



# AN ALTERNATIVE TO SILENCE

WHISTLEBLOWER PROTECTION IN IRELAND

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## RESEARCH TIMELINE

This research on whistleblower safeguards in Ireland was led by Andrew Sheridan from June to December 2009. The case studies were compiled by Emma Browne. The study was edited by John Devitt.

This national report accompanies the Transparency International report “Alternative to Silence – Whistleblower Protection in 10 European Countries” in which Ireland’s whistleblower safeguards are examined in a regional context. The report takes existing whistleblowing legislation and best practice into account and identifies weaknesses, opportunities and entry points to introduce stronger and more effective whistleblowing mechanisms in these countries.

It is also part of an ongoing consultation with all concerned stakeholders and revised editions will be posted on the TI Ireland website ([www.transparency.ie](http://www.transparency.ie)).

Every effort has been made to verify the accuracy of the information contained in this report. All information was believed to be correct as of December 2009. Nevertheless, TI Ireland cannot accept responsibility for the consequences of its use for other purposes or in other contexts.

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Anonymous interviews were conducted with spokespersons from Irish companies and whistleblowers from the Irish health service. Apologies to those we have failed to mention.

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## WORKING DEFINITION OF WHISTLEBLOWING

For ease of reference, the following working definition may be used: “Someone blows the whistle when they tell their employer, a regulator, customers, the police or the media about a dangerous or illegal activity that they are aware of through their work”. (Public Concern At Work)

The definition following definition was used for this research: “The disclosure of information about a perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action” (J.P. Near and M.P. Miceli)

## INTRODUCTION

One in four cases of fraud and corruption are exposed by whistleblowers. Whistleblowers have been responsible for exposing the sexual abuse of children. They have reported the assault of elderly patients by staff in nursing homes. Whistleblowers revealed the extent of corruption in our banks. And more often than not, whistleblowers were either ignored or punished for telling the truth.

This report highlights both the personal costs and the legal barriers faced by people who report wrongdoing, negligence and concerns in the public interest. It examines existing measures for protecting whistleblowers in government and business. The report also makes practical recommendations for the effective protection of whistleblowers and ultimately the protection of the victims of the wrongdoing they uncover.

The case studies recount the experiences of Eugene McErlean, a former internal auditor with Allied Irish Banks who blew the whistle on overcharging and other wrongdoing at the bank, only for the Financial Regulator to ignore his evidence. The second case study involving a nurse at a regional hospital was withdrawn for legal reasons close to the day of publication. It may be published after further review in a revised edition of this study. Finally, Tom Clonan, a former officer in the Irish Army describes an intimidating smear campaign led by the Irish Defence Forces after he exposed bullying and sexual harassment of soldiers by their colleagues.

Our analysis shows how the Irish government's "sectoral"\* approach to whistleblower protection will leave thousands of people with little or no guidance or protection against legal action and retaliation for speaking out against wrongdoing. We conclude by making the case for clear, comprehensive protection in a

single clear law: a law that provides assurance to anybody who exposes wrongdoing that they will not be the ones who pay the price.

## KEY FINDINGS AND RECOMMENDATIONS

### Legislation

Ireland does not have an overarching whistleblower protection law. After a series of political corruption scandals a bill proposing one was tabled in 1999. However it languished on the government programme for seven years before being dropped because of 'legal complexities'. These complexities were never fully explained by government. The government instead chose to introduce legislation on a 'sectoral' basis, which only protects employees in some professions and sectors. It leaves employees and other potential whistleblowers in some sectors with little if any legal protection.

Existing Irish legal whistleblower safeguards cover persons reporting suspicions of child abuse or neglect; breaches of the Ethics Acts; competition law; matters relating to workplace health & safety; Gardaí (police) and Garda civilian employees reporting corruption or malpractice; health care employees who report threats to the welfare of patients; offences relating to employment permits; the regulation of communications; consumer protection; offences relating to chemicals; and breaches of charities law.

\*A sectoral approach to whistleblower protection involves the passing of legislation to protect potential whistleblowers in selected state, private or professional sectors. The approach does not offer protection to everyone

## Political and Cultural Context

The traditional view of the whistleblower in Ireland has been equated with that of the 'informer' - a term with negative connotations arising from Ireland's history of political dominance by Britain. Native informers were widely perceived to have assisted the British authorities in their rule of Ireland. 'Informer' became synonymous with 'traitor'. Ireland continues to be a culture where loyalty is valued highly, political clientelism is practised openly, elite networks are tight, and the person who 'gets one over' on the state for personal gain will as often enjoy popular praise as censure.

However, traditional attitudes may have changed somewhat in recent times and there is evidence to suggest that the culture is now far more fertile ground for the support of whistleblowing. Political and corporate scandals too numerous to detail have dominated Irish public discourse in recent decades. A number of these were brought to light by whistleblowers who received some positive media coverage and popular praise. The coverage of individual instances of whistleblowing in the popular media is generally supportive, with national TV and radio producing documentary series and a high-profile dramatised account of the role of whistleblowers in Ireland. With increasing awareness of the issue, there is some cause to be hopeful that wider cultural attitudes may lead to a similar change of mind within both political and corporate circles in Ireland.

## Current Policies and Practices

Though various 'sectoral' whistleblower protections have been enacted from 1998 to date, a common thread running through them is their relative weakness where faced with powerful constituencies. There are no whistleblower protections relating to

offences neither under company law nor in relation to the provision of financial services, nor at all in relation to the civil service. The whistleblower provisions for members of the Gardaí are inadequate and those relating to medical and nursing home malpractice are weaker than other whistleblower protection provisions in Irish law. Whistleblower provisions have yet to be introduced in the anti-corruption acts however an amendment bill containing whistleblower safeguards has been published by the government.

The majority of legislative whistleblower provisions have been attached to laws creating new oversight authorities with specific remits. This was the case in respect of provisions relating to competition law, workplace health & safety, the health service, communications regulation, the police service, specific matters relating to ethics in public office, and consumer protection. In their typical form, legal provisions protect disclosures to specified external authorities. They also only offer cover for reports alleging offences under the given act or related acts where the disclosures are made reasonably and in 'good faith'. As a quid pro quo for these protections, corresponding criminal offences are created for knowingly making false claims. An unwelcome anomaly is found in the Health Act 2007 where making a claim one 'ought to know' is false is accorded the highest penalty of all such offences in Irish law. This caveat can only have a chilling effect on any prospective whistleblower who might look to the law for comfort.

A central feature of the enacted whistleblower protections is the recognition of the risk of whistleblower reprisal. This has been brought into effect by the creation of a specific 'cause of action' of reprisal for the whistleblower, which allows him/her to seek redress. The typical course is for the whistleblower who has suffered reprisal (up to and including dismissal) to lodge a complaint with the Labour Relations

Commission. Most such provisions cap potential compensation at two year's salary. This is inadequate as there are documented examples of whistleblowers who have lost employment and have never been able to secure employment of equivalent status. While the respective acts recognise whistleblower reprisal as a wrongful act and establish it as a specific ground for the wronged individual to seek redress, none create an offence of whistleblower reprisal. The provisions seek to partly compensate wronged individuals for their loss but none seek to punish the perpetrator of the retaliation.

## Conclusions

While it is recognised that Ireland has enacted many whistleblower protection provisions in recent years, it must also be recognised that there are very significant gaps in protection. In some areas where formal provision of protections has been made, it is not clear how they will work in practice. Some provisions, could deter whistleblowing altogether. The 'ought to know' clause in the Health Act for instance places an unfair and unbalanced legal onus on the whistleblower. Whistleblower codes and guidance throughout the public service are virtually non-existent. Whistleblower systems in An Garda Síochána for example provide for a 'confidential recipient' for disclosures from members of the service. Yet as of March 2009, only three reports had been made to the responsible official. In addition no 'helpline' or guidance exists for members of the force.

The most obvious gaps in coverage of whistleblower provisions relate to the reporting of offences under company law and in the provision of financial services. A cursory reading of news headlines from the past year provide plentiful evidence of unethical and perhaps even criminal practices

in some Irish enterprises, yet both the business community and government remain actively opposed to protecting those who report such wrongdoing

## RECOMMENDATIONS

1. Ireland should adopt a **generic whistleblower protection law** covering whistleblowers in the public, private and non-profit sectors. The success of the generic UK Public Interest Disclosure Act runs to a mere nine pages and applies to the entire private and public sectors in the United Kingdom. It is an example of a simple and very effective law adopted by the jurisdiction most resembling Ireland's. It makes little sense to continue with a "sectoral" approach that covers a limited number of professions and sectors.
2. In the absence of the early adoption of a generic provision, whistleblower protection provisions should be extended, as an intermediate measure, to **company law and financial services** as a matter of urgency.
3. Amendments should also be made to Health Act whistleblower provisions that remove the "**ought to know**" clause.
4. Whether a generic or sectoral whistleblower approach is adopted, 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". This is already the case under the Safety, Health and Welfare at Work Act 2005 and Employment Permits Act 2006.



## THE REALITY OF WHISTLEBLOWING IN IRELAND

**TOM CLONAN:** Blew the whistle on the sexual harassment of women in the Defence Forces

Tom Clonan joined the Defence Forces in 1989 rising to the rank of captain. He served in Lebanon and former Yugoslavia before working in the Defence Forces Press Office. In 1996 he started conducting research on women in the Defence Forces for a PhD he was undertaking at Dublin City University (DCU). The research was undertaken with the knowledge and written consent of the Defence Forces, but when it uncovered widespread bullying of women, harassment, sexual harassment and allegations of sexual assault and rape, the Army began a campaign to discredit Tom's research and his reputation.

During his research Tom interviewed 60 women in the Defence Forces, 59 of whom reported some kind of bullying, harassment or allegations of a sexual nature. Towards the end of 2000 the research was completed and as Tom was leaving the army to pursue an academic career. He was keen to present his research to the Chief of Staff before his departure.

"Before I retired I said look this situation between the women and the army has to be sorted. I was told that we were getting a new Chief of Staff and that he would have to take a lot on board and get into that position and would I leave it for month or two and I accepted that at face value".

Two months later, in February 2001, he received a phone call asking him to come into Defence Forces Headquarters.

"I presumed it was about the dissertation. I

went in and they wanted to ask my advice about crisis management. I asked about the research on the women and they said 'don't mind about that you're an academic now, we live in the real world. We will deal with the women in our own way.' I was very forceful and said 'well you have to deal with it properly'. I was told to 'f\*\*\* off and get out' and was escorted from the building".

A few months later an ex-soldier, Declan Power, who was working as a journalist and part-time lecturer in DCU was investigating an allegation of rape at an army training camp. As a DCU lecturer he also had access to Tom's research. A story reporting on the study was published in the Sunday World newspaper in August 2001.

"It got saturation coverage for about two weeks. That's when the big problems started. The military authorities said I had fabricated the research and falsified its findings. They said I had concealed the research from them and had no permission".

Tom was able to produce documentation that showed the Chief of Staff had authorised his research. Tom asked the Minister of Defence for an independent inquiry to vindicate his findings, and an inquiry was announced.

"That seemed to anger the military authorities and they released a document to journalists containing allegations about me. Implying I was a liar and I had falsified the research and that generally I was scurrilous".

Around this time Tom also received a phone call from Defence Forces suggesting that he issue a statement withdrawing the research.

"I was going on holidays and my wife was in the car with my young son when I got a phone call. They said, 'If you don't do as you're told there will be guerrilla warfare against you. Every dirty trick in the book will be used against you.' I will never forget it".

Tom had just started a new job in academia



working in an Institute of Technology.

“One of the outcomes of these allegations was that I was in probation in the Institute and I was repeatedly asked for clarification by management there who said ‘your former employers, the Defence Forces, a very respected institution are saying that you falsified your research therefore your qualifications are suspect’. I thought I might lose my job”.

After that Tom took legal advice and in October 2001 he issued defamation proceedings.

As well as his professional reputation, his personal life was affected. Tom did not receive any support from his colleagues in the army – many of whom he had trained with, served overseas with and up to this point had considered close friends. Many of the women who were the subject of the research also became the subject of hostile scrutiny within the army ‘for talking to Tom Clonan’ and were reluctant to speak out in his support.

“I was getting a lot of abusive phone calls I was confronted on Grafton Street by a colleague when I was out with my family. I went from heart of organisation to being vilified in public.

There was no support from colleagues, from defence forces, no support from any of the equality agencies no support from any of the women’s activists groups, absolutely nothing”.

It took four years for his libel case to reach the courts and in 2005 Tom reached a settlement with the Army. Tom did go on to have a successful career outside the army and is now security analyst for the Irish Times. He also teaches in the Media Department of Dublin Institute of Technology. However the army’s grudges still linger.

“Even today, as the Irish Times security analyst, I can write about Afghanistan, Iraq, Blair, Bush, Brown or Obama - anything to do with international military or security issues - but it is very difficult for me to write about the domestic situation here because of a reluctance to give me information here by certain quarters within the Department of Defence.

In all of my dealings with American, British, or other international defence and security sources over the last decade, I have never once experienced an official spokesperson who breached these fundamental professional ground-rules either in terms of a refusal to answer questions, grant access or subsequently query agreed on-the-record facts’.

In recent years Tom had to engage the National Union of Journalists (NUJ) to support him in order to counter attempts to exclude him from certain media events and attempts to freeze him out or isolate him from information sources within the Irish Defence establishment. ‘Whilst I enjoyed the full support of the NUJ in this matter, it angers me that I had to prevail upon journalistic colleagues in this manner in order to simply engage in my professional practice as a journalist – a legitimate right to which I am entitled as an accredited journalist and member of the NUJ’.

“There has to be some sort of legal protection measure for the whistleblower and in fairness too, the organisation upon which the whistle is being blown. When an organisation reacts like that and seeks to destroy a person’s reputation there needs to be some kind of third party or mediator. The legal process is fine but there are problems in terms of the time it takes and the cost”.

“I enjoyed the army. I never had any problem in it. I was very proud to be in the military.

I had been promoted to captain and then I was completely and utterly cut off. It was a very hurtful thing when people are whispering about you and they have turned their back on you and sent you to coventry. You begin to doubt yourself. It is also very frightening to have your reputation and livelihood threatened in this manner by individuals who mobilise the apparatus of state against you.

Now that I can look back on it and I am older I have realised that the message from the army was not for me it was to say to other people keep your mouth shut. This however is cold comfort for me and presumably even colder for those in other organisations who are aware of wrong-doing but who are afraid to speak out for fear of whistleblower reprisal”.

**CASE STUDY 2:** this healthcare-related case study was removed on the basis of advice from the whistleblower’s legal counsel. The study may be published at a later date.

## **EUGENE MCERLEAN:** uncovered overcharging of AIB customers and reported it to the Financial Regulator

Eugene McErlean, was head of Allied Irish Banks (AIB) group internal audit in 2001, when he completed a branch wide special audit into fees and charges at AIB. He found there was a major overcharging problem and reported his findings to AIB. He also reported the matter to the then Financial Regulator. The Financial Regulator’s response was to ask Eugene to withdraw the complaint he had made.

Due to a confidentiality agreement Eugene signed with AIB it is not clear what happened internally at AIB in reaction to his findings. What is clear is that they issued a statement saying they were not re-appointing Eugene as head auditor. In the same statement they announced a report they had conducted on a major fraud in a US subsidiary. The timing of both announcements may have led some observers to infer that Eugene bore some responsibility for the fraud whereas, in fact, it was confirmed by a senior colleague at AIB, Gary Kennedy, that he was not.

When the overcharging scandal became public in 2004, revealing overcharging of over €30 million, both AIB and the Financial Regulator blamed internal systems and controls, which Eugene was essentially responsible for. As a result of his reporting of the overcharging Eugene lost his livelihood.

In May 2002 Eugene met with the Financial Regulator to inform him of his findings in relation to the overcharging of AIB customers. He told the regulator that AIB had possibly overcharged customers by €75 million.

“I met the chief executive of the regulator in May 2002 and informed him about the overcharging, as well as quite a number of other issues that I must state were of even greater concern than was the overcharging issue. Initially, he appeared very concerned and thought it was a very serious matter. He thought this was extremely serious, said all the right things and appeared to be ready to take action about it. In October 2002, he invited me to meet him again. However, he only wanted me to state that I had withdrawn all the allegations about overcharging and the other matters. I told him that these were facts and I would not withdraw them”.

The regulator still maintains that Eugene chose to withdraw the report of the overcharging.

“I didn’t feel that I was a whistleblower at all. I was required to inform the Regulator; that was part of my job. After the second meeting I thought I had done my job and tried to forget about it and put it behind me. I was extremely annoyed with the way the regulator behaved”.

In 2004 another whistleblower reported to the Financial Regulator about the overcharging scandal. When he became frustrated with their reaction he told RTÉ (Ireland’s state broadcaster) and the scandal became public. The Financial Regulator was forced to act and they investigated the matter. They found that AIB had overcharged customers by €34.2 million. In 2006 AIB announced that they had found a further €31 million in overcharging.

“The Financial Regulator proceeded to blame me not by name but said it was a failure of the ‘systems, processes and controls’ for not uncovering it - which was me. The Chairman and CEO of AIB made statements at the time speaking about the breakdown in control functions, which were my functions, when all along they had a full report on it all. So it

looked like I had not done my job”.

“Personally it is damaging for the regulator to say that about someone in my line of work”. As a result of the confidentiality agreement Eugene’s hands were tied in terms of what he could say about his complaint to the Financial Regulator and what happened internally in AIB.

“If there was whistleblower legislation, I would have been protected if I had made public the actions of the regulator. It was made clear to me that if I broke my confidentiality agreement I would have been taking an enormous risk”.

As a result of this agreement many of the facts did not come to light until Eugene gave evidence to the Oireachtas (Parliamentary) Committee on Economic Regulatory Affairs in March 2009.

Eugene decided to seek the records of his meetings with the Financial Regulator in order to clear his name. He made an application through the Data Protection Commissioner but the regulator maintained it did not come under the Data Protection Act. It took a year for Eugene to get the documents. When he did receive them the relevant portions had been blacked out. He took a case to the District Court in attempt to get the recordings of his meetings with the Financial Regulator which he lost.

“I have hit a brick wall at this stage. They do have all the documents and they will support what I have said. Even at the Oireachtas hearings last year the Regulator said my allegation that they asked me to withdraw my complaint in 2002 was completely absurd and without foundation, but they did not produce any documentation to prove that”.

Eugene has had some vindication. At the same Oireachtas hearings in 2009, AIB’s departing chief executive Eugene Sheehy,

apologised to Eugene for his treatment by the bank saying he had worked in a highly professional manner.

“Knowing what I know now there is no way I would go to the regulator with any information after the way I was treated by them. They were unprofessional. They have issued misleading statements when they are meant to be the ones protecting the integrity of the system. This was someone doing their job as required by the financial regulation. They corrupted the system”.

“There needs to be a form of supervision over them and transparency. They are exempt from the Freedom of Information Act and they tried to say they were exempt from the Data Protection Act. They can be a law unto themselves and it is very difficult to appeal against the regulator. Who watches the regulator? Legislation is needed”.

“If there had been legislation in relation to whistleblowers in the financial services introduced earlier all the information about the banks would have come out before. We’re now paying the price for silencing people who could have told us what was going on”.

# THE LEGAL ENVIRONMENT

## Introduction

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

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

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

The research conducted to produce the report consisted of a legal review both

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

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

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

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

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

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

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

## OVERVIEW OF RULES AND PROTECTION IN PRACTICE

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

There is no free-standing whistleblower protection law in Ireland. A bill written to provide a generic whistleblower protection law was introduced by a member of an opposition party in 1999<sup>6</sup>. The bill was welcomed by the government and it was adopted onto the parliamentary programme of government in 2000<sup>7</sup>. The bill then spent the next six years on the order paper through two parliaments (the government having been returned to power in the general election of 2002) receiving regular positive reference from government yet without being enacted. In 2006, the government withdrew the bill.

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

A number of such limited whistleblower protection provisions had been enacted prior to the formal institution of the sectoral policy. These related to the protection of: persons reporting suspicions of child abuse or neglect to authorised persons; persons reporting alleged breaches of the Ethics in

Public Office Acts; persons reporting breaches of competition law to the relevant authority (and also protections specific to employees for so doing); employees against penalisation for exercising any right under the workplace health & safety act, and to Gardaí and Garda civilian employees reporting corruption or malpractice in the police force.<sup>7</sup>

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

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

There is neither provision of a mechanism for whistleblowing nor any whistleblower protections in the legislation governing the civil service; the Civil Service Regulation Acts. No whistleblower provisions were attached to the last act amending the Civil Service

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

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



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

Certain public bodies, which operate outside of the civil service, do have whistleblower protection policies. As an example, the Financial Regulator instituted a whistleblowing process/protection policy for its staff in May 2009 and its provisions include an external hotline provided by Public Concern at Work.

There is no general whistleblower provision in labour law as yet. Irish labour law is governed by many statutes and series of statutes and, to date, only those pertaining to workplace health and safety and the employment permit (visa) system have had whistleblower provisions attached. The Employment Law Compliance Bill 2008 proposes the extension of whistleblower protection provisions to the reporting of

offences under eighteen employment law acts and series of acts. However, at the time of writing this bill has not been enacted.

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

## How common is the practice of whistleblowing in the country?

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

There have been few court cases involving whistleblowing in recent years and none in the past five years. The only significant case is ten years old. In *National Irish Bank v RTE*<sup>12</sup>

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

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

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

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

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



an ex-employee of the bank had provided the state broadcaster with evidence supporting assertions that the bank had systematically facilitated the evasion of tax by its customers. There was no dispute that the information at issue was prima facie confidential as it amounted to the personal banking information of others gained by the discloser in the course of employment. However, the courts initially refused an injunction sought by the bank prohibiting publication of the information and this decision was later confirmed by the Supreme Court. The decisions of both courts noted the classic dictum that “there can be no confidence in an iniquity”<sup>13</sup> before finding that the public interest favoured the exposure of tax evasion over respecting the confidential nature of the material.

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

Ireland.

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

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

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

Formal whistleblowing policies and enabling procedures are now the norm in large Irish companies but it is difficult to state with a reasonable degree of confidence any further generalities as to the true *de facto* strength of these *de jure* processes and thus as to the true nature of corporate culture because data

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

is so scarce. An expert on corporate governance interviewed<sup>14</sup> acknowledged the lack of public disclosure but stated the view that whistleblower policies are acting as an important tool for positively changing corporate culture over time. The majority of the largest companies do not release information about the level and nature of the use of the use of internal whistleblowing procedures. The available evidential signals are mixed as, for example, one of the ten largest companies reported on condition of anonymity while their policy was promoted heavily when introduced and periodically since, their hotline was used “very rarely if at all”. Another of the companies<sup>15</sup> publicly publishes its whistleblower protection policy together with a “comply or disclose” policy in its code of conduct mandating reporting of breaches and suspected breaches of the code.

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

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

current annual report of the ten largest companies features instances of whistleblowing as examples of positive staff behaviour.

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

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

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

While no survey data on Irish public attitudes to whistleblowing exists; an analysis of media

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

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

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

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

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

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

coverage of the subject suggests that support for whistleblowers is strong among the general population, or at least regarding the individual cases of whistleblowing documented in the media. The subject has received regular positive commentary in the media due to instances of whistleblowing exposing corruption in the planning process, wrongdoing in financial services, and in the healthcare system. In 2009 RTE Television broadcast 'Whistleblower', a dramatised account of the whistleblowing of student nurses who exposed the grotesque malpractices of a consultant obstetrician/gynaecologist in a small regional hospital. Much of the comment in the media has commended the bravery of whistleblowers.

## EXTENT OF WHISTLEBLOWING PROTECTION RULES AND THEIR APPLICATION IN PRACTICE

### Scope of personnel protected by Whistleblower legislation

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

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

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

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

- Employment Permits Act 2006

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

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

- s59 of the Charities Act 2009 obliges auditors, trustees, and investment advisers to charities or any person involved in producing a charity's annual report to report suspicions of any offences under the charity legislation. Sections 60 and 61 provide protections for persons who so disclose. S63 provides protection from reprisal to employees;
- s83 of the Pensions Act 1990<sup>20</sup> obliges 'relevant persons' to report suspicions of breaches of the Act to the Pensions Board and s84 provides protections for relevant persons so doing;
- designated bodies are required to report suspicious transactions of clients to the Revenue Commissioners (tax authority) and the Gardaí under the Criminal Justice Act 1994 Regulations 2003. These regulations transpose the Second Money Laundering Directive into Irish law;
- s192(6) of the Companies Act, 1990, as amended, requires that where a

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

disciplinary tribunal of a recognised body of accountants has reasonable grounds for finding that an indictable offence has been committed by a person while that person was a member of that body, the body shall inform the Director of Corporate Enforcement. Section 58 of the Company Law Enforcement Act 2001 contains a similar provision relating to misconduct by receivers and liquidators;

- s194(1)(b) requires that an auditor must notify of any failure of a company to keep proper books of account;
- s194(5) requires auditors to report to the ODCE any reasonable suspicions that an indictable offence under the Companies Acts has been committed;
- s195(6) provides an immunity for liability for an auditor from any matter arising from compliance with the above provisions;
- s59 of the Criminal Justice (Theft and Fraud) Offences Act 2001 requires auditors to report to the Gardaí information indicating that specified offences under that act have been committed. The section provides further that such good faith disclosure shall give rise to no liability;
- s1079 of the Taxes Consolidation Act 1997 obliges auditors to report certain taxation offences and subsection 11 provides that no liability shall accrue for doing so.

## Subject matter (definition of wrongdoing)

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

- Non-compliance by public office

holders, holders of designated directorships or positions, or special [political] advisers with their obligations to register certain economic interests of theirs or persons connected to them. This protection is *not* extended to the reporting of equivalent offences at local administration level as provided by the Local Government Act 2001;

- Child abuse and/or neglect by any person;
- Any Article 81 or Article 82 type offence carried out by an undertaking or group of undertakings;
- Offences relating to unsafe work practices;
- Relating to the provision of health and social services (this is a précis of very complex provisions):

(1) Threats to the health or welfare of a person receiving a health, mental health, or personal social service or in the operation of a residential centre or nursing home amounting to: a risk to the health or welfare of the public; the failure to comply with any legal obligation; the substantial misuse or *waste of public funds* by the state health or social services providers or thereby sub-contracted providers.

(2) A complaint to the regulatory authority a healthcare profession;

- Offences pertaining to the non-EU worker employment permit system;
- Offences pertaining to the system of communication regulation;

- Unfair, misleading, or aggressive consumer practices and pyramid schemes;
- Corruption or malpractice in the police force.

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

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

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

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

## Internal Disclosure Channels

The civil service code of standards and behaviour does not specify mechanisms for

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

raising complaints of wrongdoing internally other than to state that civil servants who are unsure as to the legality of a proposed action they are required to take in the course of their duties should raise the matter with their line management for direction. The State Claims Agency maintains an Employee Assistance Service helpline for the civil service but as this is intended only to allow civil servants report personal employment grievances, it is not a whistleblowing mechanism, its primary function appears to be to reduce the state's liability in negligence for claims against it by its employees.

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

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

A recent research paper<sup>22</sup> inquiring into attitudes to whistleblowing among employees in a unit of a large Irish financial services organisation found ambivalent attitudes to whistleblowing among those surveyed. The survey presented three

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



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

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

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

and disclosure by an officer of being prevented in acting by a superior officer<sup>24</sup>

## External disclosure channels

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

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

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

Others are not subject to good faith provisions:

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

Several of the largest companies have hotlines manned by external organisations but as the purpose of these lines is to

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



facilitate internal reporting they cannot be classed properly as external reporting. Additional disclosure channels – media, elected representatives, civil society organisations.

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

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

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

## Confidentiality

- There are no confidentiality provisions in the Protections for Persons Reporting Child Abuse Act;
- the Standards in Public Office Commission is precluded from investigating an anonymous complaint but it may refuse to disclose the identity of a complainant “where the interests of justice so require”;
- the Competition Authority will accept anonymous complaints and it will also respect the confidentiality of the discloser in the course of an investigation;
- there are no confidentiality provisions

relating to complaints to the Health & Safety Executive under the Safety, Health, and Welfare at Work Act 2005;

- the Health Act 2007 does not make explicit provision for confidential disclosure;
- the Employment Permits Act 2006 does not provide for confidential disclosure;
- the confidential disclosure provisions of the Communications Regulation (Amendment) Act are strong: the Commission *may not* disclose the identity of the complainant except as may be necessary for the investigation of the matters complained of without first obtaining the person's consent. The act states further that this is the case regardless of any other enactment or rule of common law to the contrary;
- the Consumer Protection Act does not provide for confidential disclosure to the Consumer Protection Agency;
- under the Garda Regulations, the identity of the discloser (termed a confidential reporter) remains confidential unless the confidential recipient and either the Garda Commissioner or the Minister for Justice believe that knowledge of the identity of the confidential reporter is essential for the proper examination of the confidential report or investigation of the alleged corruption or malpractice concerned;
- there are none in the Chemicals Act 2008.

## Timescale for reporting

There is no provision in any of the legislation regarding a time limit from the date of knowledge of the matter complained of for the ability of a disclosure of wrongdoing by the whistleblower to attract protection

however inordinate delay would likely be a significant factor in evaluating the good faith of the discloser should this be at issue.

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

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

## Protection against reprisal/retaliation

The Unfair Dismissals Act provides a general restriction on the dismissal of employees. A dismissal demonstrated to be a reprisal for whistleblowing would be deemed unfair. The general protection afforded by unfair dismissals law is, however, limited in significant ways: the definition of “worker” is narrow and so excludes contractors/consultants and those working

less than eight hours a week. The act does not apply at all to persons who have been employed for less than one year.

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

The respective legislative provisions protecting whistleblowers are:

- the Protections for Persons Reporting Child Abuse Act 1998: “shall not be liable in damages any other form of relief” and regarding employment “an employer shall not penalise an employee”;
- the Ethics Acts: “no cause of action shall lie against the person, and no disciplinary action shall be taken against him”;
- the Competition Act 2002: “shall not be liable in damages or from any other form of relief” and “an employer shall not penalise an employee”;
- the Safety, Health, and Welfare at Work Act 2005: the employee is protected against “any act or omission by an employer or a person acting on behalf of an employer that affects, to his or her detriment, an employee with respect to any term or condition of his or her employment”.
- The Health Act 2007: “a person is not liable in damages in consequence of a protected disclosure . . . [or] any other form of relief” and “an employer shall not penalise an employee”;
- the Employment Permits Act: “an employer shall not penalise an employee . . . any act or omission by an employer or a person acting on behalf of an employer that affects, to his or her detriment, an employee

with respect to any term or condition of his or her employment.

- Communications Regulation (Amendment) Act: “incurs no civil or criminal liability”; employment provisions are included *inter alia* “If an undertaking, an associate of an undertaking or an association of undertakings causes detriment to a person . . . disadvantage or adverse treatment in relation to a person’s employment . . . the person has a right of action in tort against the undertaking, associate or association;” and
- Chemicals Act: “no one shall have a cause of action against that person”.

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

The Standards in Public Office Commission is of the view that the protection afforded to employees by s5 of the Standards in Public

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

## Right to refuse

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

## Legal liability

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

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

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

The penalties provided for reporting false allegations are:

- the Protections for Persons Reporting Child Abuse Act 1998: £1,500 or 12 months summarily or £15,000 or to imprisonment for a term not exceeding 3 years on indictment;
- the Communications Regulation (Amendment) Act 2007: to a fine not

exceeding €5,000 summarily and to a fine not exceeding €50,000 on indictment;

- the Consumer Protection Act 2007: on a first summary conviction for any such offence, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both;
- the Competition Act 2002: summarily to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 6 months or both.

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

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

## Whistleblower participation

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

The Communications Regulation (Amendment) Act provides that the Commission shall, so far as practicable and in

accordance with the law, notify the person of the outcome of any investigation into the matters to which the disclosure relates.

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

## Independent review

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

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

## Offered remedies

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

Persons Reporting Child Abuse Act 1998.

An maximum award of 104 weeks pay is clearly inadequate to compensate in any case marked by serious and/or sustained harassment and the low limit may well operate to dissuade a person from whistleblowing when they compare the economic effect of loss of employment as against a time consuming process to claim, at very most, two years pay in compensation. The Prevention of Corruption (Amendment) Bill and the Employment Law Compliance Bill both propose caps on compensation at 104 weeks pay.

The Safety, Health, and Welfare at Work Act 2005 and the Employment Permits Act 2007 provide that the Rights Commissioner may require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances. This should be regarded as the model provision for any further legislation in the area.

There are no mechanisms to provide rewards to whistleblowers.

## KEY RESULTS AND RECOMMENDATIONS

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

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

The Minister further cited “complex legal advice” relating to the proposed bill's operation with the Central Bank's confidentiality regime, the Official Secrets Act, intellectual property law, and the mandatory reporting of suspicious transactions by designated bodies. While time precludes the addressing of these arguments directly, it is worth noting that the

UK is the jurisdiction in the world which most resembles our own. Its central bank is independent as is ours and is subject to similar obligations under international agreements. The UK legislation has a simple 'carve-out' for matters under the Official Secrets Act, its intellectual property law is virtually identical. In addition, the mandatory reporting of suspicious transaction requirements are derived from European law and so should be functionally identical in both jurisdictions. PIDA has operated for more than ten years without legal mishap.

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

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

Irish company law contains over four hundred offences, some two hundred of which are crimes which may be tried upon indictment. The Company Law Review Group (CLRG), the body established by the Company Law Enforcement Act 2001 and whose recommendations for changes in Irish company law are generally enacted in time, was asked in early 2007 by the Minister for Finance to consider the inclusion of a whistleblower provision in the forthcoming Companies Consolidation and Reform Bill.

The CLRG received strong submissions in support of such a provision from both the Irish Congress of Trade Unions and the Office of the Director of Corporate Enforcement (ODCE). Despite these favourable submissions, the CLRG recommended a year later against inclusion of whistleblower

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



provisions in the Companies Consolidation and Reform Bill and consequently none are likely to be included in it.

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

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

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

Finally, the CLRG rejects whistleblowing provisions on the primary basis of the “risk of negative connotations attaching internationally to the heretofore positively perceived Irish business sector” and “Ireland’s reputation as a lightly regulated economy could suffer”.

We submit that in 2009, Ireland's reputation for corporate governance and regulation would benefit from the insertion of

whistleblower protection provisions for the reporting of serious offences under company law.

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

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

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



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## Media Analysis

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