

Providing an Alternative to Silence:

**Towards Greater Protection and Support for
Whistleblowers in the EU**

COUNTRY REPORT: IRELAND

This report belongs to a series of 27 national reports that assess the adequacy of whistleblower protection laws of all member states of the European Union. *Whistleblowing in Europe: Legal Protection for Whistleblowers in the EU*, published by Transparency International in November 2013, compiles the findings from these national reports. It can be accessed at www.transparency.org.

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Providing an Alternative to Silence: Toward Greater Protection and Support for Whistleblowers in the EU.

Country Report – Ireland

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1. Summary

Whistleblowers are essential for uncovering wrongdoings in both the public and private sectors as they are most often the ones who are in the best position to do so. The association of “whistleblower” with “informant” has begun to evolve and shift in Ireland and there is now a growing appreciation of the effective role that whistleblowers can play.

The existing sectoral approach to whistleblowing was arguably a weak attempt to provide protection to whistleblowers. It does not offer protection to everyone and the protection that it does provide is fragmented and confusing.

The sectoral statutory mandatory disclosure provisions are particularly controversial as they are extremely burdensome on those obliged to make reports. It is essential that those in possession of information disclose it to the relevant authority but the lack of protection provisions for those with specialist knowledge coupled with the criminal sanction for failing to comply with their statutory obligations is open to criticism. Such persons have little to no protection against professional and personal damage when they comply with their obligations.

Whilst statutory voluntary whistleblowing should be promoted for the public good, without the necessary protections the provisions are redundant. In order for the concept to have worked successfully there needed to be protection provisions in place for all potential whistleblowers in all sectors. This omission has resulted in superfluous voluntary disclosure provisions.

The publication of generic whistleblowing legislation, the Draft Heads of the Protected Disclosures in the Public Interest Bill 2012, by the Minister for Public Expenditure and Reform, Brendan Howlin, has been welcomed by most interested parties. There has been a slight reluctance on the part of certain employers and employers’ organisations to openly welcome the Draft Heads as they fear that the new legislation will leave their organisations open to reputational damage and malicious claims. However, if the legislation is implemented to the highest possible standards, it should be accepted by both employers and workers as a step in the right direction for all.

Under the Draft Heads, whistleblowers who fall within the definition of “worker” and make a disclosure in good faith of a wrongdoing that is in the public interest, will be able to avail of equal comprehensive statutory protections. This legislation has the benefit of encouraging good faith whistleblowing and also protecting issues that are in the public interest. Nonetheless, despite the tremendous work that has been done in producing the Bill there are many provisions that need to be amended, omitted or included in order to ensure that all potential whistleblowers are offered appropriate protection. Without this, the law could leave whistleblowers in the same precarious position that they are currently in under the sectoral approach.

2. Compilation, description and assessment of whistleblower laws

2.1 The current sectoral approach

(i) Introduction

The position in Ireland today as regards whistleblowing and whistleblower protection involves a sectoral approach. A sectoral approach to whistleblower protection requires the passing of legislation to protect potential whistleblowers in selected state, private or professional sectors. The approach does not offer protection to everyone.¹

Prior to the formal adoption of the sectoral approach to whistleblower protection in March 2006, there were a number of whistleblower protection provisions in place. These provisions related to: the protection of persons reporting suspicions of child abuse or neglect to authorised persons;² persons reporting alleged breaches of the Ethics in Public Office Acts;³ persons reporting competition law to the relevant authority (and also protections specific to employees for doing so);⁴ protection for employees against penalisation for exercising any right under the Safety, Health and Welfare at Work Act 2005;⁵ and to Gardaí and Garda civilian employees reporting corruption or malpractice in the police force.⁶ Since the formal adoption of the sectoral approach, whistleblowing protection provisions have been expanded and adopted over a range of different legislation and these provisions take the form of either statutory mandatory disclosures or statutory voluntary disclosures.

(ii) Statutory mandatory disclosures

A. Introduction

A duty to report is a burdensome requirement. However, its inclusion in Irish legislation is based on a balancing exercise between the rights of the individual and the prosecution of crimes and the protection of public policy, national security, and public good.⁷ It appears that the reasoning behind the inclusion of provisions of this nature in legislation is two pronged: (i) to help the relevant bodies to overcome difficulties that they would encounter with respect to crimes of a specialised nature; and (ii) where an issue is of great public importance.⁸

A duty to disclose information in relation to possible offences existed in Irish Law until 1997 when, under section 2 of the Criminal Justice Act 1997, the distinction between felonies and misdemeanours was abolished. This resulted in the abolition of the offence of misprision of a felony, thus, abolishing a general duty to inform of a criminal offence in Irish law.⁹ However, the State has now included a duty to inform in various pieces of legislation in Ireland. This duty is sometimes coupled with protection for such people where they have reported in good faith. The duty therein applies to two categories of

¹ Transparency International (Ireland), *An Alternative to Silence: Whistleblower Protection in Ireland* at 4 http://transparency.ie/sites/default/files/2010_Alternative_to_Silence_Ireland_v1.pdf (visited 6 October 2011).

² Protections for Persons Reporting Child Abuse Act 1998, section 4.

³ Under the Ethics in Public Office Act 2001, the Standards in Public Office Commission are empowered to investigate complaints about alleged contraventions of the Ethics in Public Office Acts. Section 5 of the Ethics in Public Office Acts 1995 to 2001 governs complaints by civil servants against other civil servants.

⁴ Competition Act 2002, section 50.

⁵ Safety, Health and Welfare at Work Act 2005, section 27.

⁶ Garda Síochána Act 2005, section 124.

⁷ Oireachtas Library and Research Service, *Disclosure of information: duty to inform and whistleblowing* (16 December 2011) at 3 [http://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/2011_Spotlight_duty_to_inform_173444\[1\].pdf](http://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/2011_Spotlight_duty_to_inform_173444[1].pdf) (visited 20 January 2012).

⁸ *Ibid.*

⁹ Ivana Bacik, *Law on reporting serious offences abolished* www.independent.ie/opinion/analysis/change-in-the-law-means-there-is-now-noncriminal-offences-for-failure-to-repeat-crime-290234.html (visited 10 December 2011).

people. The first category to which the obligation applies is to those who have specialist knowledge¹⁰ and the second applies to those who have knowledge of all serious crimes,¹¹ except for sexual crimes.

B. Specialist knowledge

In relation to those who have specialist knowledge, there are a number of legislative provisions that apply to certain professionals.

(1) Designated persons-money laundering

Under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 certain designated persons are required to make suspicious transaction reports (STRs) to the Garda Financial Intelligence Unit (FIU) and Revenue Commissioners. The STRs must be made on reasonable grounds as a result of information acquired during the course of business in relation to known or suspected money laundering or terrorist financing offences. This duty also covers attempted offences.¹² The definition of “designated persons” is quite broad in order to cover all possible persons and bodies who could acquire the necessary information.¹³ If a designated person fails to comply with their reporting obligations they are liable on summary conviction or on conviction on indictment, to a fine and/or imprisonment. The penalties are quite severe and without an accompanying protection provision under the Act to protect designated persons from personal and professional damage, the inclusion of a criminal sanction is arguably disproportionate.

(2) Pensions

Mandatory reporting obligations exist under the Pensions Acts.¹⁴ Auditors, actuaries, trustees, insurance intermediaries and investment business firms¹⁵ are required to report to the Pensions Board (the Board) where they have reasonable cause to believe that a material misappropriation or a fraudulent conversion of the resources of a pension scheme has occurred, is occurring or is to be attempted.¹⁶ Protection is provided for persons who make reports in good faith to the Board concerning the state and conduct of a scheme.¹⁷ This protection ensures that those who make a report in good faith will not be considered as breaching their obligations under the Act. However, a person will be guilty of an offence if they fail to make a report under or knowingly or willingly make a report which is incorrect.¹⁸ A finding of guilt can result in a summary conviction or a conviction on indictment to a fine of and/or a term of imprisonment.¹⁹ Although a person required under this legislation to make a report would be in the best position to uncover and disclose any wrongdoings, the penalty for the potential whistleblower who fails to act is completely unmerited without the proper whistleblower protections included in the legislation.

¹⁰ Company Law Enforcement Act 2001, Companies Act 1963, Companies Act 1990, Company Law Enforcement Regulations 2002; Companies (Auditing and Accounting) Act 2003.

¹¹ Offences against the State (Amendment) Act 1998, Criminal Justice Act 1994, Criminal Justice Act 2011, Residential Institutions Act 2002.

¹² Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, section 42(1).

¹³ (a). A credit institution, except as provided by subsection (4), (b). A financial institution, except as provided by subsection (4), (c). An auditor, external accountant or tax adviser, (d). A relevant independent legal professional, (e). A trust or company service provider, (f). A property service provider, (g). A casino, (h). A person who effectively directs a private members' club at which gambling activities are carried on, but only in respect of those gambling activities, (i). Any person trading in goods, but only in respect of transactions involving payments, to the person in cash, of a total of at least €15,000 (whether in one transaction or in a series of transactions that are or appear to be linked to each other).

¹⁴ Pensions Act 1990, Pensions (Amendment) Act 1996, and the Pensions (Amendment) Act 2002.

¹⁵ Pensions Act 1990, section 82(a) –(e), as inserted by section 38 Pensions (Amendment) Act 1996.

¹⁶ Pensions Act 1990, section 83(1), as inserted by Pensions (Amendment) Act 1996, section 38.

¹⁷ Pensions Act 1990, section 84, as inserted by Pensions (Amendment) Act 1996, section 38.

¹⁸ Pensions Act 1990, section 83(3) as inserted by Pensions (Amendment) Act 1996, section 38.

¹⁹ Pensions Act 1990, section 83(4), as inserted by Pensions (Amendment) Act 1996, section 38.

(3) Auditors in general

Auditors' duties are expanded under the Criminal Justice (Theft and Fraud Offences) Act 2001, where they are required to make a disclosure to the Garda Síochána against a firm whose accounts, information, or documents indicate an offence under that Act committed by the firm itself or specific officers of the firm.²⁰ This duty overrides any professional obligations of privilege or confidentiality that the person may have.²¹ An auditor who fails to comply with this duty is liable on summary conviction to a fine and/or a term of imprisonment.²²

Further duties apply to auditors under the Companies Act 1990.²³ These duties involve the auditor, having formed the opinion that the company has contravened their duty to keep proper books of accounts,²⁴ to serve a notice on the company itself stating their opinion of this contravention and also notifying the register of companies also.²⁵ They must also comply with any requests from the Office of the Director of Corporate Enforcement (the Director) in relation to the furnishing of information or giving access to documents.²⁶ An auditor will be guilty of an offence for failing to comply with their obligations under the Act.²⁷ An auditor is also obliged to inform the Director of any indictable offence committed under the Companies Acts.²⁸

Auditors' reporting duties also arise under the Tax Consolidation Act 1997. The Act provides that an auditor or a tax advisor of a company or friendly society is obliged to report any offence committed by a client who is not complying with the Acts or has committed tax evasion. An auditor will be guilty of an offence if the auditor fails to comply with his obligations under the Act if he knowingly or willingly makes a communication under which is incorrect.²⁹ An auditor will be guilty of an offence if he fails to comply with his obligations.³⁰

Thus, auditor's have a wide range of reporting duties under various pieces of legislation. However, there are no protection provisions accompanying these reporting duties. This omission leaves such auditors open to the risk of serious repercussions.

(4) Liquidators and receivers

Liquidators and receivers also have mandatory reporting obligations under the Companies Acts 1963-2009. Under the Companies Act 1963,³¹ liquidators, on foot of both a court ordered and voluntary winding-up of the company, must report any offence committed by any past or present officer or member of the company to both the Director of Public Prosecutions (DPP) and the Director.³² If the DPP or the Director decides to institute proceedings on foot of the information furnished by the liquidator, the liquidator must give assistance in connection with the prosecution.³³ The liquidator could be required to give evidence if the matter proceeds to trial thus opening them up to the public domain as a whistleblower. If the liquidator fails or neglects to give such assistance they will be liable for the costs

²⁰ Criminal Justice (Theft and Fraud Offences) Act 2001, section 59(2).

²¹ Criminal Justice (Theft and Fraud Offences) Act 2001, section 59(2).

²² Criminal Justice (Theft and Fraud Offences) Act 2001, section 59(4).

²³ Companies Act 1990 as amended by the Company Law Enforcement Act 2001.

²⁴ Companies Act 1990, section 202.

²⁵ Companies Act 1990, section 194(1) as amended by Company Law Enforcement Act 2001, section 74.

²⁶ Companies Act 1990, section 194(3A) as inserted by Company Law Enforcement Act 2001, section 74.

²⁷ Companies Act 1990, section 194(4) as amended by Company Law Enforcement Act 2001, section 74.

²⁸ Companies Act 1990, section 194(5) as inserted by Company Law Enforcement Act 2001, section 74.

²⁹ Taxes Consolidation Act 1997, section 1079(6).

³⁰ Taxes Consolidation Act 1997, section 1079(6).

³¹ Companies Act 1963, section 299, as amended by Company Law Enforcement Act 2001, section 51.

³² Companies Act 1963, section 299(1), 299(1A), 299(2), 299(2A), and 299(3) as amended by Company Law Enforcement Act 2001, section 51.

³³ Companies Act 1963, section 299(4), as amended by Company Law Enforcement Act 200, section 51.

of an application made by the DPP or Director seeking for the liquidator to be ordered to provide this assistance.³⁴ To a certain extent, this provision is less burdensome than the ones addressed above as the liquidator does not face a criminal sanction for any failure to comply with the duty to disclose information. However, a liquidator of an insolvent company would be guilty of an offence if they fail to provide a report³⁵ to the Director within six months and at intervals as requested by the Director.³⁶

The provisions under the Companies Acts that apply to liquidators apply also to receivers, with the necessary modifications.³⁷

(5) Accountants in general

A statutory duty to report also falls on accountants in some circumstances. Accountants have a “fairly draconian mandatory statutory framework”.³⁸ A recognised accountancy body must report to the Director whenever its disciplinary committee or tribunal has reasonable grounds for believing that an indictable offence has been committed by one of its members.³⁹ This also applies where the body has reasonable grounds for believing that a member has committed an indictable offence during the course of liquidation or receivership.⁴⁰ Failure to make such a report is itself an offence committed by each officer of the body.⁴¹ This provision is quite stringent as it guarantees that all those who could possibly be whistleblowers will be considered as such if there is a failure to carry out the statutory obligations.

C. Knowledge of serious crimes

There are a number of pieces of legislation that include provisions requiring persons who have knowledge of serious crimes to come forward and disclose any information they have in their possession.⁴² The inclusion of such provisions in legislation is premised on the fact that those investigating and prosecuting serious crimes would be greatly assisted by those who have information in relation to those crimes. The provisions place a duty on all citizens, rather than a particular specialised group, to report knowledge or suspicions of serious crimes and criminalises the withholding of information.

(1) White-collar crime

A recent addition to this group of legislation is the Criminal Justice Act 2011, more colloquially known as the “White-collar Crime Act”. The 2011 Act was enacted on the 8th August 2011 in order to address the difficulties associated with the investigations of white-collar crime. The Act applies to “relevant offences” *ie* offences that attract penalties of at least 5 years imprisonment that come within prescribed groupings relating to white-collar crime.⁴³

A controversial provision in the Act is section 19, withholding of information. This section places a positive obligation on a person at any level of a corporation to provide information that would be of material assistance in:

³⁴ Companies Act 1963, section 299(5) as amended by Company Law Enforcement Act 2001, section 51.

³⁵ The prescribed form is provided for in the Company Law Enforcement (section 56) Regulations 2002 (SI 324/2002).

³⁶ Company Law Enforcement Act 2001, section 56.

³⁷ Companies Act 1990, section 179.

³⁸ Henry Murdoch, *Murdoch's Dictionary of Irish Law* (4th ed, Lexis Nexis, 2004), at 10.

³⁹ Companies Act 1990, section 192(6) as inserted by of the Company Law Enforcement Act 2001, section 73.

⁴⁰ Company Law Enforcement Act 2001, section 58.

⁴¹ Company Law Enforcement Act 2001, section 58 and Companies Act 1990, section 192(7) as inserted by Company Law Enforcement Act 2001, section 73.

⁴² Offences against the State (Amendment) Act 1998, Criminal Justice Act 1994, Criminal Justice Act 2011, Residential Institutions Act 2002.

⁴³ Criminal Justice Act 2011, section 3(2)(a)-(h) sets out these offences as offences (i) relating to banking, investment of funds and other financial activities; and (ii) company law offences; money-laundering and terrorist offences; theft and fraud offences; bribery and corruption offences; consumer protection offences; and cybercrime offences.

(a) Preventing the commission by any other person of a relevant offence;⁴⁴ or

(b) Securing the apprehension, prosecution or conviction of any other person for a relevant offence.⁴⁵

It is an offence to fail to disclose as soon as practicable the information without reasonable excuse and is punishable on summary conviction to 12 months imprisonment and/or a Class A fine or 5 years imprisonment and/or unlimited fine on conviction.⁴⁶

The section is very broadly drafted and it is unclear exactly how it will apply in practice. The Act targets innocent persons who witness the commission of an offence, including past offences, or have information about the future commission of an offence and criminalises their inactivity.

In addition, it is unclear how the offence will tie in with other reporting obligations as already discussed. The Act does not explicitly state that it repeals those provisions so it would be open to a court to choose which one to apply.

The Act provides protection for the whistleblower by preventing them from being penalised by their employer when they report suspected white-collar crime activity.⁴⁷ The inclusion of these provisions is recognition that whistleblower protection is often seen as the key to the detection of white-collar crime. Penalisation is defined under section 20(6) as:

Any act or omission by an employer, or by a person acting on behalf of an employer, that affects an employee to his or her detriment with respect to any term or condition of his or her employment, and, without prejudice to the generality of the foregoing, includes (a) suspension, lay-off or dismissal, (b) the threat of suspension, lay-off or dismissal, (c) demotion or loss of opportunity for promotion, (d) transfer of duties, change of location of place of work, reduction in wages or change in working hours, (e) the imposition or the administering of any discipline, reprimand or other penalty (including a financial penalty), (f) unfair treatment, (g) coercion, intimidation or harassment, (h) discrimination, disadvantage or adverse treatment, (i) injury, damage or loss, and (j) threats of reprisal.⁴⁸

Penalisation can be difficult to prove, however, as an employer might dismiss somebody under another pretext.⁴⁹ This is made all the more difficult as section 20(3) provides that “penalisation” does not include anything that is required for normal business operations or required for economic, technical or organisational reasons.⁵⁰ A decision by an employer would have to be well documented in order to prove the reason for the discharge was one under sections 20(3)(a) and (b).

The Act appears to be limited in scope by failing to give protection to a person who is not an employee but is an independent contractor engaged by the company to carry out particular work. Nonetheless, the independent contractor will still be obliged under the Act to report wrongdoing. This may lead to a situation where there will be no protection against the contractor’s contract not being renewed due to whistleblowing.⁵¹

⁴⁴ Criminal Justice Act 2011, section 19(1)(a).

⁴⁵ Criminal Justice Act 2011, section 19(1)(b).

⁴⁶ Criminal Justice Act 2011, section 19(2)(a) and (b).

⁴⁷ Criminal Justice Act 2011, section 20 provides that: An employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee, (a) for making a disclosure or for giving evidence in relation to such disclosure in any proceedings relating to a relevant offence, or (b) for giving notice of his or her intention to do so.

⁴⁸ Criminal Justice Act 2011, section 20(6).

⁴⁹ Shelley Horan, “White Heat”, (October 2011), Law Society Gazette, at 27.

⁵⁰ Criminal Justice Act 2011, section 20(3) provides that, “nothing in paragraphs (a), (c), (d), (e) and (f) of the definition of “penalisation” shall be construed in a manner which prevents an employer from— (a) ensuring that the business concerned is carried on in an efficient manner, or (b) taking any action required for economic, technical or organisational reasons.”

⁵¹ Horan, note 50, at 28.

The Act is also deficient in that it does not provide for immunity from prosecution, unlike the protection that exists for competition law offences by virtue of a joint understanding between the Competition Authority and the DPP under the Cartel Immunity Programme. Further, the Act does not guarantee confidentiality which would leave the whistleblower wide open to retaliation for the disclosure made.

Under section 21(1), it is an offence for the whistleblower to disclose, recklessly or otherwise, information that is false.⁵² This provision is incredibly burdensome as the whistleblower could face a fine and/or imprisonment⁵³ in situations where they are attempting to comply with their obligations under the Act but in doing so they may be reckless as to the reliability of information disclosed.

The inclusion of a provision in the Act providing that an employer who penalises an employee will be subject to a criminal sanction is a welcomed inclusion in the Act. A person found guilty of such an offence will be liable on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or on conviction on indictment, to a fine or imprisonment for a term not exceeding 2 years or both.

(2) Offences against children and vulnerable persons

Mandatory reporting duties are seen as an important mechanism for the early detection of the abuse of children and of vulnerable persons. It is considered to be one element of the child protection system, providing both advantages and disadvantages to the effectiveness of the system as a whole. It may lead to the early detection of child welfare concerns but at the same time may result in an overloading of the system. If the system is overloaded it has been suggested that only the most serious suspicions will be investigated by the relevant authorities thus reducing protections for those at risk.⁵⁴ Nonetheless, mandatory reporting provisions have been included in a number of Acts in an attempt to provide greater detection of acts of abuse of children and vulnerable persons and also to ensure the protection of these persons from such acts.

(i) Residential Institutions Redress Act 2002

Under the Residential Institutions Redress Act 2002 (RIRA 2002), a person must disclose information that is provided to the Residential Institutions Redress Board or the Residential Institutions Redress Review Committee and obtained by that person in the course of the performance of the function of the person under the RIRA 2002 to (a) a member of the Garda Síochána if the person is acting in good faith and reasonably believes that such disclosure is necessary in order to prevent an act or omission constituting a serious offence, and (b) to an appropriate person (within the meaning of the Protections for Persons Reporting Child Abuse Act, 1998) if the person is acting in good faith and reasonably believes that such disclosure is necessary to prevent, reduce or remove a substantial risk to the life or to prevent the continuance of abuse of a child.⁵⁵

(ii) Protections for Persons Reporting Child Abuse Act 1998

⁵² Criminal Justice Act 2011, section 21(1) provides that, “an employee who makes a disclosure knowing it to be false or being reckless as to whether it is false shall be guilty of an offence.”

⁵³ Criminal Justice Act 2011, section 21(5) provides that, “a person guilty of an offence under subsection (1) or (2) shall be liable (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or (b) on conviction on indictment, to a fine or imprisonment for a term not exceeding 2 years or both.”

⁵⁴ Shannon, Geoffrey, *Third Report of the Special Rapporteur on Child Protection, A Report Submitted to the Oireachtas 2009* at 2.

⁵⁵ Residential Institutions Redress Act 2002, section 28(5).

Under the Protections for Persons Reporting Child Abuse Act 1998, a person who would normally be liable, will not be liable in damages⁵⁶ in respect of a communication, whether in writing or otherwise, by him to an appropriate person⁵⁷ of his opinion that (a) a child has been or is being assaulted, ill-treated, neglected or sexually abused, or (b) a child's health, development or welfare has been or is being avoidably impaired or neglected. Such a person will only be liable if it can be proved that he has not acted reasonably and in good faith in forming that opinion and communicating it to the appropriate person.⁵⁸

An employer must not penalise an employee for having formed an opinion that (a) a child has been or is being assaulted, ill-treated, neglected or sexually abused, or (b) a child's health, development or welfare has been or is being avoidably impaired or neglected and communicated it, whether in writing or otherwise, to an appropriate person if the employee has acted reasonably and in good faith in forming that opinion and communicating it to the appropriate person.⁵⁹ It will be presumed, until the contrary is proved, that the employee concerned acted reasonably and in good faith in forming the opinion and making the communication concerned.⁶⁰

However, a person who states to an appropriate person that (a) a child has been or is being assaulted, ill-treated, neglected or sexually abused, or (b) a child's health, development or welfare has been or is being avoidably impaired or neglected, knowing that statement to be false will be guilty of an offence.⁶¹

(iii) Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012

The Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 provides that a person will be guilty of an offence if he knows or believes that an offence, that is a scheduled offence, has been committed by another person against a child,⁶² or a vulnerable person and (b) he has information which he knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of that other person for that offence, and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána.⁶³

(3) Offences against the State

The Omagh bombing in August 1998 forced the Government to speedily enact the Offences Against the State (Amendment) Act 1998 (OAS(A)A 1998). The OAS(A)A 1998 was originally introduced in response to sedition; however, it may now be used against organised crime, given that firearms offences

⁵⁶ Protections for Persons Reporting Child Abuse Act 1998, section 3(2) provides that the reference in section 3(1) to liability in damages will be construed as including a reference to liability to be the subject of an order providing for any other form of relief.

⁵⁷ Protections for Persons Reporting Child Abuse Act 1998, section 1 defines “appropriate person” as meaning a designated officer or a member of the Garda Síochána. It further defines “designated person” as meaning an officer of a health board appointed under section 2 of this Act to be a designated officer for the purposes of this Act.

⁵⁸ Protections for Persons Reporting Child Abuse Act 1998, section 3(1).

⁵⁹ Protections for Persons Reporting Child Abuse Act 1998, section 4(1).

⁶⁰ Protections for Persons Reporting Child Abuse Act 1998, section 4(2).

⁶¹ Protections for Persons Reporting Child Abuse Act 1998, section 5(1).

⁶² Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012, section 1 provides that a “child” means a person who has not attained 18 years of age.

⁶³ Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012, section 2(1) and section 3(1).

fall within the remit of the Offences Against the State Act 1939.⁶⁴ The OAS(A)A 1998 created the new offence of withholding information about a serious crime.

Under section 9 of the OAS(A)A 1998, it is now an offence for a person to withhold information, without reasonable excuse, that the person knows or believes might be of material assistance in (a) preventing the commission by any other person of a serious offence, or (b) securing the apprehension, prosecution or conviction of any person for a serious offence.⁶⁵ The information must be disclosed as soon as it is practicable to a member of the Garda Síochána. A person found guilty of an offence under section 9 of the OAS(A)A 1998 will be liable on conviction on indictment to a fine or imprisonment for a term not exceeding five years or both.⁶⁶

(iii) Statutory voluntary disclosures

A. Introduction

Voluntary whistleblowing refers to cases where there is no legal requirement to divulge information. It may, however, be done out of a sense of civic duty (as in the case of reporting child abuse) or for protection (as in reporting victimisation in the workplace). Increasingly, when reporting is voluntary, the whistleblower is given protection by the law.⁶⁷ While whistleblowing should be encouraged for the public good, however, it is acknowledged that a person is unlikely to come forward voluntarily with such information without some system for protection in being.⁶⁸

Statutory voluntary disclosure provisions are provided for across a range of fields including, competition law,⁶⁹ employment law,⁷⁰ bribery and corruption,⁷¹ health and safety law,⁷² child protection law,⁷³ and consumer law,⁷⁴ to name but a few.⁷⁵

B. The Cartel Immunity Programme

The Cartel Immunity Programme 2001 (CIP) is a form of voluntary whistleblowing. It has been developed on the rationale that in general whistleblowers may be reluctant to come forward and report certain offences without some form of protection in place to protect them also. This is an unusual form of whistleblowing in this jurisdiction as it provides not just protection but in essence a reward for blowing the whistle.⁷⁶

⁶⁴ Part V of the Offences Against the State Act 1939 permits offences to be scheduled under the Act and so to fall within its remit. Firearms and explosives offences were scheduled by the Offences Against the State (Scheduled Offences) (No. 3) Order 1940 (SI 1940 No. 334).

⁶⁵ Offences against the State (Amendment) Act 1998, section 9(1). According to the Minister for Justice, Equality and Law Reform, Alan Shatter T.D., section 9 of the 1998 Act was used on 83 occasions between the 1 June 2011 and the 31 May 2012. <http://debates.oireachtas.ie/dail/2012/06/13/00007.asp>

⁶⁶ Offences against the State (Amendment) Act 1998, section 9(2).

⁶⁷ Murdoch, note 38, at 8.

⁶⁸ Oireachtas Library and Research Service, note 7, at 9.

⁶⁹ Competition Acts 1991-2002.

⁷⁰ Employment Permits Act 2006, Labour Services (Amendment) Act 2009, Employment Agency Regulations Bill 2009.

⁷¹ Prevention of Corruption (Amendment) Act 2001, as amended by the Prevention of Corruption (Amendment) Act 2010.

⁷² Safety, Health and Welfare at Work Act 2005, Health Act 2007.

⁷³ Protections for Persons Reporting Child Abuse Act 1998.

⁷⁴ Consumer Protection Act 2007.

⁷⁵ There are also statutory voluntary disclosure provisions included in the Charities Act 2009, Chemicals Act 2008, Communications Regulation (Amendment) Act 2007, Standards in Public Office Act 2001, Property Services (Regulation) Act 2011, Garda Síochána Regulations 2007, National Asset Management Agency Act 2009.

⁷⁶ In the UK, the Enterprise Act 2002 provides for immunity and leniency to be exercised by the Office of Fair Trading when investigating cartel and competition offences. Also, under the UK Serious Organised Crime and Police Act 2005, the DPP, Serious Fraud Squad, and other prosecuting agencies can grant immunity or agree to a reduction in sentence. In the US, the

The CIP was instigated by the Competition Authority (the Authority)⁷⁷ and came into effect on the 20 December 2001. The Authority has identified the pursuit of Cartels as a top priority.⁷⁸ Cartels are by their very nature conspiratorial. The participants in the cartel are very secretive and hardcore cartels are extremely difficult to detect and prosecute successfully.⁷⁹ It has been recognised that cartel behavior is harmful to consumers as it results in their having to pay more than they should for goods and services.⁸⁰ Therefore, the purpose of the CIP was to improve the investigation and prosecution of price-fixing offences as prohibited under the section 4(1) of the Competition Act 2002.⁸¹

By affording whistleblowers protection, the Authority enhances the possibility of receiving notifications from persons who are involved in a cartel.⁸² As a result, the CIP allows for a person who is involved in a cartel to blow the whistle on an activity that they are involved in that violates the Act and request immunity from the Authority so that the Authority can secure the detection and prosecution of other offenders who might otherwise escape detection.⁸³

A notable case where the CIP resulted in a successful investigation and prosecution of a hard-core cartel on foot of a disclosure made by a whistleblower to the Authority is the *Galway Heating Oil Cartel case*. In this case, a corporate member of the cartel blew the whistle in 2001 alleging that heating oil companies across the west of Ireland were engaging in price-fixing. It was alleged that most of the distributors of heating oil in Galway city and county area had agreed to increase the margin on the price of kerosene and gas oil. Immunity was granted by the DPP to the corporate undertaking and two of its directors, one of whom attended the price-fixing meetings and would have given evidence except that he died prior to the hearings. There have been twenty-four prosecutions since 2001 and eighteen convictions. A *nolle prosequi* was entered in six cases.⁸⁴ The latest and last prosecution was in May 2012 where the former manager of a home heating oil company, Mr. Pat Heagarty was fined €30,000 and given a suspended two-year sentence for being one of the main players.⁸⁵

C. Prevention of corruption

There was a perception in Ireland from independence until the mid-1990s that there was relatively little corruption in Ireland.⁸⁶ The few noted incidences of corruption were considered to be isolated until a number of state sponsored investigations into political impropriety were carried out during the 1990s

Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 goes even further by requiring the Securities and Exchange Commission to pay rewards for information that leads to enforcement sanctions of at least \$1 million.

⁷⁷ The Competition Authority is the statutory body established under section 10(1) of the Competition Act 1991 in order to enforce and administer domestic and European competition law in the State.

⁷⁸ The Authority's Notice on the Cartel Immunity Programme, Preface.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Section 4(1) provides that: Subject to the provisions of this section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage; e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

⁸² Shelley Horan, *Corporate Crime* (1st ed., Bloomsbury Professional, 2011) at 777.

⁸³ The Authority, note 80, at para 4.

⁸⁴ The Competition Authority, *Heating Oil* <http://www.tca.ie/EN/Enforcing-Competition-Law/Criminal-Court-Cases/Home-Heating-Oil.aspx> (visited 5 May 2012).

⁸⁵ *Manager of Heating Oil Company sentenced for price-fixing* <http://www.irishtimes.com/newspaper/ireland/2012/0504/1224315591378.html> (visited 5 May 2012).

⁸⁶ Transparency International, *National Integrity Study 2009* http://transparency.ie/sites/default/files/NIS_Full_Report_Ireland_2009.pdf (visited 10 May 2012).

and 2000s.⁸⁷ These investigations uncovered acts of corruption in certain sectors such as in politics, the beef industry, town planning, the Gardaí and facilitation by the banks of tax evasion.

Until recently there was no incentive for whistleblowers to come forward with information to assist in uncovering the widespread corruption and bribery on these shores. The Prevention of Corruption (Amendment) Act 2010, however, introduced whistleblower protection for the first time in respect of corruption and bribery offences. Whistleblower protection is now provided for employees who report offences to appropriate persons under the Prevention of Corruption Acts 1889-2010 (POCAs 1889-2010).

A whistleblower must make their disclosure to an appropriate person in order to attract the protections under the Act. A person will not be able to avail of the protections under the Act if they communicate an opinion that is knowingly or recklessly false, misleading, frivolous or vexatious,⁸⁸ or furnishes information in relation to that opinion that they know is false or misleading.⁸⁹ This provision will protect a person/body against false, malicious or vexatious claims that could be damaging to their professional or personal reputation.

A whistleblower may also make a confidential disclosure to a confidential recipient.⁹⁰ A confidential disclosure cannot be dealt with anonymously,⁹¹ but provisions have been included in the legislation in order to provide some protection for the whistleblower of his identity.⁹² Unfortunately, these provisions provide only a basic level of protection for the identity of the whistleblower as the “all practicable steps” requirement appears to be quite subjective. There needs to a strengthening of such confidentiality provisions to ensure that the identity of the whistleblower will indeed be protected.

Under the Act, there are two types of protection for a whistleblower who reports an offence under the POCAs 1889-2010. First of all, a whistleblower who would normally be liable in damages would not be so liable.⁹³ Secondly, a whistleblower is protected from penalisation or threat of penalisation by their employer or any other person caused or permitted by their employer to do so.⁹⁴ An employer who contravenes this provision shall be guilty of an offence and shall be liable on summary conviction to a maximum fine of €5000 and/or maximum 12 months imprisonment, or to a maximum fine of €250,000 and/or maximum imprisonment of 3 years.⁹⁵ These provisions are encouraging for a whistleblower to come forward as an employer would not only be liable for penalising the whistleblower but would also be vicariously liable for any penalisation caused or permitted by another person. The sanctions for such penalisation are quite high and as such this will provide greater protections for the whistleblower.

Further, a whistleblower can make a complaint to the Rights Commissioner in relation to an allegation of a contravention by an employer of section 8A(5).⁹⁶ A decision of a Rights Commissioner shall do one or more of the following:

(a) Declare that the complaint was or, as the case may be, was not well founded;

⁸⁷ Elaine Byrne, *political Corruption in Ireland 1922-2010, A Crooked Harp?* (1st ed. Manchester University Press, 2012) at 143.

⁸⁸ Prevention of Corruption (Amendment) Act 2001, section 8A((1)a)(i) and (ii) as inserted by POC(A)A 2010, section 4.

⁸⁹ Prevention of Corruption (Amendment) Act 2001, section 8A(1)(b) as inserted by POC(A)A 2010, section 4.

⁹⁰ Prevention of Corruption (Amendment) Act 2001, section 8A(16)(d) as inserted by POC(A)A 2010, section 4.

⁹¹ Prevention of Corruption (Amendment) Act 2010, Schedule 2, para 3(3).

⁹² Prevention of Corruption (Amendment) Act 2010, Schedule 2.

⁹³ Prevention of Corruption (Amendment) Act 2001, section 8A(2) as amended by POC(A)A 2010, section 4 provides that the reference to liability in damages would be construed as including a reference to liability to any other form of relief.

⁹⁴ Prevention of Corruption (Amendment) Act 2001, section 8A(5).

⁹⁵ Prevention of Corruption (Amendment) Act 2001, section 8A(9) provides that an offence under section 8A(8) can be dealt with under section 13 Criminal Procedure Act 1967. Therefore, the indictable offence may be dealt with summarily.

⁹⁶ Prevention of Corruption (Amendment) Act 2010, Schedule 1, para 1(1). There is a right of appeal to the Labour Court under Schedule 1, para 2(1).

(b) Require the employer to take a specified course of action, which may include, in a case where the penalisation constitutes a dismissal within the meaning of section 8A(13), re-instatement or re-engagement; or

(c) 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, but not exceeding 104 weeks' remuneration in respect of the employee's employment calculated in accordance with regulations under section 17 of the Unfair Dismissals Act 1977.⁹⁷

The inclusion of these provisions are to be welcomed but the limitation on the amount of compensation is controversial as a whistleblower may not be able to find future work on foot of blowing the whistle on a former employer.

2.2 The proposed generic approach: The Draft Heads of the Protected Disclosures in the Public Interest Bill 2012

(i) Introduction

The present Government, which was formed in 2011, included in its Programme for Government a commitment to introduce whistleblower legislation stating, "we will put in place a Whistleblowers Act to protect public servants that expose maladministration by Ministers or others, and restore Freedom of Information."⁹⁸

The Government initially intended for there to be a referendum on the issue of whistleblower protection in October 2011 at the same time as a referendum on reducing judges' pay, a referendum on providing the Oireachtas with powers to conduct investigations, and the Presidential election.⁹⁹ The Taoiseach stated that the work "in respect of the preparation of the legislation for those is under way. They are being treated as a priority."¹⁰⁰ Despite this, the plans for the referendum on whistleblower protection were abandoned as a result of a decision by the Attorney General, Máire Whelan, in July 2011, to refuse to approve the wording of the referendum.¹⁰¹ In response, the Minister for Public Expenditure and Reform, Brendan Howlin, said that he hoped that the matter would go before voters sometime next year.¹⁰²

Minister Howlin had a personal interest in the matter as a result of pressure placed on him in 2000, when he was Labour's justice spokesman, to reveal the sources of information about alleged corruption in Donegal to the Morris Tribunal. Minister Howlin, in responding to questions during an Oireachtas debate on the matter stated:

I have more than a passing interest in the issue of whistleblowing, having had to traipse to the High Court and the Supreme Court to protect the rights of individuals to give information to Members of the

⁹⁷ Prevention of Corruption (Amendment) Act 2010, Schedule 2 para 3.

⁹⁸ Department of the Taoiseach, *Programme for Government* 2011. http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.pdf (visited 31 May 2012) at 27.

⁹⁹ <http://www.irishtimes.com/newspaper/breaking/2011/0615/breaking27.html> (visited 8 March 2012).

¹⁰⁰ <http://www.irishtimes.com/newspaper/ireland/2011/0616/1224299001126.html> (visited 8 March 2012).

¹⁰¹ Shaun Connolly, *Plan for whistleblower referendum abolished* <http://www.irishexaminer.com/ireland/kfgbcwkwfcw/rss2/> (visited 8 March 2012).

¹⁰² *Ibid.*

House on allegations of wrongdoing. I know how stressful this can be. At one stage I was on the hazard for €500,000 in legal fees.¹⁰³

The Government changed direction in 2012 in relation to their approach to whistleblower legislation and instead began to focus on drawing up generic legislation.¹⁰⁴ The Draft Heads of Bill of the Protected Disclosures in the Public Interest Bill 2012 (the Bill) were published by Minister Howlin on the 27 February 2012.¹⁰⁵ Minister Howlin said that his Department had “looked at best international practice”¹⁰⁶ and that the Bill would use UK and New Zealand legislation as templates.¹⁰⁷

On welcoming the publication Minister Howlin stated:

This Government is committed to a significant political reform agenda. A key part of this, as set out in the programme for Government, is our commitment to legislate to protect whistleblowers who speak out against wrongdoing, or cover-ups, whether in public or the private sector. This could encompass, for example, criminal misconduct, corruption, the breach of a legal obligation, risk to health and safety, damage to the environment or gross mismanagement in the public service.

The Heads of Bill published today will provide, for the first time for employees in Ireland, a single overarching framework protecting whistleblowers in a uniform manner in all sectors of the economy. This is a huge advancement from the previous piecemeal approach where the patchwork of protections resulted in fragmented and confusing standards of protection. A key element of the proposed legislation is that it treats all parties equally and fairly within an integrated legal framework that is open and transparent.¹⁰⁸

This Bill has been welcomed as a move away from the sectoral approach as it proposes to extend whistleblowing protections beyond the limited categories of people who are protected by the sectoral legislation. This approach will provide for a level playing field for all whistleblowers. However, despite the positive reaction to the introduction of the legislation, interested parties have also raised concerns with certain provisions contained therein. These concerns are addressed in detail and analysed below.

A. Key observations

(1) Definition of worker

¹⁰³ 752 Dáil Debates col. 3. For further information see: The Morris Tribunal, *Tribunal of Inquiry into Complaints Concerning some Gardaí of the Donegal Division Sole Member The Honourable Mr Justice Frederick Morris The Morris Tribunal Further Opening Statement of Counsel on Term of Reference (h) – The Anonymous Allegation Module* http://www.morristribunal.ie/SITECONTENT_264.pdf (visited 31 May 2012).

¹⁰⁴ Dáil Debates, note 253.

¹⁰⁵ The Draft Heads of the Protected Disclosures in the Public Interest Bill 2012.

¹⁰⁶ Whistleblowers Ireland, *Brendan Howlin promises the whistleblower legislation will be ‘best in the world’* <http://whistleblowersireland.com/2012/02/28/brendan-howlin-promises-whistleblower-legislation-in-ireland-will-be-best-in-the-world/> (visited 8 March 2012).

¹⁰⁷ The UK’s Public Interest Disclosure Act 1998 (PIDA) has been in force since 1998 and is generally considered to represent an example of good practice. The Parliamentary Assembly of the Council of Europe’s Report, *The Protection of Whistleblower*, 14 September 2009 deemed the UK legislation to be the model in this field of legislation as far as Europe is concerned. Certain elements of the New Zealand Protected Disclosures Act 2000 have also been adopted into the Bill but in general it is the UK Act that has the most influence. The drafters also looked at the South African Protected Disclosures Act 2000.

¹⁰⁸ Department of Public Expenditure and Reform, *This Bill will protect whistleblowers who speak out against wrongdoing or cover ups, whether in public or the private sector* <http://per.gov.ie/2012/02/27/%E2%80%9Cthis-bill-will-protect-whistleblowers-who-speak-out-against-wrongdoing-or-cover-ups-whether-in-public-or-the-private-sector%E2%80%9D-howlin/> (visited 8 March 2012).

The protections contained within the Bill apply to public and private sector workers. Head 2 defines worker to include employees, contractors and trainees.¹⁰⁹ This definition is quite limited as it restricts to whom the provisions can apply. There are persons outside the definition who may be in a position to share information about impropriety or other risks of harm to the public. It is hoped that the Bill will be amended so that the definition of worker is expanded to include volunteers, students, consultants, former workers, job seekers, interns, family members of the person who makes the protected disclosure, organisations that may suffer vicarious retaliation by virtue of a protected disclosure by an employee or contractor, those mistakenly believed to be whistleblowers, attempted and suspected whistleblowers, and those providing supporting information. If the definition of worker is not extended then potential whistleblowers are left in the same precarious situation as they would be under the sectoral approach as they may be left outside of the legislation entirely.

(2) Eligible disclosures

Head 4 of the Bill defines what types of disclosures are considered to be eligible in order to attract the protections contained therein.¹¹⁰ The current list of protected disclosures in Head 4 does not address a range of risks of harm to the public interest that should be subject to protected disclosure. It should be expanded to include conflict of interest, abuse of authority, violations of a rule or regulation, negligent use of public monies and a cover-up of any of the conduct listed under that Head. If it fails to expand the list of protected disclosures then potential whistleblowers will not be protected if they blow the whistle on any wrongdoing that has been omitted from the Bill. Also, certain proposed protected disclosures may also pose a burden of proof on the worker that they may find unduly difficult to meet. Additionally, experience shows that where the protected disclosure has been narrowly defined, as has been the case with sectoral legislation, fewer public interest reports will be made.

Head 4(4) provides that, “a disclosure is not a protected disclosure where the person making the disclosure does so knowing that the disclosure is false or misleading or where he/she made the disclosure recklessly without regard to whether it was false or misleading, frivolous or vexatious.” This provision is far too burdensome. This Head ties in with the requirement in Heads 5, 6, 7, 8,9,10, and 12 that all disclosures must be made in good faith. There is no definition of good faith in the Bill. The absence of any definition in the UK Act has led to legal and practical difficulties for the courts, employers and workers.¹¹¹

(3) To whom shall a protected disclosure be made?

Head 5 provides that the disclosure shall be made in good faith to their employer and must be one of the improprieties prescribed under Head 4.¹¹² This provision extends the definition of a protected disclosure to impropriety by a person other than their employer and also relates to a disclosure made by an agency

¹⁰⁹ The Bill, note 107, at Head 2.

¹¹⁰ (1) A protected disclosure means any disclosure of information regarding any conduct of an employer made by a worker which in the reasonable belief of the worker making the disclosure the information concerned shows or tends to show one or more of the following: (a) That a criminal offence has been, is being or is likely to be committed; (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject; (c) That a miscarriage of justice has occurred, is occurring or is likely to occur; (d) That the health and safety of any individual has been, is being or is likely to be endangered; (e) That the environment has been, is being or is likely to be damaged; (f) That an unlawful, corrupt, or irregular use of funds or resources of a public sector body has occurred, is occurring or is likely to occur; (g) That an unlawful, corrupt or irregular use of public monies has occurred, is occurring or is likely to occur; (h) That an act, omission, or course of conduct by a public official is oppressive, improperly discriminatory, or grossly negligent, or constitutes gross mismanagement; (i) That information tending to show that any matter falling within any one of the preceding paragraphs, whether alone or in combination has been, is being or is likely to be deliberately concealed.

¹¹¹ The concept of good faith has attracted controversy in light of the way in which it has been interpreted by the Courts. This has led to a call in the Report of the Shipman Inquiry by Dame Janet Smith for the requirement to be removed altogether. See: Fifth Report, Cm. 6394 (2004), paras 11.6 and 11.10.

¹¹² The Bill, note 107, at Head 5.

worker or contractor that is made to the responsible person. The provision also provides for a disclosure to be made in accordance with an established whistleblower procedure to someone other than the employer.

The Heads of Bill provide for external disclosure, including, among others, to regulatory bodies, legislators, professional media and civil society organisations.

Head 8 is an important provision as it sets out the conditions under which a disclosure can be made to other recipients, including the media, in order to attract the protections contained within the legislation. This is a necessary protection for the employer as if a whistleblower was to go straight to the media without following the stepped procedure, the damage caused to an organisation could be monumental, especially if the disclosure is false, misleading, frivolous or vexatious. A protection of this kind has not been included in earlier legislation.

(4) Penalisation

Penalisation is defined under Head 2 as including:

Any act or omission by an employer, or by a person acting on behalf of an employer, that affects a worker to his or her detriment with respect to any term or condition of his or her employment and, without prejudice to the generality of the foregoing, includes (a) suspension, lay-off, or dismissal, (b) demotion or loss of opportunity for promotion, (c) transfer of duties, change of location of place of work, reduction in wages or change in working hours, (d) the imposition or the administering of any discipline, reprimand or other penalty (including a financial penalty), (e) unfair treatment including selection for redundancy (f) coercion, intimidation or harassment, (g) discrimination, disadvantage or adverse treatment, (h) injury, damage or loss, and (i) reprisal.¹¹³

A provision similar to section 6 of UK Public Interest Disclosure Act 1998 could be included in the new legislation. Section 6 inserted section 103A into the Employment Rights Act 1996 and provides that an employee who is dismissed, “shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.” A provision of this nature in the Bill would cover circumstances where the worker is dismissed for a number of reasons but the principal reason for the dismissal is due to the making of a protected disclosure.

(5) Confidentiality

The Bill does not provide that the identity of the person who makes the disclosure has to be kept confidential by the recipient of the information. All that is required is that the recipient uses their “best endeavours” not to disclose information that might identify the worker. This unfortunately will amount to a disincentive for whistleblowers to come forward as they may fear repercussions on foot of their identity being made known when they make a disclosure. In knowing the identity of the whistleblower it will allow the employer to know what and who they are up against in order to defend the allegation to the best of their ability. Nonetheless, confidential disclosures are protected in other jurisdictions.¹¹⁴

(6) Anonymous reporting

Head 11 provides that a disclosure made anonymously shall not be a protected disclosure for the purposes of this Act. The Explanatory Note to the legislation provides that both Heads 15 and 16 are

¹¹³ The Bill, note 107, at Head 2.

¹¹⁴ For example in the United States under Whistleblower Act 1989, section 1213(h) and in India under the Public Interest Disclosure and Protection to Persons making the Disclosure Bill 2010, section 4(1).

important safeguards to protect the confidentiality of a worker making a protected disclosure. It states that it is not considered appropriate or practical that a worker could seek to avail of the protections provided under the legislation on the basis of having made an anonymous disclosure. The Bill currently only affords protection to those who make a confidential disclosure (*ie* shares their identity with an employer or a relevant body). It clearly states that an anonymous disclosure (*ie* one where the reporting person does not share their identity) will not be a protected disclosure under the Act.

It is worth noting that while the aim of the Bill should be to promote open communication, domestic and international experience shows that this is not always possible. This is partly because workers sometimes fear formal or informal retaliation for making a disclosure. Research also shows that most prospective whistleblowers prefer to remain anonymous, while leaving the option of anonymous reporting open as a last resort is generally regarded as best practice.¹¹⁵ In addition, section 301 of the US Sarbanes-Oxley Act 2002 (SOX) already requires companies listed in the US and their subsidiaries to establish protocols for anonymous reporting (there are more than 600 US subsidiaries in Ireland¹¹⁶).¹¹⁷ The current proposal will likely create needless confusion and deny hundreds of thousands of Irish and migrant workers the same rights as those not subject to SOX to make a protected disclosure.

The legislation should 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 as it would be easier for an employer to prove that the penalisation was not on foot of the making of the protected disclosure than for the worker to prove that it was, as the employer should have a proper system in place that would include records of decisions made, the reasons for those decisions and the steps taken in relation to those decisions.

(7) Internal procedures

Under Head 26 it is proposed that all public sector organisations (including the Garda Síochána and the Defence Forces) must establish and publish internal procedures for protected disclosures. The requirement under Head 26 should be extended 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 so as to ensure the best possible system of reporting not just for the whistleblower but for the employer too.

(8) Just and equitable awards

Schedule 4(1)(3)(c) of the Bill provides that contraventions of Head 12 will require the employer to pay to the worker compensation of such amount (if any) as is just and equitable having regard to all the circumstances, but not exceeding two years' remuneration in respect of the worker's employment calculated in accordance with regulations under section 17 of the Unfair Dismissals Act 1977.¹¹⁸ Given the potential loss of career and livelihood, the award of two years remuneration will serve as a deterrent

¹¹⁵ Heungsik Park, John Blenkinsopp, Kemal Oktem, Ugur Omurgonulssen, "Cultural orientation and attitudes toward different forms of whistleblowing: A comparison of South Korea, Turkey, and the U.K." (2008) 82(4) *Journal of Business Ethics* 929 at 929.

¹¹⁶ US Department of State, *US Relations with Ireland* <http://www.state.gov/r/pa/ei/bgn/3180.htm> (visited 20 June 2012).

¹¹⁷ The Sarbanes-Oxley Act was passed by US Congress in 2002 after the Enron and WorldCom scandals in order to protect employees of publicly traded companies who report violations of Securities and Exchange Commission regulations or any provision of federal law relating to fraud against the shareholders. Section 301(4)(B), provides that in relation to complaints, each audit committee shall establish procedures "for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."

¹¹⁸ Unfair Dismissals Act 1977, section 7(1)(c) as amended by the Acts of 1993 and 2001, provides, "payment by the employer to the employee of such compensation (not exceeding in amount 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with regulations under section 17 of this Act) in respect of any financial loss incurred by him and attributable to the dismissal as is just and equitable having regard to all the circumstances."

to prospective whistleblowers. The Safety, Health and Welfare at Work Act 2005 and Employment Permits Act 2006 provide for awards that are “just and equitable”.¹¹⁹ The Bill should provide for a level of awards to whistleblowers that have been subject to reprisal of an amount that is “just and equitable in the circumstances”. This would ensure a standardised level of compensation for all whistleblowers who suffer repercussions as this is currently not a possibility for all whistleblowers.

(9) Rights Commissioner

Under the Bill, it is proposed to hear proceedings provided for under Schedule 4 before a Rights Commissioner “otherwise than in public”. Experience from the UK shows that this may provide for undue secrecy in the processing of such cases and make it difficult to evaluate the use and effectiveness of the legislation.¹²⁰ A provision could be included in the legislation that provides that proceedings before the Rights Commissioner under the legislation shall be heard in public. This provision should be similar in nature to section 6(6) of the Payment of Wages Act, 1991 which provides that, “proceedings under this section before a rights commissioner shall be conducted in public unless, and to the extent that, the commissioner, on application to him in that behalf by a party to the proceedings, decides otherwise.”¹²¹

(10) Restricted disclosures

Under Head 22 disclosures relating to security, intelligence defence, and international relations will not constitute a protected disclosure to a relevant body or to wider public disclosure if the disclosure of this information could reasonably be expected to affect adversely (a) the security of the State, (b) the defence of the State, (c) the international relations of the State, or (d) matters relating to Northern Ireland.¹²² Special rules and procedures are deemed to be necessary for all public bodies and agencies including the Garda Síochána and the Defence Forces who have access to secret and highly sensitive information relevant to the maintenance of the security of the State. This Head introduces certain limitations on the internal channels through which such disclosures can be made and also excludes any wider external public disclosures of such information. However, the legislation provides for a new disclosure channel to a “complaints referee” for protected disclosures made in relation to these issues.

Head 23 sets down restrictions in respect of disclosures to the wider public of information relating to law enforcement. In order to safeguard the integrity of criminal investigations the legislation proposes external disclosures would be limited strictly to a Member of Dáil Éireann with no potential for a general outside disclosure (e.g. to the media). However, prior to making a disclosure to a Member of Dáil Éireann the disclosure must be made to the relevant external investigatory body. A disclosure of made in relation to law enforcement other than to through the restricted disclosure channels cannot be a protected disclosure. The restricted basis on which an external disclosure can be made in relation to law enforcement matters is justified on the basis of the existing robust statutory framework provided by the Garda Síochána Ombudsman Commission in relation to the investigation of misconduct by individual members of the Garda Síochána.

(ii) Conclusion on proposed generic approach

¹¹⁹ Safety, Health and Welfare at Work Act 2005, section 28(3)(c) provides that the Rights Commissioner shall require the employer to, “to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances.” Employment Permits Act 2006, Schedule 2, section 1(3)(c) provides that the Rights Commissioner shall 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.”

¹²⁰ PCaW *Employment Tribunal Consultation 2011-PCaW Submission* www.pcaw.org.uk (visited 10 July 2012). For more information see PCaW *Where’s whistleblowing now? 10 years of legal protection for whistleblowers* (2010) www.pcaw.org.uk (visited 10 July 2012).

¹²¹ Payment of Wages Act, 1991, section 6(6) .

¹²²

The Draft Heads of the Protected Disclosures in the Public Interest Bill 2011 has been welcomed in most quarters in this jurisdiction. It presents a new approach to whistleblowing and whistleblower protection law in Ireland. Its aim is to provide a better mechanism for whistleblowing by including greater protections for whistleblowers and employers and to ensure that at the same time matters that are in the public interest are also protected. It is endeavouring to be a far more encompassing piece of legislation than any of the earlier pieces of legislation that addressed the issue of whistleblowing.

Despite its honest efforts to provide a more robust legal regime than what existed with the sectoral approach it still has a number of provisions that need to be addressed and amended.

Steps to address the problems associated with the Bill have been taken. In particular, the Joint Committee on Finance, Public Expenditure and Reform met six times during the months of April, May and June of 2012.¹²³ It has heard from interested parties on both sides of the debate¹²⁴ and will be preparing a report on the scope and design of the legal regime for Minister Howlin. Also, Minister Howlin himself has stated that, “I have an open mind on the legislation and will happily embrace any ideas that might improve it.”¹²⁵

It is hoped that when the Bill is published in 2013¹²⁶ it will in fact be as Minister Howlin promised, “the best in the world”.¹²⁷

3. Perceptions and Political Will

(i) Introduction

It has been suggested that in Ireland the concept of whistleblowing is contentious given the historical connotations of informing on a person.¹²⁸ Since Ireland’s 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”.¹²⁹

This attitude transgressed into modern times as can be seen in the case of *Berry v Irish Times*.¹³⁰ This case concerned a publication in the Defendant’s daily newspaper that included a photograph which showed a man carrying a placard on which was written, “Peter Berry- 20th Century Felon Setter-Helped Jail Republicans in England” and beneath the photograph, a news item about two Irishmen who were stated to be serving sentences of imprisonment after convictions in England for having taken part in a raid for arms in that country. The Plaintiff, Peter Berry, who was head of the Department of Justice, argued that the words meant and were understood to mean, “that the plaintiff had helped in the jailing of Irish republicans in England.”¹³¹

Berry failed in his defamation case but McLoughlin J dissenting commented:

¹²³ Joint Committee on Finance, Public Expenditure and Reform 18 April 2012, 23 May 2012, and 5, 6, 12, 13 June 2012. For a copy of all debates see: <http://debates.oireachtas.ie/committees/2012/FI.asp>.

¹²⁴ The debates were attended by representatives from IBEC, ICTU, Irish Nurses and Midwives Organisation, IMPACT, Irish Bank Officials Association, Transparency International (Ireland), A & L Goodbody Solicitors, Mr Paul Egan, Mr Eugene McErlean, and Dr Elaine Byrne, all of whom made submissions on the Draft Heads.

¹²⁵ Joint Committee on Finance, Public Expenditure and Reform (18 April 2012).

¹²⁶ Department of the Taoiseach, *Government Legislation Programme for Spring Session 2013* http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/SECTION_A1.html (visited 24 February 2013) at section A.

¹²⁷ Whistleblowers Ireland, *Brendan Howlin promises the whistleblower legislation will be ‘best in the world’* <http://whistleblowersireland.com/2012/02/28/brendan-howlin-promises-whistleblower-legislation-in-ireland-will-be-best-in-the-world/> (visited 8 March 2012).

¹²⁸ Henry Murdoch, “Touting for Business: The Rise of the Whistleblower” (October 2003) *Law Society Gazette*, at 8.

¹²⁹ Transparency International (Ireland), note 1, at 5.

¹³⁰ *Berry v Irish Times* (1973) IR 368.

¹³¹ (1973) IR 368 at 372.

He is called a felon setter because he has designated republicans, by giving information as to names and locations, addresses perhaps in England, and so assisted to have such persons jailed. Put in other words, the suggestion is that this Irishman, the Plaintiff, has acted as a spy and informer for the British police concerning republicans in England, thus putting the Plaintiff into the same category as the spies and informers of earlier centuries who were regarded as loathing and abomination by all decent people.¹³²

Even the Plaintiff himself stated, “I can think of nothing more ugly, more horrible in this life than to be called an informer. It has a peculiarly nauseating effect in Irish life.”¹³³

In 1999, during the second stage of the Dáil Debate on the Whistleblower Protection Bill 1999, a member of the Oireachtas stated that 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 eight hundred years under the yoke of the British Crown.”¹³⁴

However, the attitude of the public towards whistleblowers has become much more positive of late due to the increasing resentment of the public towards those who are perceived to have abused their powers of position, be they in the Church, in banks, in politics, to name but a few. As a result, whistleblowing has become a much more prevalent occurrence than was ever seen before. This recognition of the fundamental role that whistleblowers play stems from the realisation that a vast number of wrongdoings would not have been unearthed without the disclosure of information by whistleblowers. This can be seen in the high profile disclosures made in Ireland such as those made by Tom Clonan who blew the whistle on the sexual harassment of women in the Defence Forces; Eugene McErlean who uncovered the overcharging of Allied Irish Bank customers and reported it to the Financial Regulator; Bernadette Sullivan who gave information on Dr Neary at Our Lady of Lourdes Hospital, Drogheda; assistant principal officer Marie Mackle in the Department of Finance who consistently warned about an overheating property market during 2005 and 2006; and Louise Bayliss who in 2011, went public over plans to keep mental health patients in a locked unit over the Christmas period.

Ms. Bayliss had a six-month contract with the Irish Advocacy Network (IAN) as a trainee advocate for mentally ill patients at hospitals in Dublin. This network was part-funded by the Health Service Executive (HSE). In December 2011, Ms. Bayliss complained to the radio phone-in show, Liveline, that five long-term female patients at St Brendan’s psychiatric hospital were being moved from an open ward to a secure unit over the Christmas period. This secure unit already housed six patients. The HSE said this was due to staff shortages and that the women would return to the open ward on January 16th, 2012.

A few days after the disclosure was made by Ms. Bayliss, there was public and political outcry. The matter was raised in the Dáil by TDs Joe Costello, Derek Keating, Maureen O’Sullivan and Alex White. Minister of State Kathleen Lynch gave an undertaking to visit the unit.

On 18 January 2012, Ms. Bayliss was informed that her contract of employment was terminated. She was three months into the contract. The following day, Ms. Bayliss spoke of this termination on Liveline and claimed the termination of her contract was at the instigation of the HSE. This was echoed in the media. As a result, there were calls for her to be reinstated by TDs Richard Boyd Barrett, Derek Keating and Joe Costello. In a matter of days, on the 23 January 2012, Ms. Bayliss was reinstated. Colette Nolan, chief executive of the IAN, stated that, “(a)fter more in-depth and intensive consultation with colleagues

¹³² (1973) IR 368 at 379-380.

¹³³ (1973) IR 368 at 380.

¹³⁴ 506 Dáil Debates col. 5 (16 June 1999).

in the organisation over the last few days, we realise we made an error in this regard.”¹³⁵ The IAN also said that the HSE had no role in the decision to let Ms. Bayliss and another trainee go, or to reinstate them, and that the decision to let them go related to some shortcomings in their current training program.

Ms. Bayliss, on announcing that she had been reinstated by the IAN stated that she had no second thoughts about any of her actions, stating “I don’t regret it.....I would do it again.”¹³⁶ She expressed hope that her case would give other whistleblowers the courage to come forward and expose abuses in the Irish healthcare system. Fine Gael TD Derek Keating, who was with Ms. Bayliss when she announced her reinstatement, said that the treatment of Ms. Bayliss underlined the urgent need for the government to bring in new whistleblowing legislation as soon as possible. He stated that, “it is deeply regrettable that an employee could lose his or her position for having spoken out on behalf of vulnerable and voiceless individuals....How many more comparable situations are out there? How many good, honest workers are being treated in this way?”¹³⁷ He called on Minister Brendan Howlin to advance legislation on Whistleblowers as soon as possible.¹³⁸

One month later the Draft Heads of the Protected Disclosures in the public Interest Bill was published by Minister Howlin.

This incident highlights the emerging positive attitude of the public and also of politicians towards whistleblowers. There has been heightened media coverage of incidences of whistleblowing in Ireland and this reflects the evolving attitude of the public towards whistleblowers. In addition, national television and radio has broadcasted a number of high profile dramatised accounts of the role of whistleblowers in Ireland¹³⁹.

(ii) Case-study

There is very little case-law in respect of decisions before the courts concerning whistleblowers. One notable case, however, is the Labour Court’s decision on the 3rd March 2009 in *Vodafone Ireland Limited (Represented by Vodafone Ireland Limited) v. A Worker (Represented by Irish Municipal, Public and Civil Trade Union)*.¹⁴⁰ This case concerned an appeal by Vodafone Ireland Limited of the Rights Commissioners Recommendation which awarded €14,500 to “A Worker” (John Bagge) on the basis of personal difficulties and perceived risks associated with bringing forward certain allegations.

The issue in dispute concerned Mr. Bagge, an employee of Vodafone Ireland Limited, who discovered that a colleague was involved in defrauding the company. Mr. Bagge disclosed the information in relation to the fraud to management and this resulted in significant savings to the company. Mr. Bagge apparently agonised over the situation for many months as he felt that it would have been detrimental to his career to make false allegations against a senior member of management. When he did make his

¹³⁵ Christine Bohan, Grangegorman Whistleblower Louise Bayliss reinstated by Irish Advocacy Network, <http://www.thejournal.ie/grangegorman-whistleblower-louise-bayliss-reinstated-by-irish-advocacy-network-335853-Jan2012/> (visited 5th February 2013).

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ RTÉ ONE, *Whistleblower* <http://www.rte.ie/tv/whistleblower/>; RTÉ Radio One, *Whistleblowers* <http://www.rte.ie/radio1/whistleblowers/>; RTÉ ONE *Prime Time: Rostrevor whistleblowers stranded despite assurances* <http://www.rte.ie/news/av/2011/0623/media-2985710.html>.

¹⁴⁰ *Vodafone Ireland Limited (Represented by Vodafone Ireland Limited) v. A Worker (Represented by Irish Municipal, Public and Civil Trade Union)* CD/09/266 <http://www.labourcourt.ie/labour/labcourtweb.nsf/cb8265a3e1c5c3f180256a01005bb359/80256a770034a2ab802575cf005115be?OpenDocument>

suspensions known to management, he alleged that he was not given adequate support in assisting with the personal difficulties caused to him by the event. As such, the Union's position was that Mr. Bagge was not supported by management when he reported the fraud and that management failed in its duty of care to offer on-going support afterwards.

Vodafone Ireland Limited argued that Mr. Bagge was employed in the fraud detection area of the company and by reporting the fraud he was merely doing the job assigned to him. It also contended that it would be inappropriate for workers to be compensated for carrying out their contractual duties. In addition, it was submitted that even though Mr. Bagge did report the fraud that was taking place, he could have done so a lot sooner and saved the company from the significant losses it incurred. Finally, it was contended by the company that it did support Mr. Bagge and made every effort to fulfil its duty of care.

The court held that having regard to all the circumstances and the exceptional nature of the case that it was satisfied that compensation should be awarded to Mr. Bagge. The court recognised that at the material time there were no supports or guidelines available to Mr. Bagge to assist him in dealing with the situation in which he was placed (supports and guidelines have since been put in place). Whilst Mr. Bagge acted responsibly and reported his suspensions, the absence of appropriate supports and procedures caused him to suffer significant anxiety and distress resulting in him requiring a prolonged period of sick leave. The Court, however, believed that a more appropriate level of compensation was €12,000.¹⁴¹

(iii) Whistleblower agencies and whistleblowing statistics

There is no independent agency, authority, or official that receives or investigates complaints of whistleblower retaliation or improper investigations in Ireland. Transparency International (Ireland) provides a telephone and e-mail service for anyone facing an ethical dilemma or considering reporting wrongdoing at work. It's Speak Up service is for people or organisations that have been the victim of corruption or white collar crime. Such persons can get information and help when they need to report or stop corruption via this service. There are no statistics available in relation to the prevalence of whistleblowing.

¹⁴¹ *Ibid.*

4. SWOT

Strengths <ul style="list-style-type: none">• Cartel Immunity Programme• Prevention of Corruption legislation	Weaknesses <ul style="list-style-type: none">• Diffusion of provisions in the sectoral approach.• Lack of protections for statutory mandatory whistleblowers.• Lack of protections for statutory voluntary whistleblowers.• Lack of an independent whistleblowing agency.
Opportunities <ul style="list-style-type: none">• Proposed generic legislation.• Improvement in the attitude of the public and politicians towards whistleblowers.	Threats <ul style="list-style-type: none">• Recessionary issues may result in the Government failing to treat the proposed legislation as a priority which may delay the passing of the Act.

5. Charts

A. Criminal Justice Act 2011

	Yes	No	Partial	Notes
Broad definition of whistleblowing		X		Provision relates solely to the disclosure of information that would be of material assistance in (a) preventing the commission by any other person of a relevant offence, or (b) securing the apprehension, prosecution or conviction of any another person who commits a relevant offence as stipulated under the Act.
Broad definition of whistleblower		X		Only applies to employees and not for example to independent contractors.
Broad definition of retribution protection	X			Includes any act or omission by an employer, or by a person acting on behalf of an employer, that affects an employee to his detriment with respect to any term or condition of his employment, and, without prejudice to the generality of the foregoing, includes: (a) suspension, lay-off or dismissal; (b) the threat of suspension, lay-off or dismissal; (c) demotion or loss of opportunity for promotion; (d) transfer of duties, change of location of place of work, reduction in wages or change in working hours; (e) the imposition or the administering of any discipline, reprimand or other penalty (including a financial penalty); (f) unfair treatment; (g) coercion, intimidation or harassment; (h) discrimination, disadvantage or adverse treatment; (i) injury, damage or loss; (j) threats of reprisal.
Internal reporting mechanism		X		
External reporting mechanism	X			Reports are to be made to the Garda Síochána.
Whistleblower participation		X		
Rewards system		X		
Protection of confidentiality		X		
Anonymous reports accepted		X		
No sanctions for misguided reporting		X		An employee who makes a disclosure knowing it to be false or being reckless as to whether it is false is guilty of an offence. A person found guilty of such an offence will be liable on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or on conviction on indictment, to a fine or imprisonment for a term not exceeding 2 years or both.
Whistleblower complaints authority		X		
Genuine day in court	X			
Full range of remedies			X	A complaint may be presented to the Rights Commissioner. Also, in respect of a dismissal, proceedings can be instituted under the Unfair Dismissals Acts 1977 to 2007 or damages can be recovered at common law for wrongful dismissal.
Penalties for retaliation	X			A person found guilty of an offence will be liable on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or on conviction on indictment, to a fine or imprisonment for a term not exceeding 2 years or both.
Involvement of multiple actors				

B. The Draft Heads of the Protected Disclosures in the Public Interest Bill 2012

	Yes	No	Partial	Notes
Broad definition of whistleblowing			X	Detailed definition but could be more comprehensive to include additional recognisable risks of harm to the public interest such as abuse of authority, violations of a rule or regulation, negligent use of public monies etc.
Broad definition of whistleblower			X	Protection only applies to “worker”. This includes employees, contractors and trainees.
Broad definition of retribution protection			X	Does not include threat of reprisal.
Internal reporting mechanism	X			Included as part of a “stepped” disclosure regime in which a number of distinct disclosure channels are available – internal, “regulatory” and external – and through which the worker can, subject to different evidential thresholds, make a protected disclosure.
External reporting mechanism	X			
Whistleblower participation		X		
Rewards system		X		
Protection of confidentiality			X	Recipient of information only has to use “best endeavours” not to disclose information that would reveal the identity of the whistleblower unless the whistleblower consents to his identity being disclosed; or that identification is necessary for the investigation of the allegations; or to prevent serious risk to public health, public safety or the environment; or is essential having regard to the principles of natural justice.
Anonymous reports accepted		X		
No sanctions for misguided reporting	X			Misguided reporting will not be sanctioned but it will not be subject to the protections under the legislation.
Whistleblower complaints authority		X		
Genuine day in court	X			
Full range of remedies			X	(a) A declaration that the complaint was or was not well founded; (b) The employer may have to take a specified course of action, which may include, in a case where the penalisation constitutes a dismissal, re-instatement or re-engagement; (c) The employer may have to pay to the worker compensation of such amount (if any) as is just and equitable having regard to all the circumstances, but not exceeding 2 years’ remuneration in respect of the worker’s employment. Two years remuneration is too limited.
Penalties for retaliation		X		
Involvement of multiple actors				

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