



Spotlight

Disclosure of information: duty to inform and whistleblowing

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Editorial

The duty to inform and the limits on what a person is obliged to disclose have long played a core part of the Irish legal system. Privilege (legal, medical or clerical) is currently a defence for failing to disclose information. Recent legislative developments, however, have seen an increased trend towards the citizen being obliged to disclose information, not only where one knows of a crime committed, but also where a crime is suspected. This trend is framed against a backdrop of abuse scandals and the banking crisis, where individuals and organisations knew or suspected what was happening but did nothing about it. Legislation in relation to disclosure aims either to aid and protect someone giving information (whistleblowing) or to compel people to give information about actual or suspected crimes (duty to inform).

Legal protection must be given to those forced to reveal information given the possible sanctions for non-cooperation, including imprisonment and the interference with rights.

This *Spotlight* examines the difference between voluntary and mandatory disclosure, current and proposed measures, problems arising from disclosure and possible protections.

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16 December 2011

L&RS Central Enquiry Desk: 618 4701/ 4702

Executive summary

In Irish legislation, the disclosure of sensitive information by private individuals is dealt with in one of two ways:

- Duty to disclose - mandatory
- Whistleblowing - voluntary

While these concepts are long established, both have been expanded significantly through legislation in the last decade.

The current legal duty to inform can be broadly split into two parts: a duty based on specialist knowledge (such as a professional vocation) and a general duty to report (for serious crimes).

While traditionally, certain types of specialist knowledge have been privileged (doctor-patient, lawyer-client, clergy-congregation), this privilege has been curtailed somewhat in modern times, and can be overridden by conflicting interests, such as the rights of the child.

There has been little debate and little research into the general duty to report. This in particular is problematic, as the onus is on the private individual both to report suspicious activity and to determine what constitutes a reasonable suspicion.

Whistleblowing or informing has historically had negative connotations in Ireland.

Ireland has approached whistleblowing on a sectoral or “case-by-case” basis. This approach contrasts with other countries, which have attempted to create a general system of whistleblowing.

The Government has proposed “to introduce overarching legislation for the protection of whistleblowers.” This

may alleviate current problems with whistleblowing in Ireland, including confusion as to the extent protection exists which may account for a general reluctance of persons to whistleblow.

Both the duty to disclose and whistleblowing require legal protection for those providing information. This is needed as the consequences for both are potentially severe, including loss of reputation, livelihood, or loss of freedom through imprisonment.

Introduction

Disclosure has an important function in society. It assists in righting wrongs, and provides valuable evidence of wrongdoing.

There are different ways of going about attaining disclosure. The State can either persuade or force citizens to provide information.

Terminology relating to disclosure is not universal. The duty to disclose is also referred to as a duty to inform or as mandatory reporting.

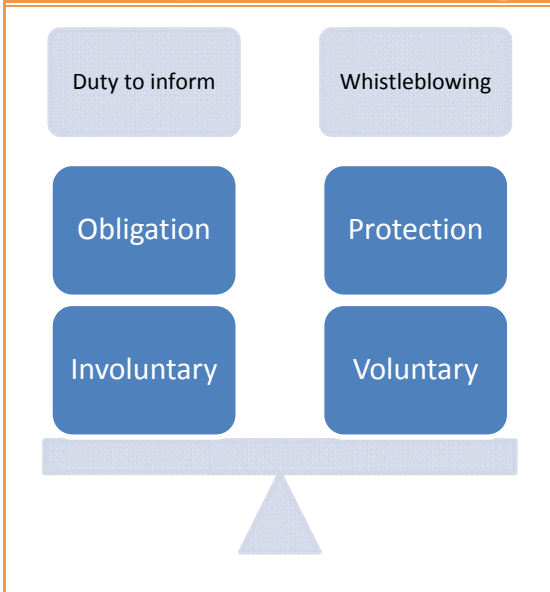
Whistleblowing is a general, informal term, which can be interchangeable with disclosure. It can be voluntary (where there is no legal requirement) or involuntary (where there is a legal obligation). The generality of the term leads to confusion: some contend that it covers mandatory reporting, some feel it only applies to voluntary disclosures.

For the purposes of this *Spotlight*, disclosure is divided into two parts:

- Duty to inform; and
- Whistleblowing.

Text box 1 below outlines the distinction between the duty to inform and whistleblowing:

Text box 1: Disclosure - duty to inform compared to whistleblowing



The *Criminal Justice Act 2011* and *Offences against the State (Amendment) Act 1998* and proposed legislation (such as *Withholding Information in Relation to the Abuse of Children Bill* [due in December 2011] and the *Children First Bill* [due in 2012]) penalise failures by citizens to disclose information or suspicions to relevant authorities.

Penalising the withholding of information in relation to possible offences is a version of the old offence of misprision of a felony. This offence was effectively abolished in Irish law when the distinction between felonies and misdemeanours was abolished under Section 2 of the *Criminal Justice Act 1997*.¹ This meant that a general duty to inform no longer existed in Irish law.

¹<http://www.irishtimes.com/newspaper/ireland/2002/1024/1033174061367.html>

Why is a duty to inform used in law?

The imposition of a duty to inform can be done for a number of reasons. One of these relates to the difficulty in getting information about particular specialised crimes such as competition or banking crimes. By placing a duty on those working in these areas it is hoped that certain crimes may be stopped or those guilty of certain crimes apprehended.

Another reason for a duty to inform is where an issue is of great public importance, for example in relation to child abuse or anti-terrorism. Here, it is argued, that the public good or the protection of certain members of the public outweighs whatever concerns there may be in relation to the rights of individuals. Legislation to date has either specified particular classes of individuals who are bound to inform, or has placed a general duty on all citizens to inform.

The nature of the duty to inform

The nature of the duty to inform can vary greatly. The duty can be limited to a particular group such as social workers or bankers who by the nature of their specialist knowledge may become aware of or suspect certain crimes are being committed.

The duty may be further limited to suspicions about crimes which these groups come across in the course of their day to day work only. A more general duty can be placed on all citizens.

A person may be bound to report actual knowledge rather than the suspicion of a crime. Suspicions or knowledge of **imminent** crimes rather than past crimes may have to be reported. In other cases, knowledge or suspicions of both future and past crimes must be reported.

For example, mandatory reporting requirements for child abuse vary hugely from jurisdiction to jurisdiction even within a federal country.

- The **persons bound to report** ranges from health care professionals, to other professionals, and in some cases to include all citizens.
- The **types of reportable abuse** have been expanded beyond sexual abuse to include emotional or psychological abuse, and neglect.
- The **nature of the abuse** to be reported has expanded in certain jurisdictions to beyond actual harm caused to the risk of harm being caused in the future. Other jurisdictions, for example, have moved away from the need to show “serious harm” towards a more general “harm.”

How does a person know what should be reported?

Generally, the language used in legislation criminalising the withholding of information or compelling the disclosure of information is complex and uses legal terminology which would not be familiar to the majority of citizens. For example legislation may require a person to report an arrestable offence without giving examples of such offences. Irish legislation specifies whether knowledge of an actual crime or a mere suspicion must be reported. However, it may also ask individuals to assess and judge the value of their suspicions or knowledge, and to decide whether any information would be of “material assistance in securing the apprehension, prosecution or conviction of that person for that arrestable offence.” This again may be difficult for any individual to do.

Confusion can arise from the defence of reasonable excuse as it leads to the

question— is it an excuse that is reasonable in the eyes of the person who did not inform or is it reasonable in the eyes of the court or the Gardaí? The issue of privileged communications as a reasonable excuse is examined below.

Privileged communications

This section looks at the limits to professional privilege, particularly legal and clergy-penitent privilege. Exempting privileged communications from a duty to inform is the statutory recognition of the right to maintain confidential communications between professionals and their clients, patients, or congregants. A husband-wife privilege also exists in some circumstances.

However, privilege is rooted in public policy and should only be granted where the balance of advantage favours protection of confidentiality rather than disclosure. Privilege is not absolute, and may be curtailed, for example, where there is a suspicion of child abuse or terrorism.

A review of US State laws on the mandatory reporting of child abuse shows that:

- The doctor-patient and husband-wife privileges are the most common to be denied by States.
- The lawyer-client privilege² is most commonly affirmed.³
- The clergy-penitent privilege is also widely affirmed, although that privilege usually is limited to confessional communications and, in some States, denied altogether.

² Attorneys in most States must report admissions from clients that they are planning a life threatening crime.

³http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/mandatory_reporting_statutory_summary_chart.authcheckdam.pdf

Legal privilege

The rationale behind legal professional privilege is that it assists and enhances the administration of justice. This is done by facilitating the representation of clients by legal advisers and the full and frank disclosure of the relevant circumstances by the client to the solicitor. Claims of legal privilege are decided by the courts. Legal professional privilege will not be allowed in situations where communications exist in the furtherance of conduct which is considered by the courts to be criminal, fraudulent or contrary to the interests of justice.

Clergy-penitent privilege

This section looks at clergy-penitent privilege in the US, the UK and in Ireland. The approach to clergy-penitent privilege in different US States varies greatly and is complex. Currently 21 States specifically require clergy to report child abuse. However, 17 of those States recognise the clergy-penitent privilege and allow clergy to maintain the confidentiality of pastoral communications.

A number of States are noticeable for their approach to privileged communications when there is a suspicion that a child has been abused. New Hampshire, North Carolina, Rhode Island and West Virginia only recognise attorney client privilege. Oklahoma and Texas do not recognise any privileged communications. These six States do not recognise any penitent or confessional privilege where there is a suspicion of child abuse.

In Ireland, the High Court has held that priest-congregant privilege exists in Irish law. Judge Gavan Duffy held in *Cook v Carroll*⁴ that a priest had "sacerdotal privilege," which gave him

⁴ [1945] IR 515

a legal right "to refuse in a court of law to divulge any confidential communication whatever made to him as a priest." This goes beyond divulging information given during a confession and is a much broader privilege. This case is currently binding precedent on this matter.⁵

By contrast, there has been debate in the UK as to whether priest-congregant or priest-penitent privilege actually exists. It is generally acknowledged that it did exist prior to the Reformation but its status has been in doubt since then as it is not part of any statute. Lord Denning held in the UK House of Lords that a special relationship including that of clergyman and parishioner is a defence to a charge of misprision of felony:

"Non-disclosure may sometimes be justified or excused on the ground of privilege. For instance, if a lawyer is told by his client that he has committed a felony, it would be no misprision in the lawyer not to report it to the police, for he might in good faith claim that he was under a duty to keep it confidential. Likewise with doctor and patient, and clergyman and parishioner. There are other relationships which may give rise to a claim in good faith that it is in the public interest not to disclose it."⁶

Following on from this reasoning it would appear that clergy-penitent privilege does exist in the UK and would be a reasonable excuse for withholding information.

⁵ It was followed by Carroll J. in *E.R. v J.R* I.L.R.M. 125 [1981] Both judgments were regarded as good law by the High Court in *Goodman v The Honourable Mr. Justice Hamilton and Others*. Unreported, 27th May 1993.

⁶ *Sykes* [1961] 3 All ER 33.

Duty to inform in current legislation

Two types of duty to inform can be identified in current Irish legislation. The first is based on specialist knowledge, and the other is a general duty to inform in relation to all serious crimes except for sexual crimes.

Text box 2: Duty to inform in current legislation

Section 57 of the *Criminal Justice Act, 1994* (specialist knowledge re. money laundering)

Section 19 of the *Criminal Justice Act 2011* (specialist knowledge re. white collar crime)

Section 9 of the *Offences against the State (Amendment) Act 1998* (general duty to inform on all serious crimes except for sexual crimes)

Specialist knowledge

Section 57 of the ***Criminal Justice Act 1994*** is an example of a duty to report specialist knowledge acquired during the course of work. The section obliges designated bodies, such as financial institutions, to report suspicions of money laundering offences to the Garda Síochána. This duty is only placed on particular institutions which have particular information.

Section 19 of the ***Criminal Justice Act 2011***, dealing with white collar crime, also targets specialist knowledge. The Act created a new offence of withholding information in relation to certain offences. The duty here is aimed at a particular group of people and limited to a specified number of offences. Unlike the *Offences against the State (Amendment) Act 1998* s. 57 and s. 19 of these Acts are not subject to annual renewal by the Oireachtas.

General duty to inform

This section looks at s.9 of the ***Offences against the State (Amendment) Act 1998*** (*the 1998 Act*) in some detail. The reason for this is that the Act places a duty on all citizens, rather than a particular specialised group, to report knowledge or suspicions of serious crimes. The legislation was brought in following the Omagh bombings and aims to combat terrorism. However, it criminalises the withholding of information in relation to serious crime and not just terrorism offences.

Section 9 of the Act makes it an offence to withhold information which a person believes might be of material assistance in preventing the commission of a serious offence or securing the apprehension, prosecution or conviction of another person for such an offence. A “serious offence” has the same meaning as it has in section 8 of the Act.⁷ It covers all serious crimes except for sexual crimes.

It was decided that certain sections of the Act should be revisited annually by the Oireachtas in recognition of the exceptional nature of the measures contained in the 1998 Act. The purpose is to allow the Oireachtas to decide whether the current circumstances justify the continued operation of these sections.

⁷ In Section 8 a serious offence is defined as an offence which is both :

(a) an offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of 5 years or by a more severe penalty, and

(b) an offence that involves loss of human life, serious personal injury (other than injury that constitutes an offence of a sexual nature), false imprisonment or serious loss of or damage to property or a serious risk of any such loss, injury, imprisonment or damage, and includes an act or omission done or made outside the State that would be a serious offence if done or made in the State.

The Minister for Justice stated in June 2011 that:

“the clear message is that the relevant sections of the Act continue to be of significant value to the Garda in tackling the threat from terrorism. Taking into account the provisions of the Act, the numbers of occasions on which certain provisions have been used and the current security environment, the Garda authorities consider that the Act continues to be one of the most important tools available to them in the ongoing fight against terrorism. The inevitable conclusion must be that the provisions are necessary to counter the threat from terrorism and their continued availability to An Garda Síochána is warranted.”⁸

All parts of the Act in operation up to June 2011 will continue in operation up to June 2012.

Table 1: Use⁹ of Section 9 of the *Offences Against the State (Amendment) Act 1998*

Year	Number of times s. 9 of the <i>Offences Against the State (Amendment) Act</i> was used
Up to June 2011	63
Up to June 2010	117
Up to May 2009	137
Up to June 2008	127
Up to April 2007	79
Up to June 2002	115

Source: Annual report to the Dáil. The reports look at the use of the section from June the previous year for a 12 month period unless specified.

⁸ <http://debates.oireachtas.ie/dail/2011/06/21/00027.asp>

⁹ The report does not indicate where someone was charged or was convicted of the offence.

While the annual reports to the Dáil show the number of times section 9 has been used, they do not make it clear how section 9 is used. For example, is it not clear as to whether it is used generally in relation to terrorism offences, or in relation to other serious offences unrelated to any terrorist activity such as a serious assault. A further exploration of how S. 9 is used would be interesting.

The exceptional powers given by the *Offences against the State (Amendment) Act 1998* are renewed annually. However, there has been little debate in Ireland as to the value of placing a general duty to inform on all citizens or as to the need for such a provision.

There has been one substantial review of s. 9 to date. A review committee examined the *Offences Against the State Acts 1939 – 1998*¹⁰ examined Section 9 (as well as all other legislation on terrorism). A majority of the review committee were in favour of keeping Section 9 in operation:

“This section creates a new statutory offence of failing to disclose information without reasonable excuse. While there was a common law offence of misprision of felony, the ambit of this offence was always unclear. The Committee agrees that it is preferable that there should exist a modern statutory offence which traverses much of the ground hitherto covered by the offence of misprision of felony, and it does not consider it unfair that members of the public should commit an offence where in these circumstances they fail to assist the Gardaí in their law enforcement duties.”

¹⁰ A Report of the Committee to Review the *Offences Against the State Acts 1939 – 1998* and Related Matters (the Hederman report) <http://www.justice.ie/en/JELR/hederman%20report.pdf/Files/hederman%20report.pdf>

Professor Dermot Walsh was the only dissenting voice on the committee and called for the abolition of the offence of withholding information (among other offences) as it would “positively encourage the use of the power against persons who are merely suspected of having information about the commission of a relevant offence by others.”

He went on to state that:

“The offence of withholding information created by section 9 is, in my view, fundamentally objectionable in a society which seeks to strike a fair balance between the autonomy of the individual and the intrusive demands of the State. Just as the State should not use the criminal sanction to compel an individual to provide evidence against himself or herself in a criminal investigation, so also should it not use the criminal sanction to compel the individual’s co-operation with a police investigation.”

Comparative powers in the UK

It is interesting to contrast the use of s. 9 with similar legislation in the UK (S.38b and S.39 of the *Terrorism Act 2000*). The comparable provision in Irish law is used on a much more regular basis. The withholding of information in relation to terrorist acts was the principal offence in only 22 cases in the UK between 2001 and 2009.¹¹

The UK had moved away from a general duty to inform under s. 18 of the *Prevention of Terrorism Act* following Lord Lloyd of Berwick’s independent *Inquiry Into Legislation Against Terrorism*, published in October 1996. Lord Lloyd noted concerns that the offence was little used and appeared to be of little

practical value in increasing the flow of information to the police. He stated that:

“The provision is commonly criticised on two grounds. First, there is the point of principle that, while every citizen has a moral obligation to help the police, the state should be reluctant to transform this into a legal duty. The second argument is a practical one; that prosecutions under s.18 are most often used against members of the families of suspected terrorists, putting them in an impossible position of conflicting loyalties.”

The legislation was amended to place a duty to report only on beliefs and suspicions which people acquire as a result of information coming to their attention in the course of their work.

However, in the wake of the London bombings in 2005 new anti-terrorism legislation was brought in which reintroduced a general duty to inform of suspicions in relation to terrorism. In the UK it is possible to be penalised for not giving information before an event, and for not giving information after an event.¹²

Legislative gaps

As outlined above, current duty to inform legislation does not cover all crimes committed. *The Offences against the State (Amendment) Act 1998* places a duty on all individuals to disclose information or suspicions they have about serious crimes. This definition of serious crimes excludes sexual offences. The current specialised duty to inform legislation targets two particular areas: white collar crime and money laundering. Recent banking and child abuse scandals have shown that some individuals and organisations knew or

¹¹ <http://webarchive.nationalarchives.gov.uk/20110220105210/rds.homeoffice.gov.uk/rds/pdfs09/hosb1809.pdf>

¹² See *Girma* case at http://www.cps.gov.uk/publications/prosecution/ctd_2007.html#a06

suspected that crimes were being committed but did not alert the authorities. This may have been because of the fear of the consequences if the suspicions were unfounded, or because the individuals were not under a legal obligation to inform.

Proposed legislation

As mentioned previously, the distinction between felonies and misdemeanours was abolished under Section 2 of the *Criminal Justice Act* 1997.

Oireachtas debates from this time¹³ show an awareness that the abolition of this offence would mean that it was not a crime not to report child abuse.¹⁴

However, it appears that it was expected that some form of mandatory reporting of child abuse would be put on a statutory footing in the then near future. This did not transpire and mandatory reporting is due to be introduced in 2012 through the placing of the Children First guidelines on a statutory footing.

These guidelines and the proposed *Withholding Information on Crimes against Children and Vulnerable Adults Bill* will place additional disclosure duties on individuals. The Withholding Bill will criminalise equally the withholding of information in relation to serious crimes against children and vulnerable people. *The Protections for Persons Reporting Child Abuse Act (1998)* provides whistleblowing protection for people reporting suspected child abuse in good faith – however a similar protection does not currently extend to people reporting alleged abuse of vulnerable people.

¹³<http://debates.oireachtas.ie/dail/1996/06/06/0007.asp>. The non-use of a misprison of felony was also discussed

¹⁴<http://debates.oireachtas.ie/JUS/1996/11/26/0008.asp#N8>

Whistleblowing

Whistleblowing is a process whereby a person perceives an activity to be illegal, unethical or immoral, and discloses this activity. There are several reasons why a person may do this: legal requirement, civic duty, or for protection.

The term “*whistleblower*” originates from the British police, who would blow their whistles when they noticed the commission of a crime.¹⁵

As stated above, for the purposes of this *Spotlight*, whistleblowing is taken to mean a voluntary disclosure.

While whistleblowing should be encouraged for the public good, a person is unlikely to voluntarily come forward with such information without some system for protection. The person may well be in a vulnerable position (an employee giving information against those who pay their wages), be wary of the consequences, retaliation or stigma attached, or be unsure as to what level of suspicion is needed for investigation to begin. Protection given usually takes the form of one of the following:

- Protection of identity (giving the whistleblower anonymity);
- Legal protection (making sure the whistleblower does not face legal liability for their disclosure).

Any protection is contingent on the disclosure being *bona fides*, or made in good faith. Genuine suspicions that turn out to be false are protected.

¹⁵ Eversheds solicitors, “*Whistleblowing*”, 1st October 2010.

<http://www.eversheds.ie/News.aspx?ID=79D21E24-862B-4685-A66A-2D7059FB72E2&PID=a257bece-c1e7-464a-9cd0-fde10d3a18c3&NID=18d93d8c-20d3-4afd-98e3-a0b31c69d0e8&M=2>

False allegations that are made unreasonably will not be protected.

History of whistleblowing

It has been suggested that in Ireland, the concept of whistleblowing is contentious, given the historical connotations of informing on a person.¹⁶

These connotations have survived to modern times. In a 1973 case, *Berry v Irish Times*,¹⁷ Berry sued for the publication of a placard which read "Peter Berry – 20th century felon setter – helped jail republicans in England". While his defamation case failed, several of the judges commented on the words used and their historical connotations:

Text box 2: Historical view of informers (whistleblowers)

"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 with loathing and abomination by all decent people."

Source: *Berry v Irish Times*, McLoughlin J (1973)

In recent history, there have been several high profile examples of whistleblowing, such as the former head of Group Internal Audit, Eugene McErlean, disclosing allegations of overcharging and questionable share dealings in AIB to the Financial Regulator. Another example is disclosures by nurses bringing to light certain well-publicised medical scandals, such as Rostrevor House Nursing Home, and Bernadette Sullivan giving information on Dr Neary at Our Lady of Lourdes Hospital, Drogheda.

¹⁶ Henry Murdoch, "Touting for Business: the rise of the Whistle Blower", *Law Society Gazette* (Oct 2003) 8

¹⁷ *Berry v Irish Times* [1973] IR 368

Current legislation relating to whistleblowing

To date, Irish legislation has been sectoral, applying to defined parts of Irish society/industry, and has not been standardised. There is no general legislation for whistleblowing.

Most whistleblowing legislation has been attached to the creation of new public oversight bodies, to protect those cooperating with the bodies and increasing their regulatory enforcement. Examples of such bodies are the Standards in Public Office Commission (SIPO),¹⁸ the Health and Safety Authority (HSA),¹⁹ and the Health, Information and Quality Authority (HIQA).²⁰

There are penalties for any employers or other persons who punish or intimidate persons for whistleblowing, though these vary by Act. The *Safety Health and Welfare at Work Act 2005* and *Employment Permits Act 2006* already offer whistleblower compensation that is deemed to be "just and equitable in the circumstances". The *Unfair Dismissals Act 1977* (as amended) provides up to two year's salary. Nevertheless, it has been suggested that the provisions do not always go far enough, and there is still a threat of a whistleblower never working in their professional area again.²¹

Though existing legislation on whistleblowing has provision for punishing false statements, the penalties, like protections above, can vary widely, from a small fine, to a maximum sentence of three years

¹⁸ *Standards in Public Office Act 2001*

¹⁹ *Health and Safety Authority Act 2005*

²⁰ *Health Act 2007*

²¹ Andrew Sheridan, "Blowing the whistle", *Law Society Gazette* (Aug/Sept 2010) 20.

<http://www.lawsociety.ie/Documents/Gazette/Gazette%202010/AugSept2010.pdf>

imprisonment under the *Health Act 2007*.

The Irish courts have already found that the disclosure of confidential information will almost always be justified in the public interest where it relates to a crime or an intended

crime.²² The position is less clear in civil cases, to which the bulk of the cases below would relate.

The most recent piece of legislation including whistleblower protection is the *Criminal Justice Act 2011*, dealing specifically with white collar crime.

Text box 3: Current legislation giving protection to whistleblowers

White Collar Crime: See the *Criminal Justice Act 2011* (discussed above).

Child abuse: *The Protections for Persons Reporting Child Abuse Act (1998)* provides protection for people reporting suspected child abuse in good faith.

Pensions: Certain persons involved in administering a Pensions Scheme (such as an auditor, actuary, trustee, insurance intermediary, or investment business firm) are required to report to the Pensions Board reasonable suspicions of fraud or misappropriation (see above – failure to disclose). Section 84 of the *Pensions Act 1990* states that regardless of whether there is a duty or disclosure is voluntary, no liability or action will be taken against a person in court for whistleblowing. This includes an employee, and anyone who fires an employee for making a report will be guilty of an offence under the Act. Under s. 85, any such report is absolutely privileged. Pension Schemes include PRSAs.

The Competition Authority: Under s. 50 of the *Competition Act 2002*, people who in good faith report suspected competition law offences are not liable for damages regarding their statement. An employer cannot penalise an employee in such circumstances.

Health and Safety: Under the *Safety, Health and Welfare at Work Act 2005*, an employer cannot penalise staff for complying with the law, making a complaint about safety, health and welfare matters, or giving evidence in labour proceedings.

Electronic Communications: Under s. 24A of the *Communications Regulation Act 2002*, protection is given to persons who disclose information on the conduct of undertaking providing electronic communications services.

Health Services: Under ss. 55A-55T of the *Health Act 2004*, protection is given to persons who disclose information relating to health services.

Consumer Protection: Under s. 87 of the *Consumer Protection Act 2007*, protection is given to persons inform the National Consumer Agency of relevant offences being carried out.

Charities: Under s. 61 of the *Charities Act 2009*, protection is given to persons who report non-compliance with the Act in relation to charitable organisations.

NAMA: Under s. 222 of the *National Asset Management Agency Act 2009*, an employee of a participating institution, or a NAMA officer, who informs the Gardaí or a NAMA Board Member of suspected offences, then they will not have committed a breach of duty, unless the person is acting in bad faith.

FÁS (soon to be Solas): Under s. 7 of the *Labour Services (Amendment) Act 2009*, protection is given to person who reveals certain information in relation to FÁS, including suspected offences being carried out. An employer cannot threaten or penalise a person who reveals such information. A person who gives false information will be guilty of an offence.

²² *NIB v. RTÉ*, Unreported High Court, 6 March 1998, 1998 No. 1306p.

Despite the numerous Acts, there appears to be limited use of whistleblower protection provisions in Ireland. Sheridan²³ suggests several reasons why this may be:

- a lack of awareness of whistleblowing provisions due to having so many different statutes;
- the absence of whistleblowing in sectors where it is needed (though bear in mind that since Sheridan commented, the *Criminal Justice Act 2011* was enacted);
- there has been little experience of whistleblowing in Ireland and a whistleblowing culture does not exist;
- a combination of all these.

The current system under Irish law of sectoral whistleblowing protection means that provisions can lead to confusion, a lack of awareness and ultimately reduces the potential level of whistleblowing.

In addition, greater consideration needs to be given to related matters, such as the distinction between compulsion and voluntary disclosure, dealing with false disclosure and disclosure that proves honestly unfounded, along with sanction for prevention of disclosure.

Non-legislative whistleblowing in Ireland

Not all whistleblowing is statutory. There are also non-legislative schemes for protecting and rewarding whistleblowers.

²³ Andrew Sheridan, "Blowing the whistle", *Law Society Gazette* (Aug/Sept 2010) 20. <http://www.lawsociety.ie/Documents/Gazette/Gazette%202010/AugSept2010.pdf>

Examples of current campaigns that can be regarded as whistleblowing are:

Gardai²⁴ - Garda Confidential Line [1800 666 111] and Crimestoppers [1800 250 025].

Revenue - The *Revenue Regulation Act 1890* allows Revenue to make tax-free awards to whistleblowers where information leads to the recovery of unpaid taxes (usually subject to a maximum of €5,000). Revenue also has a Drugs Watch Scheme [1800 295 295].

Business Software Alliance - To prevent computer piracy [1890 510 010, infoireland@bsa.org]. A reward of 10% of the value recovered, up to €10,000, is offered for information leading to a successful prosecution or settlement.

Irish Insurance Federation - Local telephone facility - Insurance Confidential [1890 333 333]. Concerned members of the public can report suspected scams and bogus claims.

Practice in certain Professions

Certain regulated professions or vocations have requirements (usually self-regulated), relating to the disclosure of information and the protection of those disclosing such information.

Medicine – The Medical Council can conduct investigations of misconduct and fitness to practice under the *Medical Practitioners Act 1978*. There are professional guidelines and standards apply to nurses also.²⁵

²⁴ An Garda Síochána have an official fund to pay informers for information. This is part of the "Secret Service Account", which appears in the list of allocations in the Minister for Finance annual budget statements.

²⁵ See *A Guide to Ethical Conduct and Behaviour* (6th edition - 2004), para 4.3., and *Code of Professional Conduct of each Nurse and Midwife* (2000).

Law – The Bar Council (barristers) and the Law Society (solicitors) have self-regulated systems for investigating misconduct.²⁶ Please note that the Legal Services Regulation Bill 2011 will change this, bringing all practitioners into one complaints and investigation system.

Accountants - The Institute of Accountants in Ireland has a statutory system in place to deal with complaints from members of the public, from the Institute's own regulatory committees, and in relation to reports in the media which relate to its members.²⁷

Engineers - a chartered engineer who has reasonable grounds for believing that another engineer is in breach of the code of ethics with risk of serious detriment to any person must inform the Institution of Engineers.²⁸

Proposed developments in Ireland

General rather than sectoral whistleblower legislation has been called for repeatedly within the Oireachtas.²⁹

The Government of the day in 2000 had within the Programme for Government a commitment to a bill modelled on Britain's *Public Interest Disclosure Act 1998* (PIDA), which would have protected all those who disclose, in good faith, suspicions of serious wrongdoing to an appropriate authority. This was the *Whistleblowers Protection Bill 1999*

[PMB],³⁰ originally presented by the Labour Party. The Bill was dropped in 2006. The reason given by the Government of the day was that legal advice indicated such a generic provision would be unworkable in this jurisdiction.³¹ The legal advice was not made public.

Rather, the approach to whistleblowing has been sectoral, as evidenced recently by tandem whistleblowing protection relating to white-collar crime in the *Criminal Justice Act 2011* and the *Prevention of Corruption Act 2010*³² which added whistleblower protection for those disclosing information about corruption.

At the time, the 2010 Act was referred to as a "whistleblowers charter",³³ though the legislation is not comprehensive and does not contain a general protection for whistleblowing.

There have been two recent Private Members Bills on the topic: the *Whistleblowers Protection Bill 2010* [PMB]³⁴ and the *Whistleblowers Protection Bill 2011* [PMB].³⁵ The 2010 Bill has lapsed. The 2011 Bill, brought by the Technical Group, remains on the Order Paper and was presented (First Stage) in June 2011.

The current Government, formed in March 2011, included in their

³⁰ *Whistleblowers Protection Bill 1999* [PMB]. <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/1999/1699/default.htm>

³¹ *Whistleblowers Protection Bill 1999: Leave to Withdraw*, Dáil Debates, Vol. 617 No. 72 at 15 (4 April 2006). <http://debates.oireachtas.ie/dail/2006/04/04/00015.asp>

³² *Prevention of Corruption Act 2010*. <http://www.irishstatutebook.ie/2010/en/act/pub/0033/index.html>

³³ "Whistleblowers charter an important step", *Meath Chronicle*, 26/05/2011. <http://www.meathchronicle.ie/opinion/comment/articles/2010/05/26/3997311-whistleblowers-charter-an-important-first-step>

³⁴ *Whistleblowers Protection Bill 2010* [PMB]. <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2010/0810/document1.htm>

³⁵ *Whistleblowers Protection Bill 2011* [PMB]. <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2011/2611/document1.htm>

²⁶ See "A Guide to Professional Conduct of Solicitors in Ireland" (2002) chap 7.8.

²⁷ See s. 73 of the *Company Law Enforcement Act 2001*.

²⁸ See "Code of Ethics - The Institution of Engineers of Ireland" (Nov 2003) - clause 1.11.

²⁹ There are significantly more than 100 hits when the term is searched for through the Oireachtas debates website.

Programme for Government³⁶ a commitment to introduce whistleblowers legislation. Specifically:

“We will put in place a Whistleblowers Act to protect public servants that expose maladministration by Ministers or others, and restore Freedom of Information.”

In Section C of the Government Legislation Programme, there is the Government intention to draft the *Public Interest Disclosure Bill*,³⁷ with a stated purpose “to introduce overarching legislation for the protection of whistleblowers.” The Heads of the Bill have yet to be approved by Government, and publication is expected in 2012. At Committee Stage of the *Criminal Justice Act 2011*, Speaking at Committee Stage, the Minister for Justice stated:

“It is a Government commitment to bring forward comprehensive legislation on whistleblowers. My colleague, the Minister for Public Expenditure and Reform, Deputy Brendan Howlin, will deal with it, but there is substantial work still to be undertaken.”

Whistleblowing was initially considered as an element of the recent referendum. However, the wording of the proposed referendum was not approved by the Attorney General.³⁸

³⁶ Department of the Taoiseach, *Programme for Government 2011*.
http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.pdf

³⁷ Department of the Taoiseach, *Government Legislation Programme*, Section C.
http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/SECTION_C11.html

³⁸ “Plans for whistleblower referendum rejected”, *Irish Examiner*, 25th July 2011.
<http://www.examiner.ie/ireland/politics/plans-for-whistleblower-referendum-abandoned-162122.html>

Whistleblowing in other countries

Internationally, whistleblowers are considered important when it comes to combating corporate crime and corruption.

In the United States, United Kingdom,³⁹ New Zealand,⁴⁰ Australia, Canada and South Africa, comprehensive safeguards for whistleblowers have been in place for some time.

In the UK, for example, these protections have been used to create a greater culture of speaking up than in Ireland. Most Common Law jurisdictions have recognised the importance of flexible, comprehensive laws in preventing corruption, fraud, waste of public resources, discrimination and sexual abuse. International evidence shows the value of whistleblowing. More than one in four cases of corruption and fraud are disclosed by whistleblowers. Many cases of sexual abuse and wrongdoing at work are uncovered by whistleblowers.⁴¹

This is not to say that such laws in different countries have not been without problems. Whistleblowing is not just problematic for the Irish legal system.

In the United States, there is theoretically sophisticated legislation, though in practice caselaw has highlighted difficulties in securing protection for whistleblowers. In the United Kingdom, whistleblowing is contingent on the informer acting in good faith with reasonableness. This means that the intent of the whistleblower, and not the action of

³⁹ *Public Interest Disclosure Act 1998* [UK].
<http://www.legislation.gov.uk/ukpga/1998/23>

⁴⁰ *Protected Disclosures Act 2000* [New Zealand]

⁴¹ Estelle Feldman, *Whistleblower Protection: Comparative Legal Developments* (1999) 17
Irish Law Times 264

the company/persons acting, becomes the focus of the court action.

United States

Much of the academic research on whistleblowing relates to experience in the United States. It shows that despite Federal and State legislation that should offer protection, the whistleblower remains exposed and isolated.

The *Civil Service Reform Act of 1978* was an attempt to protect whistleblowers revealing mismanagement, waste, fraud and abuse in Federal Government. The protection given by Act was deemed to be insufficient, so the *Whistleblower Protection Act of 1989* was enacted by Congress to improve the protection for whistleblowers in Federal Government.

The Office of Special Counsel (OSC) was established to aid whistleblowers by providing anonymous investigation and preventing retaliation. Despite this, Irish legal academic Estelle Feldman has stated that it has failed to provide this protection. She gives the following examples:

1. A 1993 Senate oversight hearing revealed that far from protecting whistleblowers, the OSC suffered from numerous unauthorised leaks and a lack of explanation for OSC decisions in relation to the approach taken towards investigations.
2. Alex Kozinski. Kozinski used the OSC's own manual, meant to protect staff and whistleblowers from retribution from employers, as a guide to teach a course for federal managers on how to fire staff without repercussions from the OSC.

For non-federal employees, American employment law has few protections and is based on the "employment at will" doctrine. Whistleblowers will be

protected if a case is made out for a public policy exception to the "employment at will" doctrine. The exceptions vary depending on each State, and there is usually a strict threshold to prove: there have been cases where an employee has not been protected for refusing to fraudulently alter official documentation.

Another piece of United States legislation, the *Federal False Claims (Amendment) Act 1986*,⁴² gives strong protection to whistleblowers.⁴³ It was enacted after some high profile cases of fraud emerged, perpetrated against the federal government. The Act gives individuals or corporations a percentage of the recovery (fine) where they provide information of fraud against Federal Government which leads to a successful prosecution. The fine can be up to three times the amount of fraud, and the reward can be up to 30% of that fine.

This system provides financial incentive for bringing such information to light and provides security through compensation for persons risking their careers and livelihood by speaking out. It compensates corporations whose business of market share may have been damaged by the fraud.

United Kingdom

In the United Kingdom, the main legislation regarding whistleblowing is the *Public Interest Disclosure Act 1998* (PIDA).⁴⁴ This Act heavily influenced the drafting of the *Irish Whistleblowers*

⁴² *Federal False Claims (Amendment) Act 1986. Pub.L. 99-562, Oct 27, 1986, 100 Stat. 3153; 31 USCA § 3732*

⁴³ For further information, see "*The Civil False Claims Act Enlisting Citizens In Fighting Fraud Against the Government*", A Report by Getnick, Neil V. and Skillen, Lesley A. for the Civil Prosecution Committee New York State Bar Association, Commercial and Federal Litigation Section, New York May 1996

⁴⁴ *Public Interest Disclosure Act 1998 [UK]. <http://www.legislation.gov.uk/ukpga/1998/23>*

Protection Bill 1999,⁴⁵ Ireland's primary attempt to enact general whistleblower protection. The PIDA gives protection to the *bona fide* whistleblowers who act reasonably and in good faith. Unlike in America, protection is not given where disclosure is made for personal gain. Feldman⁴⁶ outlines three important elements to the PIDA:

1. The Act makes any confidentiality clause void where the employee suspects an offence or breach of legal obligation. Thus, traditional rules of contract law and employment law are not applicable where legitimate whistleblowing takes place;
2. Extra-territorial disclosure (relating to information outside of the UK) is protected. This is important in relation to multi-national companies;
3. The Act prohibits any threats or negative consequences due to an employee making a protected disclosure.

Whistleblowing under the Act is for specific legal wrongdoing; exposing poor management, incompetence or negligence is not protected. Applying the Act to the Irish context, a person who was fired for trying to expose incompetence before the banking crisis would not have been protected (though obviously a person may have a case under employment law for unfair dismissal).

In addition, there is no protection for whistleblowing regarding breaches of the *Official Secrets Acts*.⁴⁷

Court cases in the UK, like in Ireland, have interpreted whistleblowing as a

⁴⁵ *Whistleblowers Protection Bill 1999* [PMB]. <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/1999/1699/default.htm>

⁴⁶ Estelle Feldman, *Whistleblower Protection: Comparative Legal Developments* (1999) 17 Irish Law Times 264

⁴⁷ See the *Official Secrets Act 1989*. <http://www.legislation.gov.uk/ukpga/1989/6/contents>

balancing act between competing public interests, such as a duty of confidence within working arrangements, and the interest of the community to know of wrongs perpetrated.⁴⁸

Conclusion

An exploration of the duty to disclose reveals that the areas of both mandatory and voluntary disclosures are complex. There is an increasing tendency in legislation to compel or facilitate disclosure in relation to crimes which have been committed or are suspected of being committed.

Any future criminalisation of a failure to disclose suspicions or beliefs will have to be approached cautiously and be matched by appropriate protections, including whistleblower protection.

Further debate and more research on the current general duty to report serious crimes, and further research into how it has been used in practice since 1998 would be welcome.

The language used in duty to inform legislation, and the sectoral nature of whistleblowing legislation can lead to confusion about what an individual's duty of disclosure is. A more overarching approach to whistleblowing protection than currently exists may help to eliminate confusion in the area.

In addition, the literature would tend to indicate that any legislation which criminalises quite severely the non-disclosure of the suspicion of a crime committed by another person should be easily understandable and precise. Legislation should also specify clearly the defences to a charge of withholding information, such as who is entitled to claim privilege or what constitutes a reasonable excuse.

⁴⁸ *British Steel v. Granada Television* [1981] A.C. 1096