongdoing through a free-phone number and secure email system. Most of the calls relate to concerns from both clients and staff in the health service, education system, the legal profession, banking and local government.

¹ Association of Certified Fraud Examiners Annual Report 2012, www.acfe.com

Patterns

While we have yet to publish our first year's final set of statistics, in the relatively short time the service has been running, we have been able to identify five common features among the issues raised by our clients and advisers that may be most pertinent to our discussion today:

1. Firstly, most people want to report **anonymously or want a guarantee of confidentiality** when reporting. We are aware of a number of cases where the identities of whistleblowers and witnesses have been needlessly disclosed without their permission and with little justification. In all of these cases the whistleblower has suffered a detriment. The worker has had their good name questioned; or found themselves isolated by colleagues. In one case we believe the client's dismissal was directly related to his disclosure being made known to his colleagues.
2. Our helpline volunteers have also dealt with a **wide range of issues** and subjects that are being reported from **across professional and economic sectors**. Allegations are being made of bribery, false accounting, whistleblower retaliation, nepotism and cronyism. No sector, whether it be public, private or non-profit appears to be immune. It should be added however that **most calls are not of a criminal nature** - in fact, most are related to allegations of poor governance or conflicts of interest – issues that have traditionally not received any protection under existing whistleblower legislation. The fact that the reports have been made about behaviour that may not fall within the scope of criminal law should not render them any less eligible for protection.
3. It is worth noting that many of our callers **fall outside the employee-employer relationship**. Some clients have reported concerns about medical malpractice or issues in the health system. We are aware of cases where workers in the health service were dismissed because they do not enjoy employee status with the relevant public body.
4. **All of our clients who have reported to an outside agency** have been the victim of or threatened with retaliation. Where employers do have internal policies in place, they often fall short of encouraging or offering assurances to workers that they will not suffer if they report to a regulatory body or law enforcement agency. Indeed, we believe that many internal helplines established to assist with forwarding reports of wrongdoing are sometimes abused by managers whose primary motive is to prevent the disclosure of wrongdoing to outside agencies
5. Finally, and contrary to the sometimes wilful misrepresentation of whistleblowers as troublemakers, everyone who has come to us has been **fearful of making a false report** and if anything, they have been overly-scrupulous in preparing their evidence before coming forward. We would be hopeful therefore that the discussion on this issue will be cognisant of the desire of the vast majority of Irish workers to do the right thing. They deserve no less than fair and consistent treatment before the law.

Recommendations

While our recommendations are largely based on our work with whistleblowers and witnesses, we have also consulted widely with legal practitioners at home and overseas. We also draw from

international standards commissioned by Transparency International, Public Concern at Work, the OECD and the Council of Europe. We shared our preliminary observations on the General Scheme with members of the Committee in April and I will not go into too much detail on the substance of those observations right now. We will also be making a more detailed submission to the Minister on the draft legislation soon. That said, with your permission Chairman, I can summarise our observations and draw your attention to a number of additional comments that might be worth discussing today.

1. Anonymous reporting

Under Head 11 we **recommend** that the legislation protect a worker making an anonymous disclosure where the worker can be identified as the source of a protected disclosure. The burden of proof should rest with the employer to prove that any retaliation was not a result of the protected disclosure.

2. Good faith

Under Heads 5,6,7,8,9,10,and 12 – we have recommended that the legislation include a definition of “good faith”.

3. Protected disclosures

Under Head 4 we have recommended that a protected disclosure include a report of negligent not just grossly negligent or irregular use of public monies.

4. Just and Equitable Awards

Under schedule 4.1,(3).c we **recommended** that the level of awards to whistleblowers that have been subject to reprisal should be of an amount that is ‘just and equitable in the circumstances’ and not limited to the equivalent of two years’ salary.

5. Internal procedures and education

Under Head 26 we advise that the requirement to have a whistleblower policy extends to all organisations in the public, private and non-profit sector in receiving and dealing with information about a serious impropriety in or by that organisation. The Labour Relations Commission in consultation with employers, unions and civil society might be well placed to draft a framework code of practice that could then be adapted by employers, taking into account the size of the organisation and the different and significance of risks associated with the work of the organisation. The legislation must also be supported by awareness-raising, communication, training of employees, employers and statutory bodies responsible for the oversight and adjudication of cases.

6. Vicarious liability

We would urge the Minister to consider a provision of vicarious liability of the employer for any detriment suffered by a worker as a result of informal or formal retaliation by co-workers.

7. Whistleblower Discrimination

We will recommend that remedies for persons who suffer future work-place discrimination (including unjust denial of work opportunities) on the grounds that they made a protected disclosure during the course of previous employment be provided for under the Employment Equality Acts 1998 to 2003.

8. Interim Relief (additional recommendation)

We will recommend that the right to seek interim relief before the Employment Appeals Tribunal against dismissal be included in the legislation. Such a provision is provided for under sections 128-132 of the UK Employment Rights Act 1996 and has operated without unnecessary disruption to labour relations there.

9. Protected Persons (revised recommendation)

We recommend consideration of the expansion of protections against civil liability to volunteers and students and as well as safeguards against vicarious retaliation against family members, co-workers, and employers, directly as a result of a report made by a whistleblower.

10. Confidential reporting (additional recommendation)

We recommend that Head 16 is amended to read, "Every person to whom a protected disclosure is made or referred shall not disclose information that might identify the worker who made the protected disclosure unless a number of criteria have been fulfilled."²

11. Disclosure to Legal Advisors (additional recommendation)

Under Head 10, it would be worth considering protecting disclosures made to trade union officials, auditors and independently accredited advisors such as ethics and compliance officers in the course of seeking advice.

12. Review and Information (additional recommendation)

Finally, we recommend that the legislation requires a statutory review of the effectiveness of the legislation be undertaken at five to ten year intervals.

Chairman, there is a great deal to be done to ensure that this legislation is fit for purpose. That notwithstanding, after a long delay, I am satisfied that we are now moving in the right direction. Many thanks for your time.

² (a). that worker consents in writing to the disclosure of that information; or (b). The person who has acquired knowledge of the protected disclosure reasonable believes that disclosure of identifying information-

- (i). is essential to the effective investigation of the allegations in the protected disclosure; or
- (ii). is essential to prevent serious risk to public health or public safety or the environment; or
- (iii). is essential having regard to the principles of natural justice.

(c). Any person, who intentionally or negligently reveals the identity of a complainant shall, without prejudice to the other provisions of this Act, be guilty of an offence.