TRANSPARENCY INTERNATIONAL IRELAND

SPEAK UP

SPEAK UP REPORT 2020

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

www.transparency.ie

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SPEAK UP

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1.
INTRODUCTION

This report draws from anonymised data collected from 566 people who approached Transparency International (TI) Ireland's Speak Up Helpline for information, referral or support between January 2017 to January 2020. Some Helpline data from 2015 to the beginning of 2017 has been presented to show changes in patterns from the subsequent period. The report also reflects on some important developments and activities during the year.

This is the third biennial Speak Up report to be published. It highlights the types of concerns our clients are reporting, the processes that people believe are abused, and the sectors and institutions they consider to be vulnerable to corruption and other forms of wrongdoing. This data can be used to identify corruption risks and we outline a number of recommendations to help address these risks in the final section. The report also provides an update on changes made to the Protected Disclosures Act 2014 (PDA), as well as the changes to be made under the EU Whistleblowing Directive.

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

ABOUT THE SPEAK UP HELPLINE, THE TRANSPARENCY LEGAL ADVICE CENTRE AND INTEGRITY AT WORK

The Speak Up Helpline was launched by TI Ireland in May 2011 to provide support to whistleblowers, witnesses and victims of corruption and other wrongdoing. Since then, it has provided information, and referral services to over 1,700 people. Our team has also provided advocacy support to clients including Garda whistleblowers Maurice McCabe and John Wilson, helping counter the narrative of them as 'trouble-makers'.

Since the introduction of the PDA we have noticed a 123% increase in the number of callers reporting concerns from inside their organisations. This increase has continued since the 2017 Speak Up Report was published and 33% of all Speak Up Helpline callers are seeking advice on making protected disclosures or how to deal with penalisation arising from a protected disclosure. This increase may partly be explained by the introduction of additional supports through the Transparency Legal Advice Centre (TLAC) and the Integrity at Work (IAW) initiative.

TI Ireland launched TLAC in 2016 to provide legal advice to anyone disclosing wrongdoing, particularly under the PDA. It is the only independent law centre in Ireland that specialises in providing free legal advice on protected disclosures. As of September 2020, TLAC had taken on 89 clients, and the market value of legal advice provided by TLAC's Solicitors to date is estimated at over €880,000.

The demand for the legal services of TLAC continued steadily between 2017 and 2019.

However, it has often been a challenge to meet client demand for free legal advice, and sometimes there are waiting lists for advice due to TLAC's limited funding and capacity to provide this essential service.

TI Ireland also launched Integrity at Work (IAW) in 2016, and it is the world's first multi-stakeholder initiative that publicly commits organisations to protect workers that speak up about wrongdoing. IAW is a not-for-

profit initiative dedicated to informing employers from all sectors about the implications and requirements of the PDA. IAW supports member organisations in developing a workplace culture that encourages staff to speak up and deal with their concerns in a thorough and timely manner. Through the IAW programme, TI Ireland helps employers to improve their systems for receiving and dealing with disclosures. The programme also sign-posts workers to the Speak Up Helpline and TLAC and provides reassurance to staff that they can access specialist advice before, during and/or after raising a concern. See page 30 for more information.

THE TEAM

The Speak Up Helpline is coordinated by Donncha Ó Giobúin of TI Ireland and directed by John Devitt, TI Ireland Chief Executive. Protected disclosure cases are referred to Judy O'Loan, Managing Solicitor of TLAC and Lorraine Heffernan, Assistant Managing Solicitor of TLAC. Judy and Lorraine are supported by Solicitor William Slattery. Donncha is supported by a small team of volunteers who generously give up their time to operate the Helpline and who offer a 'triage' service to help identify the support that TI Ireland or TLAC can offer to callers. The team is also supported by Stephanie Casey, Programme Manager and Niamh O'Connor, Programme Executive of the Integrity at Work initiative.

The TI Ireland and TLAC team 2019. From left to right (back row) – Donncha Ó Giobúin, Lorraine Heffernan, Judy O'Loan, Niamh O'Connor and John Devitt; From left to right (front row) – Elliott Jordan-Doak, Stephanie Casey and William Slattery.

TI Ireland, Integrity at Work and TLAC

TI IRELAND

Supported by

- Grants, Membership Fees and Public Donations

Providing support to

- Individuals and Organisations

Responsible for

- Programmes
- Research
- Advocacy
- Fundraising

INTEGRITY AT WORK

Supported by

- Grants, Earned Income and Membership Fees

Facilitated by

- TI Ireland

Providing support to

- Organisations

Activities

- Standard Setting
- Capacity Building
- Awareness
- Dialogue

SPEAK UP/TLAC

Supported by

- TI Ireland
- Integrity at Work income
- Grants/Donations

Operated by

- TI Ireland/Transparency Legal Advice Centre

Providing support to

- Individuals

Responsible for

- Information
- Referral
- Guidance
- Legal Advice

ACKNOWLEDGEMENTS

TI Ireland and TLAC are very grateful for the support of the Public Interest Law Alliance who have provided free legal support and has facilitated pro bono legal services from firms including Kennedy's Solicitors, Eversheds Sutherland, and the many solicitors and barristers who have supported our clients over the years such as Sean Costello & Co, Micheal Kinsley BL and Gary Daly & Co. The essential support TI Ireland and TLAC provide could not be offered without the financial assistance of voluntary contributions from the public and our institutional donors. Funding for TLAC, the Speak Up Helpline and IAW is currently provided by the Department of Public Expenditure and Reform, the Department of Education and Skills and the Department of Justice and Equality.

We also want to thank the many volunteers that have given their time and skills to TI Ireland and TLAC.

The Speak Up helpline could not be run without their support. We would like to thank the following volunteers for their dedication and support since 2017:

Alhanoof Alsunidi, Batool Aly, Erik Berrones, Paul Bruun-Nielsen, Zoe Byrne, Anastasia Campbell, Brónagh Carvill, Mary Kate Cawman, Caoilfhionn Cullen, Niall Dunphy, Renée Eisenhardt, Luna Ernst, Áine Fellenz, Piet Flintrop, Colleen Guernier, Kieran Henderson, Ugne Kaskelyte, Carter Kelly, Cloey Lane, Reilly Lee, Carla Lima, Pauline Lowe, Oilbhe Madden, Edmund Mahon, Aoife McNamara, Morgane Monteuuis-Dréval, Tadhg Morris, Emma Mulligan, Kate Murphy, Simone Murray, Lubani Nondo, Alison O'Dea, Simon O'Donnell, Alexis Pellechio, Stephanie Price, Lindsay Pulsford, Alison Radu, Lucianna Ravasio, Aisling Reidy, Mark Reidy, Cillian Rossi, Ronda Rupprecht, Sami El-Sayed, Niall Shannon, Ethan Shattock, Tanya Singh, Aniela Tolentino, Vincent Trometter, Meghan Van Portfliet.

Client Support

ACTION TAKEN	TOTAL	PERCENTAGE
Basic information/advice	344	61%
Referred	125	22%
Referred to legal advisor	92	16%
Advocacy support	1	0.3%

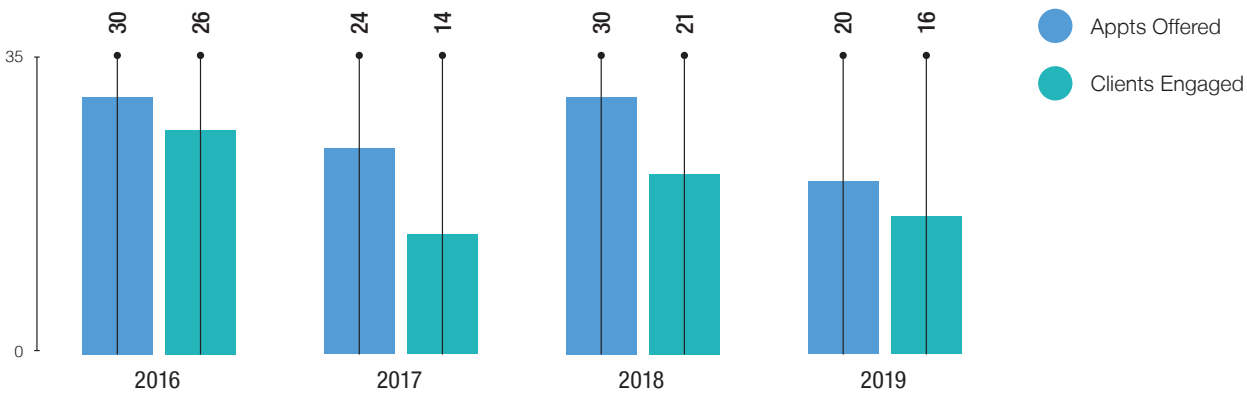
HOW WE WORK ON CASES

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

Speak Up callers are referred to TLAC for free legal advice where appropriate. A solicitor-client relationship is established (with the benefit of legal professional privilege) and advice is given on disclosure options and/or potential remedies. Given that the aim of the law centre is to provide legal advice to as many clients as possible, it does not litigate on their behalf.

The largest number of clients contacting the Speak Up Helpline have received basic information and advice on reporting channels and potential remedies for their concerns. More than 22% of clients have been referred to the relevant agency, while 16% of clients have been referred to a legal advisor – an increasing number of these are now being referred to TLAC for free legal advice. In rare circumstances, TI Ireland has also provided advocacy support or representation to clients.

TLAC client appointments offered and clients engaged



2. SUMMARY

WHISTLEBLOWING AND THE PROTECTED DISCLOSURES ACT

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

The experiences of Speak Up Helpline and TLAC clients have been informative in helping TI Ireland identify legal and practical obstacles to disclosing wrongdoing, in addition to the experiences of clients whose employers are members of the IAW programme. To that end, much of this report (on pages 25 and 35) deals with the PDA, how it has been amended, and the changes that will be introduced when the EU Whistleblowing Directive comes into force by December 2021.

The report looks at a number of rulings under the PDA and how these might impact on those making protected disclosures. The report also draws attention to potential shortcomings in the legal framework to be introduced through the EU Directive and offers proposals for further reform. TI Ireland's recommendations include extending the requirement on all organisations to have whistleblowing procedures in place, and to expand access to the employment law system to include all workers who have been penalised for making protected disclosures.

WHISTLEBLOWER REPRISAL

Previous Speak Up Reports have summarised some of the stories of witnesses and whistleblowers who reported concerns of wrongdoing to the Helpline over the previous two years. Unfortunately, too often these reports are met with inaction or reprisal. In the case of whistleblowers such as former Garda Sergeant Maurice McCabe, the consequences of inaction and reprisal were borne for more than a decade and documented by a Tribunal of Inquiry (an update on the conclusion of his case is on page 22).

Countless whistleblowers will never be vindicated or have their stories recorded in this way. Nonetheless, it is important their experiences be documented where possible and patterns of mistreatment and misconduct be highlighted in reports such as this. This is particularly important given emerging risks and trends that require workers to speak up without fear of futility or reprisal. The enormous challenge posed by the spread of Covid-19 in Irish workplaces is one such risk. The world is facing its most serious public health emergency in over a century and one caused, in part, by the silencing of whistleblowers such as Li Wenliang, the Wuhan based doctor who was one of the first to raise the alarm about the novel coronavirus in late 2019.[1] Li Wenliang's experience and that of his colleagues should have served as a warning to policy-makers and employers of the need to welcome bad news and create the conditions for workers to feel safe in speaking up. Unfortunately, that lesson has yet to be learned and the cost of that failure will be paid with the lives and health of millions of victims of the pandemic.

Retaliation against healthcare whistleblowers is a common phenomenon and is believed to pose serious risks for patients and safety.[2] Almost 40% of healthcare whistleblowers who contacted the Speak up Helpline between 2017 and 2019 reported that they were penalised after raising concerns of wrongdoing. This is significantly higher than rates across all sectors (24%), and health care workers account for 20% of all incidences of whistleblower retaliation reported to the Speak Up Helpline over the reporting period. The failure to protect or listen to whistleblowers will also have enormous financial consequences beyond the direct economic costs of national lockdowns. Within weeks of the spread of the virus to Europe, national health authorities were faced with orchestrated attempts to defraud them with scams selling faulty medical equipment and accounts of procurement corruption.[3] The pandemic will continue to create the conditions for corruption to thrive with governments procuring supplies without competitive tenders or the means to effectively detect corruption and fraud. It should not be assumed that Ireland is immune to such risks either and we will rely on whistleblowers more than ever to ensure that the damage done by the virus is not compounded by fraud and corruption in the supply of public goods and services.

GENERAL RECOMMENDATIONS

Although we propose reform of the PDA and sector-specific measures, protecting whistleblowers is not enough to stop wrongdoing on its own. This report makes several recommendations aimed at stopping corruption across the public and private sectors. These include calls for the establishment of a unitary anti-corruption agency and/or an inter-agency task-force which would allow law enforcement agencies and other state bodies to more proactively share intelligence and prosecute offences.

TI Ireland also repeats its call from 2017 to enact the Public Sector Standards Bill 2015 which lapsed earlier this year. It also calls for local authorities to be compelled to publish and report on their compliance with statutory Fraud and Anti-Corruption Alert Plans as well as to be provided with anti-corruption and ethics training. In addition, all public officials and representatives should be provided with ethics training and guidance. Resources should also be invested in educating the public on the risks and costs associated with economic crimes and corruption and ways in which they can take action against it.

Stopping corruption requires a comprehensive strategy aimed at promoting transparency, strengthening institutions, enacting and enforcing laws to hold the corrupt to account, and protecting those that speak up. In addition to lobbying for a range of measures aimed at stopping corruption, TI Ireland has dedicated much of its time to protecting whistleblowers. Since 2014 there has been a 123% increase in the proportion of whistleblowers seeking advice from the Speak Up Helpline and TLAC. These initiatives will need significantly increased funding if they are to continue their vital work in supporting whistleblowers and the organisations they work for.

“

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3.
WHO IS SPEAKING UP?

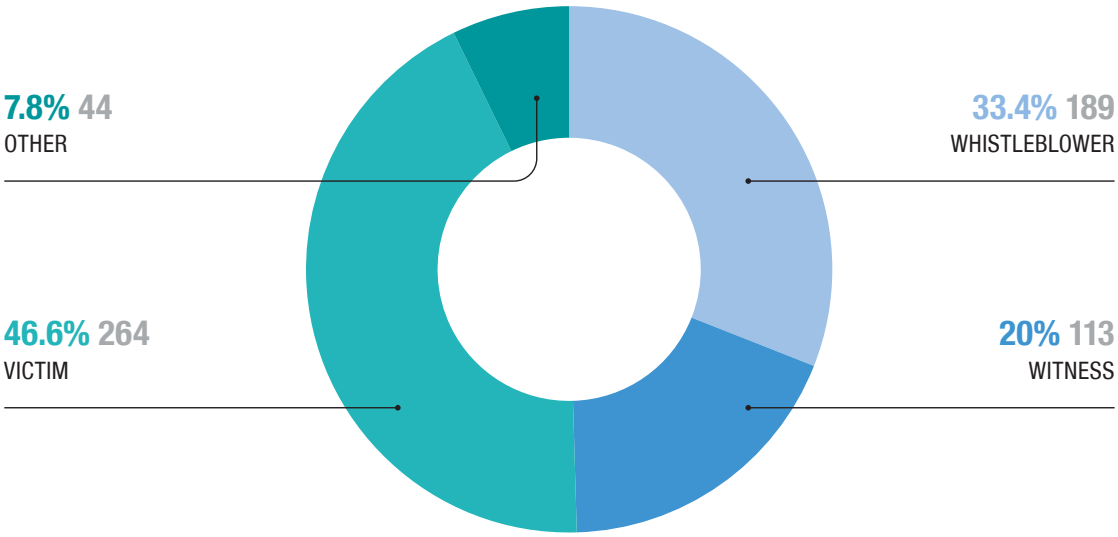
VICTIMS, WHISTLEBLOWERS AND WITNESSES

In the last reporting period,[4] 27% of calls were from whistleblowers (i.e. those who had reported wrongdoing witnessed at work), 24% were from witnesses, and 39% were classified as victims. This was a significant increase over the figures from the 2015 report, when just 15% of callers were categorised as whistleblowers. Between January 2017 and 31 December 2019, TI Ireland received an additional 566 unique calls to the Helpline and the number of whistleblowers continued to increase. During this time-frame, 33% of calls were from whistleblowers, 19% were from witnesses, and 46% were classified as victims.[5]

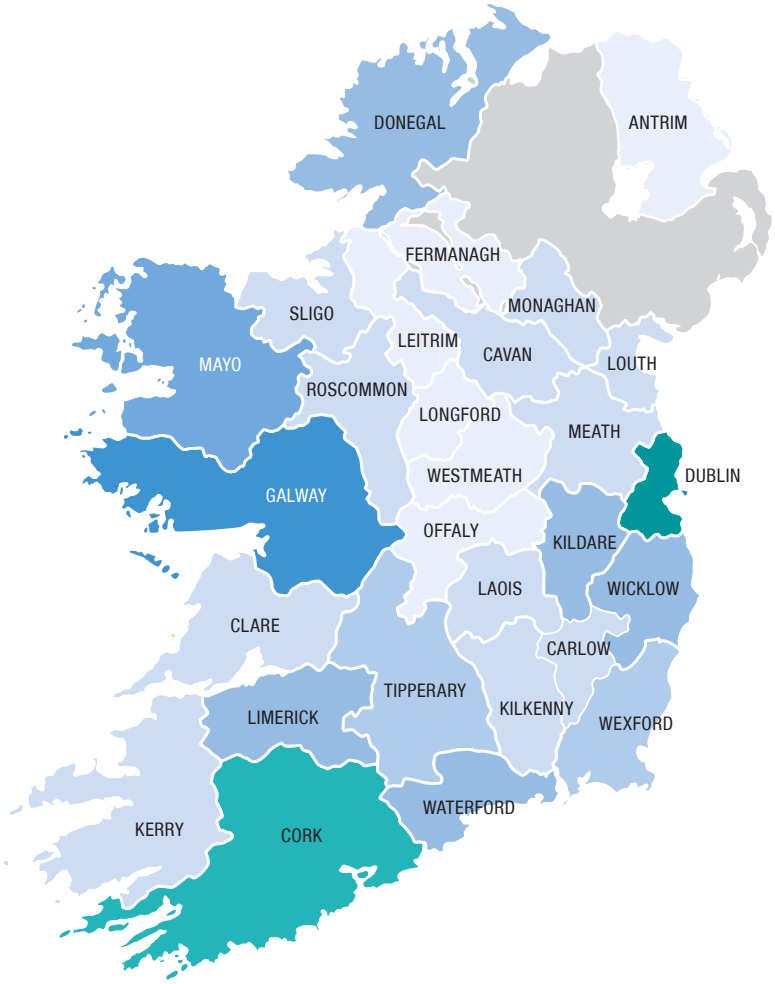
TI Ireland launched the IAW initiative and TLAC in 2016, and the number of members of IAW has grown steadily. Members signpost their staff to the Speak Up Helpline for independent guidance on speaking up. There is also more awareness of the availability of free legal advice on making protected disclosures from TLAC. This may partially explain the increase in the number of whistleblowers calling the Helpline. Other factors could include the prevalence of whistleblowing cases in the media, such as coverage of the proceedings and findings of the Charleton Tribunal in 2018.[7]

Not all callers felt comfortable disclosing their location. The total share of callers who identified their location as Dublin increased significantly over previous years, while there was a substantial decrease in the number of callers who came from Cork.

Client Category[6]



REGION	NUMBER	PERCENTAGE
Dublin	119	44.4%
Cork	19	7.1%
Galway	16	6.0%
Mayo	11	4.1%
Wicklow	10	3.7%
Kildare	9	3.4%
Limerick	8	3.0%
Wexford	7	2.6%
Tipperary	6	2.2%
Donegal	6	2.2%
Waterford	6	2.2%
Monaghan	5	1.9%
Laois	5	1.9%
Clare	5	1.9%
Meath	4	1.5%
Louth	4	1.5%
Kerry	4	1.5%
Sligo	3	1.1%
Kilkenny	3	1.1%
Cavan	3	1.1%
Roscommon	3	1.1%
Carlow	3	1.1%
Longford	2	0.7%
Westmeath	2	0.7%
Leitrim	2	0.7%
Antrim	1	0.4%
Fermanagh	1	0.4%
Offaly	1	0.4%



DEMOGRAPHIC PROFILE

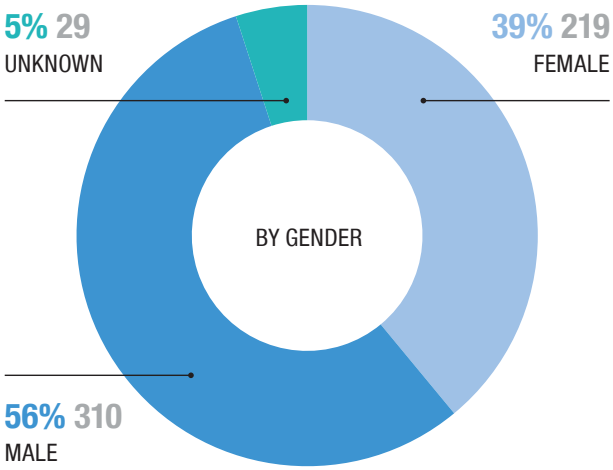
Gender of Speak Up Clients/Callers

Most Speak Up clients up to the end of 2019 were men, although the proportion of male clients fell slightly from 57% to 56%. Most clients categorised as whistleblowers also identified as male, with 61% compared to 34% female. A number of economic and social factors, such as profession and length of service, may explain the disparity between the number of male and female callers to the helpline and would justify further analysis.[8]

AGE PROFILE OF SPEAK UP CLIENTS/CALLERS

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

Gender and Age Profile of Clients/Callers



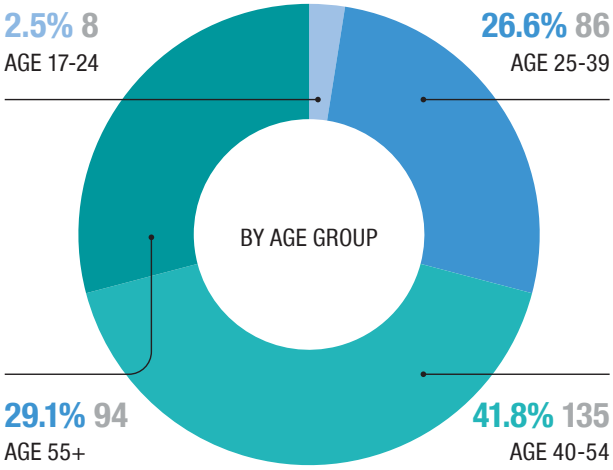


Photo: shutterstock.com/Artens

4.

WHAT ARE SPEAK UP CLIENTS CALLING ABOUT?

There was a significant increase in calls to the Helpline from people reporting concerns related to the Social Services sectors up to 2020, as well as a more moderate increase in the number of calls relating to public administration and charities. This may be partially due to a number of high-profile stories about wrongdoing within these sectors.[9]

The increase of reports relating to the charitable sector in particular mirrors an increase in reports made to the Charities Regulator over the period.[10] There was a marked decrease in the number of reports received about An Garda Síochána since the last report in 2017 – the bulk of which alleged garda inaction on reports of criminal offences. This reflected a spike in calls to the Speak Up Helpline in 2015 and 2016 from clients whose cases were submitted to the Independent Review Mechanism (IRM) established in May 2014 by the Department of Justice, Equality, and Law Reform.[11] There was a more moderate decrease (36%) in the number of callers reporting concerns relating to the Health Sector since the last reporting period.

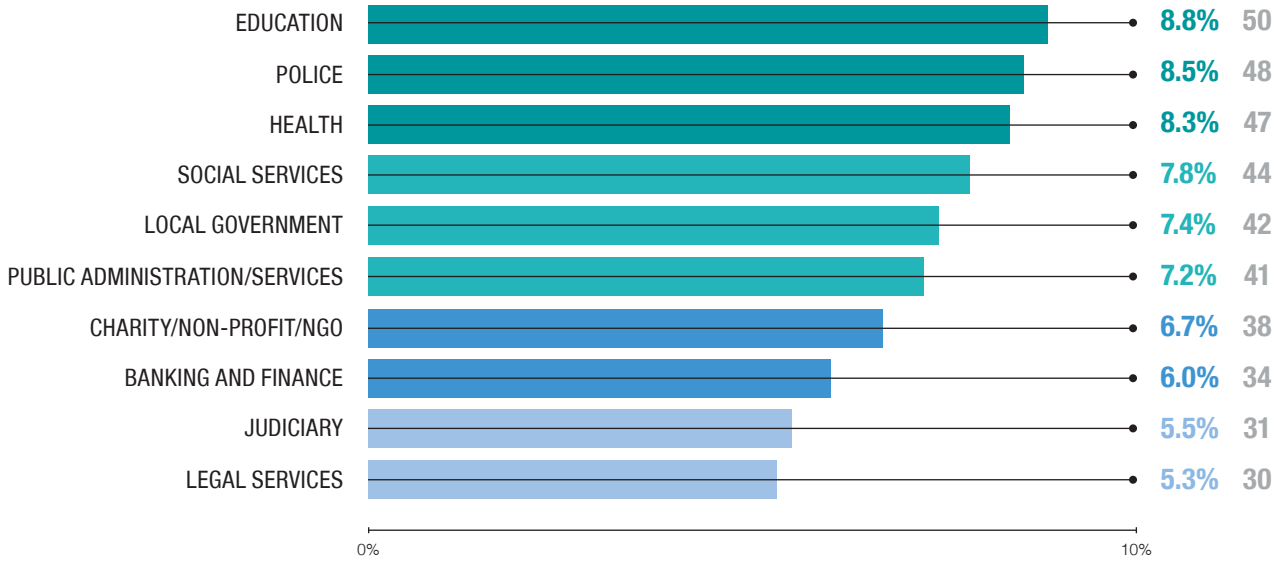
Education was the most reported sector to 2020 and the number of callers concerned about the sector increased by 10%. There was a marked increase in the number of whistleblower callers from the sector (35%). TI Ireland discusses some recent cases from this sector on page 20.

A larger number (11%) of callers preferred not to share information on the industry to which their concerns relate compared to 2017, when 9% declined to identify the sector they were concerned about.

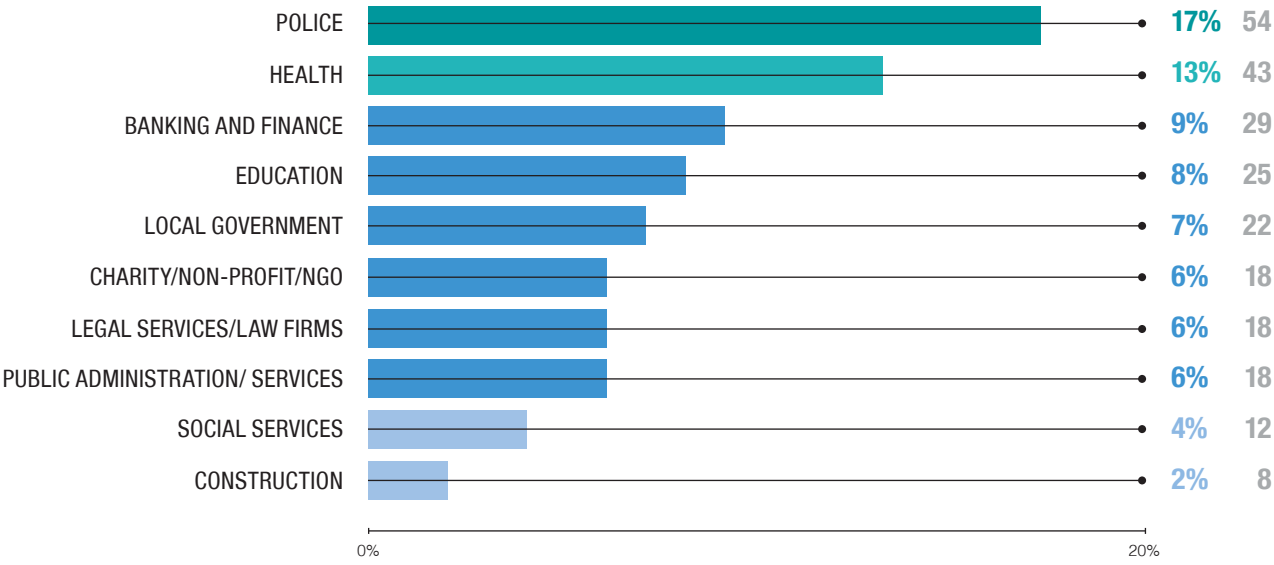
> **It is difficult to assess how problematic any one sector is in absolute terms and it may not be possible to establish whether any one category is more affected by wrongdoing relative to another. However, this data does point to a general lack of trust in public institutions in Ireland.**

SECTORS

Most Reported Sectors to 2020



Most Reported Sectors to 2018



It is difficult to assess how problematic any one sector is in absolute terms and it may not be possible to establish whether any one category is more affected by wrongdoing relative to another. However, this data does point to a general lack of trust in public institutions in Ireland which is evidenced in polling conducted by Eurobarometer in their recent survey on corruption in the EU.[12] Corruption in Ireland is viewed by the public to be a significant problem, with 68% of respondents saying that it is widespread. This compares to 50% on average in northern and western EU countries including Austria, Belgium, Denmark, Germany, Finland, Luxembourg, Netherlands, Sweden and the UK.[13] A quarter of Irish respondents to the survey said they had been personally affected by corruption in their daily lives compared with 11% of their Northern European counterparts. Irish respondents were also more likely to view government efforts to address corruption as ineffective, and that not enough was being done to pursue high-level corruption cases.

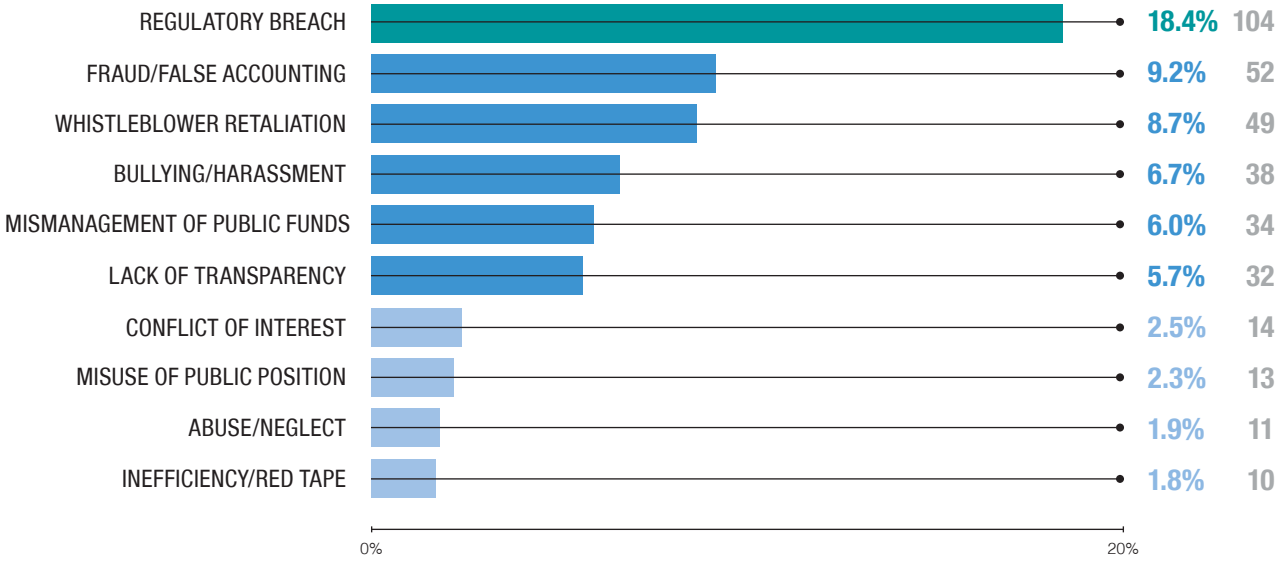
DETERMINING THE RISK OF CORRUPTION

Drawing on the research of academics in anti-corruption and white-collar crime such as Donald R Cressey and Robert Klitgaard, TI Ireland suggests that the risk of corruption can be determined by a combination of factors.[14] It can be calculated as a function of incentive, opportunity and inclination which is limited by external oversight (the possibility that a person will be held to account for his/her behaviour) and the individual's and society's own commitment to living by ethical values (integrity). In other words:

$$\text{CORRUPTION} = \frac{\text{INCENTIVE} + \text{OPPORTUNITY} + \text{INCLINATION}}{\text{TRANSPARENCY} + \text{ACCOUNTABILITY} + \text{INTEGRITY}}$$

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

Types of Wrongdoings reported by Speak Up clients/callers to 2020



The most common concerns reported by Speak Up callers were breaches of regulations. These were predominantly regulations governing health and safety, although they also included breaches of the Data Protection Acts. This is reflected in the top concerns reported by those categorised as whistleblowers (see table above) over the same period. This could indicate that more workers are contacting the Speak Up Helpline for guidance on reporting wrongdoing in the workplace as public awareness of the PDA increases. This may also explain an increase in the number of cases relating to bullying and harassment that Helpline callers report.

The percentage of callers reporting that they faced retaliation for speaking up has decreased by over a third since 2016. It is impossible to say with any degree of certainty why this is the case. That said, since clients are frequently referred to TLAC for legal advice, the Speak Up Helpline may no longer be capturing the same level of data on whistleblower retaliation which it might have done in previous years.

Reports of a lack of transparency and alleged failures to investigate wrongdoing reduced significantly over the 2019 reporting period. This could be partially due to the conclusion of the IRM which had led to a rise in calls about failures to investigate to the Helpline.

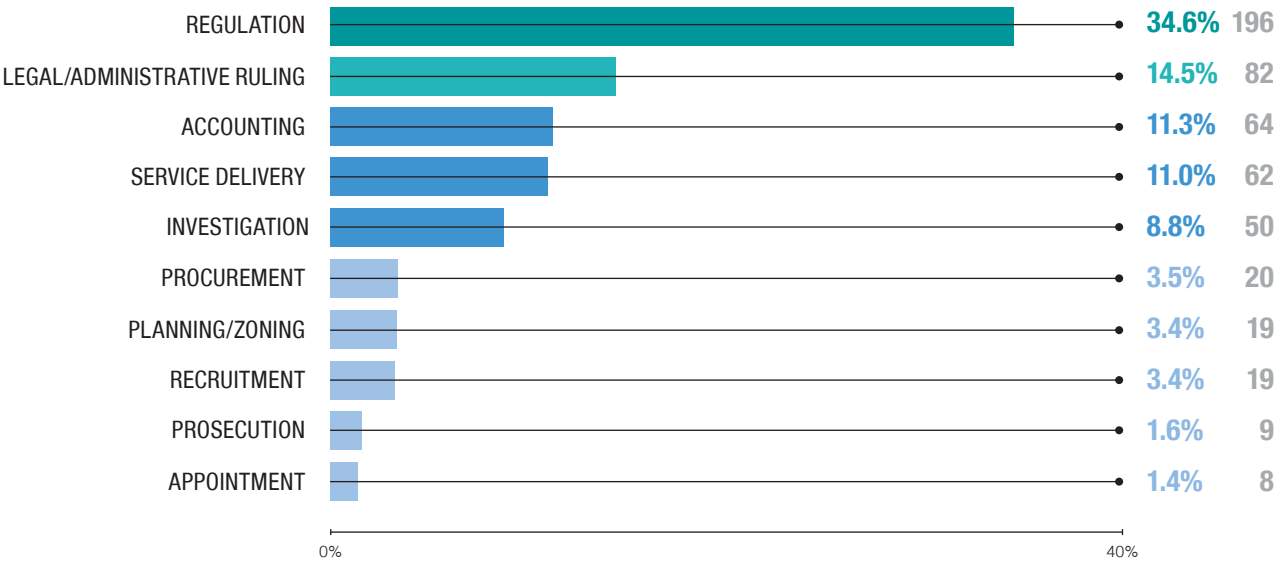
Fraud and false accounting, as well as mismanagement of public funds continued to be significant issues in 2019, although the percentage of these cases relative to the total has decreased. From 2017 to 2019, 9.2% of complaints related to alleged fraud or false accounting, which is down from 13.1% to the end of 2016. It was still the second most widely reported type of alleged wrongdoing during the year.

PROCESSES AFFECTED

The largest number of complaints to the Helpline during the previous period related to apparent failures to investigate wrongdoing. The percentage of these reports has decreased during the period to the beginning of 2020, due to the winding-down of the IRM. However, delays in investigating reports of wrongdoing; the manner in which investigations have been undertaken; and/or refusals to open a formal investigation or prosecute, continue to cause dissatisfaction among a large number of Speak Up clients. The outcome of investigations, particularly within the workplace, were also the source of a significant percentage of concerns reported.

The process most frequently reported as being affected by wrongdoing was Regulation, which is reflected in the Types of Concerns Reported on page 16. This category records breaches of regulations.The most frequently raised concerns affecting the regulation process include breaches of health and safety and data protection law. Many callers contact the Speak Up Helpline with concerns that fall outside of TI Ireland's practice area. These callers may be referred on to relevant regulatory authorities, or to TLAC if they are workers seeking to make protected disclosures.

Processes Affected to 2020

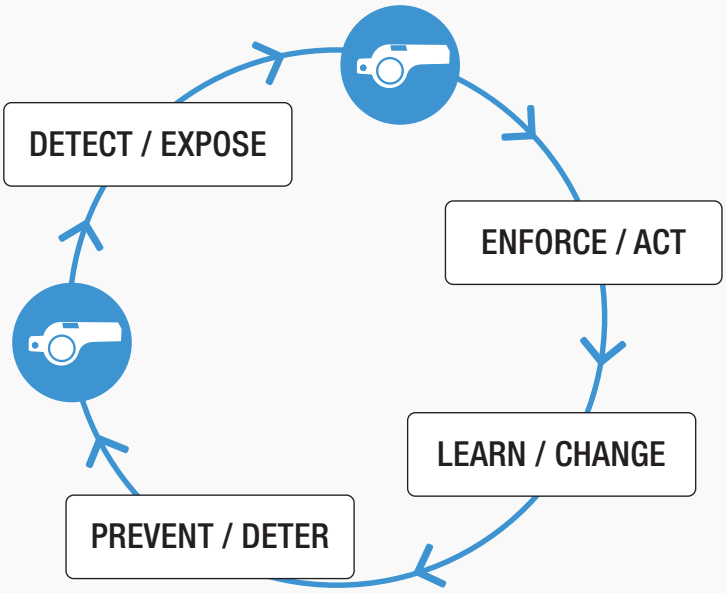


5.
SPOTLIGHT ON WHISTLEBLOWING

A total of 189 people called the Helpline about wrongdoing in connection with their work since the last reporting period.

WHY IS WHISTLEBLOWING IMPORTANT?

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



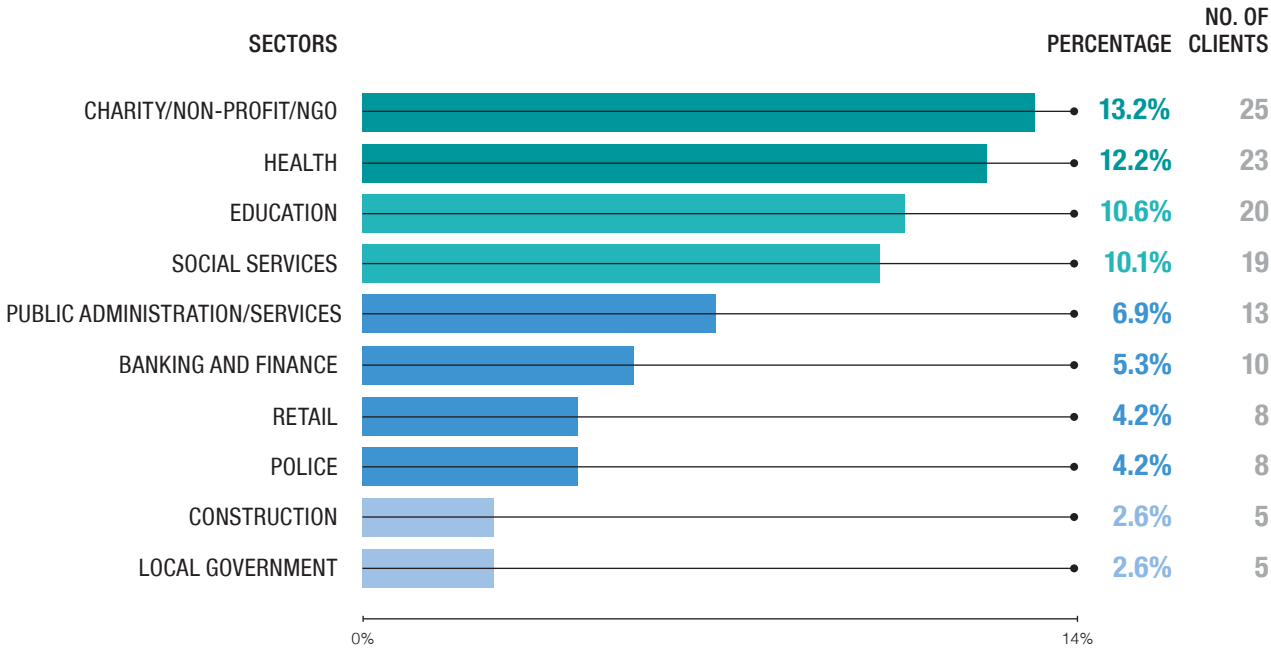
*See National Whistleblowers Center, 'Proven Effectiveness of Whistleblowers' http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/NWC_NationalWhistleblowersCenter_Annex2.pdf

As the diagram on page 18 illustrates, whistleblowing plays an important role in preventing, detecting and taking action against corruption and other forms of wrongdoing. Where wrongdoing has been identified following an investigation, whistleblowers may serve as witnesses in prosecutions, inquests or inquiries. In addition, because whistleblowers are often the closest witnesses to wrongdoing, they can lend important insights into practices or systems failures that gave rise to the problem in the first place. For that reason, they can play a pivotal part in learning from mistakes and helping prevent wrongdoing in the future.

Finally, whistleblowing can have an important deterrent effect. If someone who is inclined to engage in wrongdoing knows that such activity is likely to be reported by his or her colleagues to management, he or she may be less likely to proceed to engage in it. Encouraging workplace whistleblowing therefore allows organisations to address wrongdoing at an early stage, before it leads to bigger problems.

There is growing awareness of the economic and societal benefits of encouraging whistleblowing. However, many whistleblowers have continued to report that blowing the whistle has been a life-changing experience for the worse.

Top Whistleblowing Sectors to 2020



Charities replaced the Health Sector as the employment sector from which the largest number of whistleblowers called the Helpline during the period to the end of 2019. It is difficult to identify any single reason for this change. However, the rise in calls from charities coincides with a number of corruption scandals in recent years.

A 2019 investigation by the Charities Regulator found that the Galway University Foundation spent close to €50,000 on business class flights, taxi trips between Galway and Dublin, luxury hotels, and travel for directors' spouses.[15] The Solas Cinema in Galway was also investigated after the charity went into liquidation in 2017. The investigation found that the charity transferred charitable assets without an independent valuation or competitive disposal process, and lacked appropriate corporate governance structures to properly oversee the activities and decisions the charity made.[16] Ataxia Ireland was also in the headlines for making payments of €84,009 to two trustees over

eight years without informing the other trustees. The two receiving the payments were the parents of the charity's CEO. An investigation also found the charity had poor financial controls, as they had paid the employee pension contributions of the CEO, about €38,500, instead of deducting it from her salary.[17]

The decline of public confidence in Irish charities was captured in Edelman's Trust Barometer, which marked a 6% decline in trust in 2017,[18] although trust in the sector rose again in 2018.[19] As noted previously, there has been a steep rise in the number of concerns being raised with the Charities Regulator in recent years.[20] This was coupled with an increase in enforcement actions against charities who have been in breach of the Charities Act 2009. The Charities Regulator received 1,766 individual concerns since its establishment in October 2014 till the end of December 2018.[21] A significant proportion (1,217, or 69%) of those concerns were reported in 2017-2018 alone. Of these reports, 32 were made under s.59 of the Charities Act 2009, which relates to reporting offences under the Criminal Justice (Theft and Fraud Offences) Act 2001. Further analysis indicates that about 12.6% of the 932 individuals that raised concerns through the Charities Regulator's online form were either employed in, or volunteering for, the organisation they were reporting.

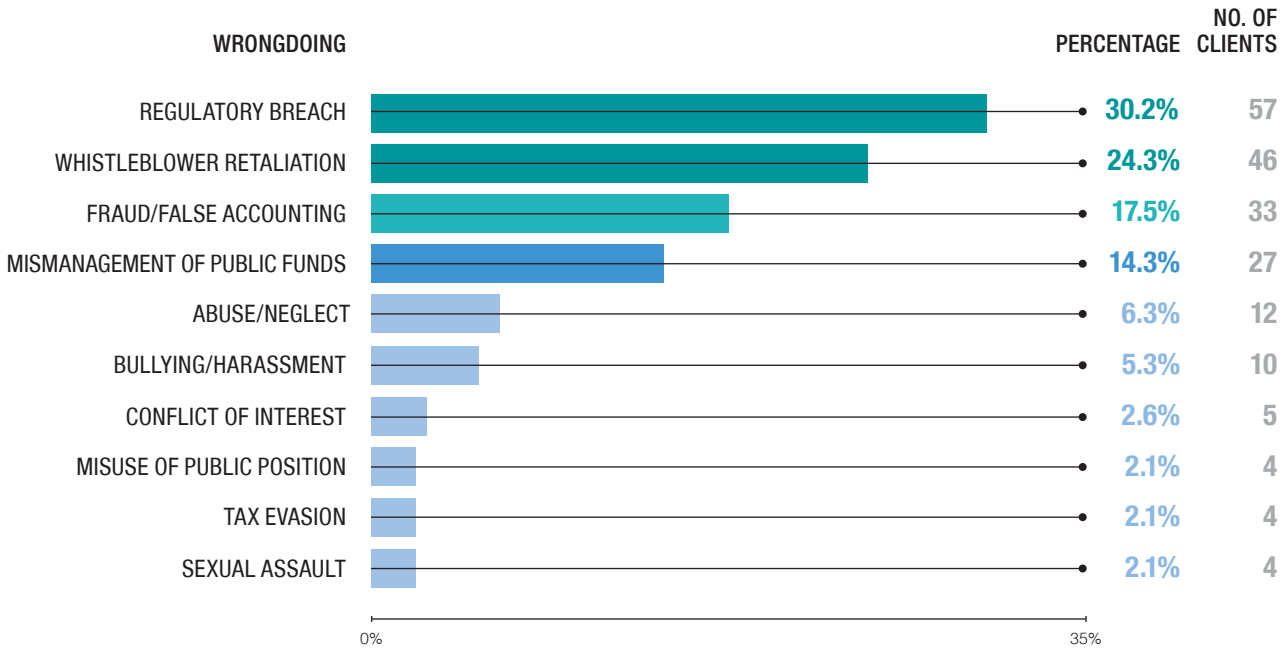
The number of whistleblowers reporting concerns from within the education sector increased by over a third compared with last reporting period. There were a few high-profile cases arising from the sector during the period as well.

The University of Limerick was under investigation in 2017[22] after a number of whistleblowers made protected disclosures about financial irregularities and concerns about human resources and governance policies. The Higher Education Authority expressed concerns over a "culture of inappropriate" expense claims at the university on foot of an earlier review into allegations of irregular expense claims, including mileage payments for trips between home and the college.[23] The report was critical of the University's treatment of whistleblowers, and also found that the University breached public pay rules when they spent more than €1.7 million on severance packages for eight employees.[24]

In July 2018, an investigation into procurement irregularities at the Kildare and Wicklow Education and Training found the ETB's tender practices were flawed.[25] Among the findings was that a company with family connections to the ETB's Chief Executive was engaged on short notice to renovate an ETB building. The report resulted in a referral to the Garda Economic Crime Bureau,[26] and four people have been arrested by the Gardaí as part of their investigation at the time of writing.[27]

Social services were the source of the fourth highest volume of calls from whistleblowers this reporting period, with an increase of 50% since the last report in terms of the percentage of overall whistleblower calls. The sector was the subject of substantial media coverage in 2017-18, particularly surrounding Tusla's involvement in the Sergeant Maurice McCabe case and their handling of a false allegation against him, which was investigated in detail by the Disclosures Tribunal.[28] A subsequent investigation by the Health and Information Quality Authority (HIQA) into Tusla found significant systems failure, including poor quality record-keeping and inconsistencies in practice.[29] The residential care sector was also under the spotlight in 2017 when HIQA threatened the closure of St John of God's residential services upon finding that the charity had failed to provide safe environments for some of its residents.[30]

Wrongdoings reported to 2020



A key trend visible from the data is the increased number of whistleblowers who are reporting regulatory breaches. The types of regulations reported to be contravened included breaches of health and safety regulations and data protection law.

Whistleblower retaliation continues to be a significant concern faced by whistleblowers contacting the Speak Up Helpline, although the percentage of callers reporting reprisal has decreased since the last report. As noted on page 9, Almost 40% of healthcare whistleblowers who contacted the Speak up Helpline between 2017 and 2020 reported that they were penalised after raising concerns of wrongdoing. This is significantly higher than the average rates across all sectors (24%). The highest number of reports of whistleblower retaliation came from the Health sector, accounting for 20% of all allegations of whistleblower retaliation reported to the Speak Up Helpline over the reporting period. Whistleblowers from the Police sector reported similar rates of whistleblower retaliation (38%). The sector with the third highest rates of alleged whistleblower reprisal was Banking and Finance (30%).

Sergeant Maurice McCabe attending the Disclosures Tribunal at Dublin Castle, 2018 | Credit: Rollingnews.ie

CONCLUSION OF THE GARDA WHISTLEBLOWING CASE

The story of Garda whistleblowers Sergeant Maurice McCabe and Garda John Wilson has been covered extensively in both the 2015 and 2017 Speak Up Reports. Both men were clients of the TI Ireland Speak Up Helpline and the controversy surrounding their exposure of systemic malpractice led to reform of how the police service was held accountable as well as the departure of senior political figures and a Garda Commissioner. In spite of Government commitments to reform and the findings of the O'Higgins Commission of Investigation, which further vindicated Sergeant McCabe in 2016, the whistleblower's ordeal and that of his family was to continue for another two years.

In February 2017, the McCabe family called for a fully public investigation into whether false allegations of child abuse made against Sergeant McCabe and allegations that he had been motivated by malice in making his disclosures were part of a coordinated smear campaign against him.[31] It was also revealed that the Child Protection Agency Tusla had kept a record of a false allegation of child abuse against McCabe. The resulting public outcry compelled the Government to establish a statutory Tribunal of Inquiry on 14 February 2017.[32] The Disclosures Tribunal (Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters following Resolutions) chaired by Supreme Court Justice Peter Charleton was formally opened on 27 February 2017.[33]

On 11 October 2018, the Tribunal published its third interim report which contained its full findings on the terms of reference relevant to Sergeant McCabe's case. Justice Charleton said that Sergeant McCabe was a 'genuine person who at all times has had the interests of the people of Ireland uppermost in his mind', his dedication to which Sergeant McCabe saw as 'superior to any loyalty which he had to the police force of the State'.[34] Justice Charleton found that former Garda Commissioner Martin Callinan engaged in a 'campaign of calumny' against Sergeant McCabe. The report found that Callinan sought to discredit Sergeant McCabe by falsely portraying McCabe as a child abuser.

Two senior politicians John McGuinness TD and John Deasy TD, as well as the Comptroller and Auditor General Seamus McCarthy and journalist Philip Boucher-Hayes gave evidence to this effect. The tribunal accepted their evidence, noting the four witnesses had come forward in a spirit of public duty.[35]

The report was highly critical of the former head of the Garda press office, Superintendent Dave Taylor, finding that he was actively involved in the smear campaign against Sergeant McCabe, and that it was not simply a case of him acting under orders from Commissioner Callinan. Justice Charleton found that Superintendent Taylor's credibility as a witness was 'completely undermined by his own bitterness'.[36] Taylor had also alleged that the former Garda Commissioner Noírín O'Sullivan was involved in the smear campaign against McCabe. However, the Tribunal found that he was motivated to make this allegation to stymie a criminal investigation being taken against him for unauthorised leaking to the press. The report found that there was 'no credible evidence' that Commissioner O'Sullivan 'played any hand act or part' in the smear campaign against Sergeant McCabe.[37] Justice Charleton also accepted Commissioner O'Sullivan's evidence that that she never suggested that Sergeant McCabe's integrity be challenged at the O'Higgins Commission.[38] He also accepted her assertion that her instructions to her legal team at the Commission of Investigation were to consider the interests of all gardaí before the inquiry and to have Sergeant McCabe's evidence scrutinised.[39]

The Tribunal's efforts to investigate any contacts made between members of An Garda Síochána and members of the media were frequently hindered as most journalists called to provide evidence relied on a defence based on journalistic privilege and protection of their sources. While Justice Charleton concluded that journalistic privilege was not at stake, he accepted the evidence of most journalists who testified they were not negatively briefed by Superintendent Taylor, contrary to evidence given by Taylor. Only one journalist admitted to being briefed by Taylor, however, the judge did not accept the evidence of two other journalists because both attempted to interview the alleged abuse victim, Ms D.[40]

Justice Charleton also strongly criticised Tusla for its documentation of the false child abuse claim made against Sergeant McCabe in 2006. The agency gave the false allegation an afterlife through 'shocking administrative incompetence'.[41] The report had found the abuse allegation against Sergeant McCabe had been incorrectly inflated to a rape allegation when a counsellor mixed up the Ms D allegation with another case on her file concerning a man accused of raping a child and threatening her father. Files had been opened in four of Sergeant McCabe's children's names, suggesting they may be at risk of abuse from their father.

> **Justice Charleton said that Sergeant McCabe was a 'genuine person who at all times has had the interests of the people of Ireland uppermost in his mind', his dedication to which Sergeant McCabe saw as 'superior to any loyalty which he had to the police force of the State'.**

The Health Information and Quality Authority investigated Tusla parallel to the Disclosures Tribunal. Their 300-page report found that systems failures were common within the Agency, record-keeping inadequacies were not being addressed, and children who are not at immediate risk were not being properly handled.[42] Three social workers from Tusla who were involved in the McCabe case were due to be investigated by the health and social care professional regulator at the time of writing.[43]

Echoing many of the recommendations of the Morris Tribunal before him, Justice Charleton recommended that An Garda Síochána implement effective disciplinary and dismissal procedures, and overhaul the promotions system. He also recommended an examination of the way the Garda press office was staffed so that only qualified professionals occupied the role.

Justice Charleton also suggested that there was a 'lacuna in the law' in the PDA; specifically, where disclosures are made to journalists. He noted the leaks that led to Superintendent Taylor's protected disclosure were introduced into the Dáil record by public representatives, and subsequently published in the media. Justice Charleton suggested that this was an 'accelerant used to inflame public opinion', and that the Oireachtas should consider further regulation to prevent this from happening again. Prominent journalist Mick Clifford, who had covered the controversy surrounding Sergeant McCabe's treatment, disagreed with this assertion noting it was questionable whether a public tribunal of inquiry would ever have been set up without the public pressure that resulted from these revelations compelling the government to do so.[44]

Sergeant McCabe took early retirement on 31 October 2018, just over two weeks after the conclusion of the Tribunal. RTÉ broadcast a TV documentary shortly thereafter in which the McCabe family recounted the challenges they faced over the years fighting this case. The documentary was the most watched of 2018, with an audience of 637,000.[45] The McCabes endured rumours that their marriage had ended, that Sergeant McCabe was having an affair and that he was preying on his own children.[46] His wife Lorraine noted that he was so depressed that at one stage, he committed himself into a psychiatric hospital for help.

The fall-out from one of Ireland's longest-running political scandals also affected other key players in the case. Former Garda Wilson, who claimed to have taken early retirement due to stress caused by his treatment at the hands of Garda management, was unable to find employment after his departure and lost possession of his family home in 2018.[47]

In all, two Ministers for Justice (Minister Alan Shatter and Minister Frances Fitzgerald), two Garda Commissioners (Martin Callinan and Nóirín O'Sullivan), and the Secretary General of the Department of Justice resigned as a result of controversy surrounding the McCabe case.[48] The current Commissioner Drew Harris, the first ever recruited from outside the State, is widely regarded to have been appointed in part because he had no association with the events surrounding the whistleblowers' mistreatment.[49]

Judge Peter Charleton chaired the Disclosures Tribunal hearings related to Sergeant Maurice McCabe from 2017 to 2018. Credit: Rollingnews.ie

At the time of writing, other cases of alleged Garda whistleblower mistreatment were pending before the Disclosures Tribunal which continued under the chairmanship of Justice Sean Ryan.[50] Ultimately, Sergeant McCabe's disclosures, along with those of retired Garda John Wilson, led to the end of the widespread and systemic abuse of the Garda traffic database and to institutional reforms changing how senior gardaí are held to account. Both men paid a heavy price for performing their public duty.

In May 2020, TI Ireland appointed Sergeant McCabe as its Patron in recognition of his courage and outstanding contribution to the public interest. At the time of writing, it was also establishing a permanent fund in his name to support the work of TLAC and the Speak Up Helpline.[51]

THE PROTECTED DISCLOSURES ACT IN PRACTICE

The PDA covers all workers, regardless of whether they are in the private, public or not-for-profit sectors, and allows a wide range of wrongdoings to be reported. These include crime, health and safety issues, the improper use of public money and concealing wrongdoing. It also sets out a framework of disclosure options, seeks to shield the identity of the whistleblower and minimises the risk of adverse legal proceedings.

In addition, it provides remedies if a worker suffers as a result of speaking up. These include a right for employees to claim unfair dismissal and for anyone to sue for damages if they suffer loss as a result of a protected disclosure having been made.

TLAC had noted a steady rise in the number of cases brought under the PDA before the Workplace Relations Commission (WRC) and Labour Court since the publication of the 2017 Speak Up Report. Case numbers have increased by 200% over the period, with 21 listed cases in 2017, 44 in 2018 and 61 cases in 2019. These cases were primarily taken by workers seeking a remedy for unfair dismissal and/or penalisation they incurred for having made protected disclosures.[52]

Despite the increase in the number of cases being brought before the WRC and Labour Court, only 8% of cases litigated under the PDA between 2016 and 2019 were won by the worker.[53] Further research is required to understand why so few cases are being successfully litigated, however, the finding demonstrates how important it is for workers to seek legal advice before making disclosures and taking legal proceedings.

Time limits

One of the pitfalls encountered by complainants at the WRC (who often do not have the benefit of legal representation) is failing to submit claims within the given time limits. An action for penalisation or unfair dismissal must be brought within six months of the contravention. These time limits can only be extended in very limited circumstances.[54] Time limits are often raised as preliminary issues at the WRC. An action for interim relief has an even shorter time limit and must be brought within 21 days.

In the case of **A Sales Assistant v A Clothing Retailer**,[55] a sales assistant sent his area manager an e-mail complaining of sexual harassment by his store manager. He was dismissed on 17 August 2017, two months after raising his concerns. The store manager was dismissed for misconduct shortly afterwards but was never interviewed about the allegations of sexual harassment. The sales assistant claimed he contacted the WRC's Information and Customer Services section shortly after his dismissal, and on their advice took a claim under the Unfair Dismissals Act and the Industrial Relations Act. These complaints were scheduled for a hearing but were delayed. The sales assistant engaged a solicitor shortly before a hearing on 1 August 2018. His original claims were withdrawn as he did not have the required 12 months' service to bring those claims, and he instead submitted new claims under the Employment Equality Act 1998, the Safety, Health and Welfare at Work Act 2005 and the PDA. The new claims failed however as the WRC did not find his evidence that he had been advised by the WRC to submit complaints under the incorrect legislation to be credible. His request that the time limit be extended was denied.

The six-month time limit for claims of penalisation or unfair dismissal can be difficult for claimants to meet without access to legal advice, but the 21-day time limit for interim relief is even more challenging. The Circuit Court was asked to assess whether the time limit for interim relief could be extended in the case of **Paul Cullen v Kilternan Park Cemetery**.[56] Mr. Cullen, the General Manager of Kilternan Park Cemetery, claimed he had been dismissed for making a protected disclosure and took interim relief proceedings three and a half months after being made redundant. Mr Cullen claimed he had raised concerns about the planning status of the ash burial site at the cemetery. This disclosure was made some weeks after he had requested an exit package from the company, as he was unable to reach an agreement with them on his return to work after being absent due to illness. Schedule 1 of the PDA allows courts to extend the 21-day time limit but does not outline what factors might justify an extension. This case was the first time a court had to decide what sufficient reasons could grant an extension.

Although Mr Cullen's application failed, Judge O'Connor outlined ten factors courts should take into account when considering whether to grant an extension of time and which should be instructive for those seeking an extension in future:

1. The nature of the disclosure;
2. The nature of the dismissal;
3. The length of time since the expiration of the 21-day time limit;
4. The whistleblower's capacity and ability to process the court application;
5. The nature of the employer and employee relationship;
6. The extent of legal advice afforded to the whistleblower;
7. The reasons for the delay;
8. The merits of the case, and whether the whistleblower established an arguable case that the dismissal was linked to the protected disclosure made;
9. The prejudice any party might suffer because of the delay in making the application;
10. Taking into account all circumstances of the case, the extent to which a court deems it just and equitable to extend the time limit.

Procedural errors

Some PDA claims have failed due to procedural errors. In the case of **A Plumber v A Plumbing and Heating Contractor**,[57] the worker claimed he was dismissed for having made a protected disclosure and took a penalisation claim under Section 12 of the Act. The WRC adjudicator found that he did not have jurisdiction to hear the complaint, as it should have been taken under the Unfair Dismissals Act 1977.

In the case of **Boyne Valley Foods v Barry Tyndall**,[58] Mr Tyndall took a case under Section 8A(5) of the Prevention of Corruption Act 2001 claiming he had been penalised for reporting the creation of incorrect invoices. The PDA amended the Prevention of Corruption Acts to the effect that S.8A(5) does not apply to a protected disclosure as defined in the PDA. The court found that Mr Tyndall had made a protected disclosure as defined under the PDA and so they did not have jurisdiction to hear his claims under the Prevention of Corruption Acts.

The definition of wrongdoing

When assessing a claim taken under the PDA, the first thing that the Court will examine is whether a protected disclosure has been made. This emphasises why legal advice is vital to ensure that a disclosure made meets the definition set down in the PDA. In the case of **A Civil Servant v A Government Department**,[59] a civil servant reported concerns about imprecision in official forms that he claimed had potentially serious adverse consequences. He alleged this constituted a disclosure of gross negligence and gross mismanagement as defined in the PDA. The WRC found that the matters reported by the complainant could potentially have serious consequences and that the clerical practices were in need of change (and were changed) but that they did not arise from 'wrongdoing' in the sense intended in the PDA either in their nature or degree of gravity.

In **A Concierge v A Hotel**,[60] the complainant reported a co-worker for breaching the employer's policies by accepting commission payments. The complainant was on probation at the time and was called into meetings with the hotel's human resources department some months later where he was cautioned about his time-keeping. He was told this could result in the extension of his probation, and he was due to have a follow-up meeting a week later but was instead dismissed. He brought a claim before the WRC claiming unfair dismissal for having made a protected disclosure. The adjudicator found that his disclosure did not provide enough detail about the alleged wrongdoing to meet the definition of a protected disclosure under the PDA, nor was a breach of the employer's policy serious enough to be considered a 'relevant wrongdoing'.

Causation

Once an adjudicator is satisfied that a protected disclosure has been made, they will examine 'causation'. The complainant must demonstrate the penalisation they suffered would not have occurred 'but for' the fact that they made the disclosure.

In **SOLAS v Patrick Wade**,[61] the WRC adjudicator accepted that a protected disclosure had been made but determined that the alleged detriment was due to a re-organisation and not a result of the worker making a protected disclosure. Similarly, in **Department of**

Employment Affairs and Social Protection v Pascal Hosford[62] a protected disclosure had been made but the alleged detriment that ensued (the invoking of a disciplinary process) was found to be a result of the complainant's 'disruptive behaviour'. In **Minister for Business, Enterprise and Innovation v George McLoughlin**,[63] the Labour Court found that the detriment complained of existed prior to the disclosure being made.

The transposition of the EU Whistleblowing Directive will make significant changes to protected disclosures claims, as it reverses the burden of proof in relevant proceedings and means the employer must show that any alleged detrimental action was taken on 'duly justified grounds'. For more information, see page 35.

Level of Awards

Twelve claims alleging penalisation for having made protected disclosures resulted in awards between 2017 and 2019. Although the PDA places a cap on compensation at five years' remuneration, the awards made to date vary significantly and all have been lower that this upper limit. In 2019 the seven awards ranged from €2,500 to €35,000.

Two successful cases from 2019 involved penalisation following protected disclosures made under the Safety Health and Welfare at Work Act 2005 and were awarded €35,000 and €30,000 respectively. These comparatively high awards suggest that the compensation permitted under the PDA could be brought into line with the Safety, Health and Welfare at Work Act 2005, which provides for awards at a level that is just and equitable in all the circumstances.

Legal obligations arising under the worker's contract

Section 5(3)(b) of the PDA states that a breach of a legal obligation arising under the worker's contract of employment is not a relevant wrongdoing. **A Carpet Weaver v A Textiles Company**[64] clarifies whether contractual breaches can ever be considered a 'relevant wrongdoing'. The worker brought a number of employment rights issues to the attention of the employer, including their failure to pay annual leave entitlements to staff. The worker brought a claim to the WRC claiming he was penalised for raising his concerns. The employer argued that he reported contractual breaches which were not defined as a relevant wrongdoing by virtue of s.5(3) of the PDA. The WRC held that the worker's disclosure was not confined to his own contractual rights and that the use of the term 'worker' in s.5(3) was to be understood in the context of a worker's individual dispute with an employer, rather than raising issues of contractual breaches that impact the workforce.

The transposition of the EU Whistleblowing Directive will make significant changes to protected disclosures claims, as it reverses the burden of proof in relevant proceedings and means the employer must show that any alleged detrimental action was taken on 'duly justified grounds'.

Investigating wrongdoing

In **Clarke v CGI Food Services Limited** the way in which protections of the PDA apply to workers employed to detect, investigate or prosecute wrongdoing was clarified by the High Court for the first time.[65]

Mr. Clarke was a financial controller for CGI Food Services who raised concerns about payments to directors which appeared in excess of agreed limits. He subsequently raised more concerns about financial irregularities and food safety. Following this, he reported difficulties in his working relationships and submitted a formal grievance. He was then subjected to a sequence of performance reviews, which he viewed as arbitrary. He was suspended following an investigation and was eventually dismissed. He sought an interim relief injunction, which the Circuit Court granted ordering the employer to maintain his pay and benefits pending the determination of his complaint to the WRC. His employer appealed the Circuit Court interim relief order, but the appeal was dismissed by the High Court in July 2020. In its decision, the High Court made a number of important observations on the interpretation of the PDA and the factors a Court will take into account in examining a performance-based dismissal, which are shown below.

One of the most significant findings made in the Clarke case related to Section 5(5) of the PDA. This section provides that: 'A matter is not a relevant wrongdoing if it is a matter which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer'.

The employer appealed the grant of interim relief on the basis that the wrongdoings Mr Clarke disclosed were within his functions to detect as the financial controller. The Court rejected this position stating that the disclosure was defined as protected under the PDA as the wrongdoing disclosed involved an act or omission on the part of the employer, even if a complaint was made in the discharge of the employee's duties.

It is not clear from some WRC decisions that this same test was applied. In the case of **a General Manager v a Golf Club**,[66] the Manager disclosed concerns over electrical testing, legionella testing and fire safety. The WRC found that the Manager's contractual duties encompassed the issues he had raised concerns about. The decision does not demonstrate whether the wrongdoings disclosed were the result of an act or omission on the part of the employer.

In **Worker A v a Clamping Company**[67] and **Worker B v a Clamping Company**,[68] the workers raised concerns about wrongful clamping, wrongful impounding and destruction of vehicles, and wrongful actions by co-workers so they could avail of their employer's incentive scheme. The employer contended that the workers' reporting was within their duties as clamping workers. The WRC accepted this argument and found that the workers reporting was not defined as a protected disclosure under Section 5(5) of the PDA. Unlike the Clarke decision, these decisions suggest that the WRC had not taken a view on whether the wrongdoings disclosed were the result of an act or omission on the part of the employer.

No necessity for disclosure to be stated as a protected disclosure

The Clarke case was also important in setting an important precedent in respect of determining how a disclosure should be made. The employer argued that Mr Clarke did not make any mention of protected disclosures until after the dismissal and claimed that Mr Clarke had only characterised the reports as protected disclosures after his alleged retaliation had taken place. However, the High Court determined that a protected disclosure can be made without invoking the PDA or using the language of 'protected disclosure'.

Performance Based Dismissal

The High Court in Clarke also quoted from a recent UK Supreme Court's decision in **Royal Mail Group Ltd. v. Jhuti**[69] and found that courts have a duty to examine stated reasons given for a performance-based dismissal, and to assess whether the stated reasons are an invention concocted to hide the true reason for a dismissal. The High Court identified eight factors that were relevant in determining whether the reason given by the employer for Mr. Clarke's dismissal was an invention:

1. When the performance related issues emerged — these only emerged after Mr Clarke raised concerns;

2. The intensity of performance related reviews – Mr Clarke's attended monthly meetings about alleged performance related issues, which the Court deemed to be 'quite relentless';

3. The form of dismissal – Mr Clarke was summarily dismissed as if guilty of gross misconduct rather than following the procedure for suboptimal performance;

4. Following through with proposed methods – The employer proposed to engage an independent barrister to chair Mr Clarke's disciplinary hearing, but this was not done;

5. The independence of the disciplinary hearing – The employer appointed the same person who made adverse findings against Mr Clarke as chair of the disciplinary hearing;

6. Affidavits of those involved in disciplinary hearings – and lack thereof in this case;

7. The need to tease out issues at a disciplinary meeting – in this case, there were no questions asked of Mr Clarke during the meeting; and

8. Accountability – there was no accountability as to who made the decision to dismiss Mr Clarke.

Until Clarke, the wrongdoing revealed by the discloser had only been examined to establish whether a protected disclosure has been made. The High Court set a potential precedent in protected disclosures cases by examining the detail of Clarke's allegations and ordering that it would be in the public interest that the judgement be sent to the Department of Agriculture, Food and the Marine and to the Revenue Commissioners to undertake whatever investigations might be considered necessary in light of the allegations made by the employee. Prior to this, practitioners tended to look at the protected disclosure and the investigation as one of a parallel track and the litigation for a remedy as another. These parallel lines were essentially crossed for the first time in Clarke v v CGI Food Services Limited.

Grievances and Protected Disclosures

Another significant case was that of **Baranya v Rosderra Irish Meats Group**.[70] This case examined the interplay between a grievance and a protected disclosure and concluded that the two are not mutually exclusive.

Mr Baranya was employed with Rosderra Irish Meats Group Limited and was tasked with 'back-scoring' (cutting the back) of meat. He informed his supervisor that he did not want to do back-scoring as it caused him a lot of pain. He was later dismissed for 'walking off the line'. Mr Baranya brought a claim before the WRC for unfair dismissal due to having made a protected disclosure, which was ultimately appealed to the Labour Court. He claimed his communication to the Health and Safety Officer was a protected disclosure on the grounds that his health and safety was being endangered. His employer argued that the disclosure was more appropriately categorised as a grievance.

The Code of Practice on Protected Disclosures Act 2014 (SI 464/2015)[71] distinguishes between grievances and protected disclosures, defining grievances as 'a matter specific to the worker i.e. that worker's employment position around his/her duties, terms and conditions of employment, working procedures or working conditions'. Both the WRC and the Labour Court found that the matter Mr Baranya disclosed was specific to him and defined it as a grievance. Mr Baranya appealed to the High Court on a point of law.

Justice O'Regan in the High Court affirmed the Labour Court's decision determining that Mr Baranya's communication was 'a grievance and not a protected disclosure'. The Court found that Mr Baranya's disclosure would have required more detail on why his health and safety was being endangered in order to satisfy the definition of a protected disclosure under the PDA. Importantly, the Court also found that protected disclosures can contain grievances and that the two are not mutually exclusive.

6.
INTEGRITY AT WORK

The Integrity at Work (IAW) programme was launched by TI Ireland in 2016 with the aim of fostering workplaces where people are supported to raise concerns of wrongdoing or unethical behaviour. IAW promotes positive cultural change within Irish workplaces and provides practical support and guidance to employers and regulators in developing speak up systems, as well as signposting workers to TI Ireland's Speak Up Helpline and TLAC.

IAW is the only not-for-profit initiative of its kind and is endorsed by the Department of Public Expenditure and Reform, Chambers Ireland, the Irish Congress of Trade Unions and the Charities Regulator.

IAW MILESTONES 2017 - 2019

Membership

Over the course of this period, 28 organisations joined the IAW initiative, including 12 agencies sponsored by the Department of Justice and Equality and three Institutes of Technology sponsored by the Department of Education and Skills. The majority of IAW members are public sector organisations who are obliged under section 21 of the PDA to establish procedures for protected disclosures. This obligation will be extended to a significant portion of the private sector with the transposition of the EU Whistleblowing Directive into Irish law in 2021, and TI Ireland expects to see more engagement with private sector companies through IAW over the next three years. A number of charities have also joined the initiative despite there being no obligation on them to have whistleblowing procedures currently. A discounted membership fee is offered to non-profit organisations so that any organisation, regardless of size or income, can take part.

Grainne Madden, Founder and Principal, GMJ Associates, Dana Gold, Senior Counsel and Director of Education, Government Accountability Project, Andrew Samuels, Founder, Addveritas and John Devitt, Chief Executive, Transparency International Ireland at the Integrity at Work Conference 2018.

Left: Anna Myers (Whistleblowing International Network) Helen Shaw (Charities Regulator) and Wendy Addison (Speak Up, Speak Out) at the 2018 Integrity at Work Conference. Right: Jack Poulson, Tech Inquiry at the 2019 Integrity at Work Conference. Credit: Robbie Reynolds

Membership Activities

All IAW members sign a public pledge that their workers will not be penalised for reporting concerns of wrongdoing and that their reports will be acted upon. TI Ireland provides a range of supports designed to help members to deliver on this pledge that includes training for senior staff on protected disclosures legislation and best practice in responding to concerns, guidance on reviewing organisational policies and procedures on whistleblowing and anti-corruption frameworks. Members also receive communication tools to inform staff about the Speak Up Helpline and TLAC.

IAW Events and Workshops

IAW provides a forum for staff of member organisations that are responsible for receiving disclosures to meet and discuss best practice. Over 300 people have attended IAW events and workshops during the period. These events were designed to increase awareness and understanding of the PDA and related legislation by preparing employers to receive, assess and investigate disclosures of wrongdoing. They have also informed organisations on the implications the GDPR has for whistleblowing, as well as on the likely changes that will come in once the forthcoming EU Whistleblowing Directive is transposed into Irish law. Other sessions centred around proactive strategies member organisations could put in place that would support their staff in speaking up.

IAW CONFERENCE

The annual IAW Conference is the only national event dedicated to exploring how employers across all sectors can foster a culture of integrity within Irish workplaces. Each year the event features expert speakers from the public, private and charity sectors, as well as leading academic thinkers, legal experts and public commentators who explore a wide-ranging agenda designed to address questions relating to ethics in the workplace and whistleblowing.

Since the inaugural IAW Conference in 2017, over 300 senior executives from across all sectors have attended the event. In addition to hearing about best practice procedures from practitioners in the field, delegates also heard from whistleblowers who had first-hand experience of disclosing wrongdoing.

For example, delegates heard from Wendy Addison in 2017 who exposed fraud at LeisureNet Ltd, a company listed on the Johannesburg Stock Exchange (JSE). The company imploded in what was the biggest corporate disaster in South African history at the time. The two joint chief executives of LeisureNet Ltd were later convicted of fraud.[72]

In 2019, the keynote speech was given by Richard Bowen, a former business chief underwriter at Citigroup who discovered that billions of dollars annually of defective mortgages were being sold to investors in securitisations as quality mortgages.[73] Delegates also heard from Dr Jack Poulson, who

previously worked as a Senior Research Scientist in Google's Research and Machine Intelligence division until he publicly resigned over the company's refusal to clarify its stance on proactive censorship and surveillance of human rights and dissent.[74]

In 2020, the conference was transformed into a week-long series of webinars featuring speakers from Ireland and overseas. Delegates heard from Dr Scott Allen, a medical consultant for the Office of Civil Rights and Civil Liberties at the Department of Homeland Security who made protected disclosures to the US Congress about the harms resulting from family detention in the U.S. immigration system.

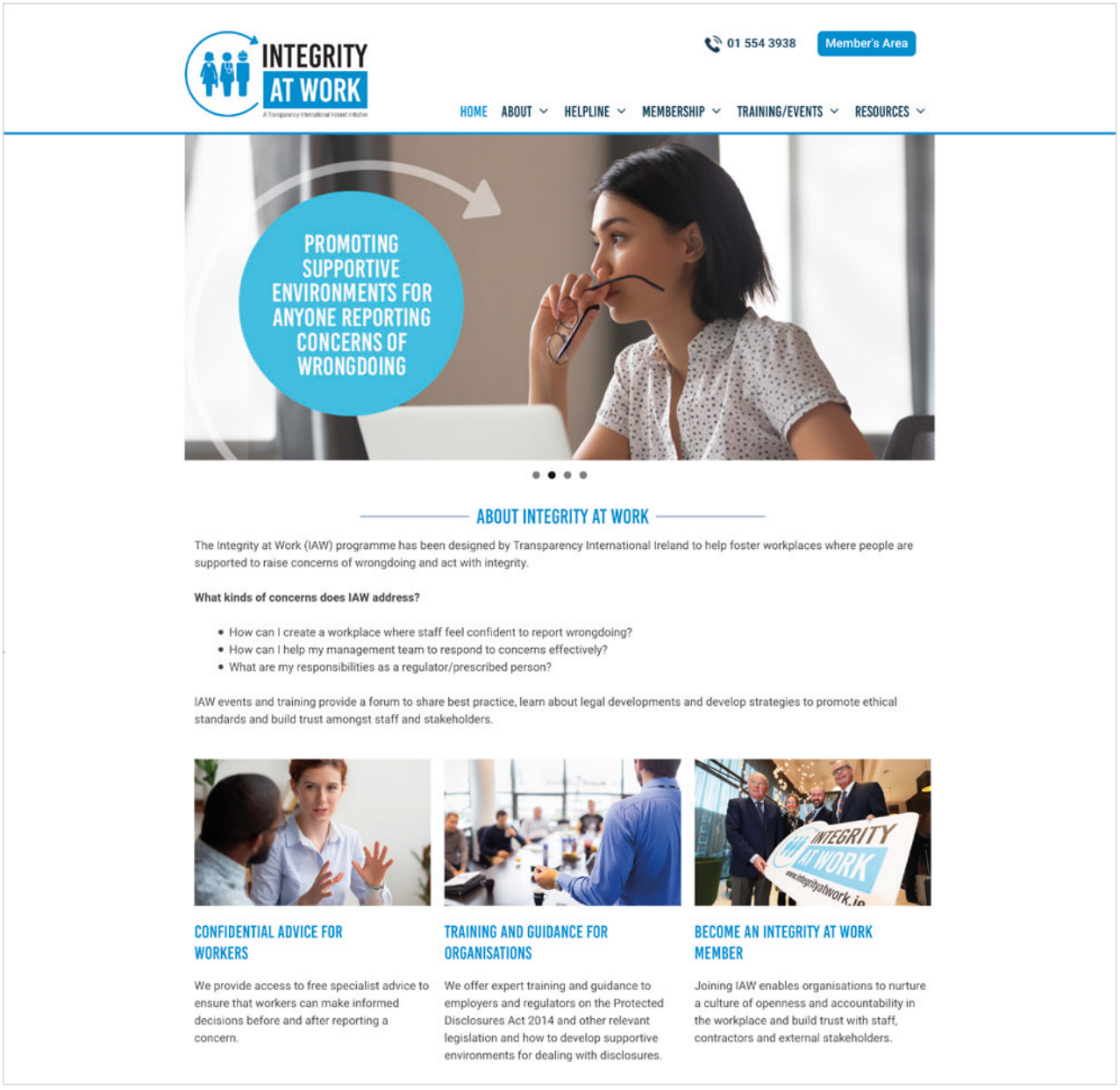
DEVELOPMENT OF THE INTEGRITY AT WORK PROGRAMME

TI Ireland expanded its range of public webinars during the period. This included IAW training and events hosted to help employers and workers to respond to the emerging challenges generated by Covid-19. Two webinars were designed for both managers and workers on protected disclosures during Covid-19 and training on the PDA and the EU Whistleblowing Directive for regulators and government departments. TI Ireland will launch more sector-specific IAW training in 2021.

In 2020, TI Ireland developed the IAW Case Review Service. The aim of the Case Review Service is to help identify systemic issues in how IAW members are responding to disclosures of alleged or apparent wrongdoing. Workers from IAW member organisations can contact the Speak Up Helpline to communicate any difficulties or alleged detriment experienced as a result of making a protected disclosure. If the worker is not satisfied with the way their employer has addressed their disclosure, or they believe they have been penalised as a result, TI Ireland may contact the employer to make recommendations on how to improve the way they respond to concerns and prevent the penalisation of workers reporting wrongdoing. Details of the service will be shared with IAW members in 2021.

TI Ireland will also launch a new benchmarking system for IAW Members in 2021 which will enable them to review their protected disclosure policies and procedures in comparison with other participants in the programme through an anonymised scoring system. Members currently review their systems using a Self-Assessment Framework which is designed to help members evaluate existing whistleblowing/ protected disclosure policies and systems against best practice standards. TI Ireland expects that this new benchmarking tool will enhance the overall quality and standard of whistleblowing systems amongst IAW members.

TI Ireland is currently developing an e-learning platform (supported by grant funding from the Department of Justice and Equality), which will be used to train staff of IAW members from the Justice Sector in dealing with protected disclosures from 2021. This will complement face-to-face training on the PDA that is currently provided to members. The e-learning platform will be available to members on the new dedicated IAW website which was launched in 2020 (www.integrityatwork.ie).



The Integrity at Work website was launched by TI Ireland in October 2020.

Visit: www.integrityatwork.ie

7.
ADVOCACY IN REVIEW

TRADE SECRETS DIRECTIVE

In the 2017 Speak Up Report, TI Ireland argued that the EU Trade Secrets Directive be transposed into Irish law in a way that was consistent with the aims of the PDA. This was based on concerns that the Directive could lead to legal action being taken against whistleblowers that revealed 'trade secrets'. After a campaign by non-governmental organisations (NGOs), an exception was inserted in the Directive for whistleblowing.[75]

In 2013, the Government decided to exclude a public interest test from the PDA as it understood it to be an unnecessary technical hurdle for whistleblowers. The absence of any 'good faith' motivation test also removed an unnecessary hurdle from the Irish legislation that had been faced by UK whistleblowers until the Public Interest Disclosures Act was amended in 2013. Instead, the focus was to be trained on the content of disclosures, rather than the character or state-of-mind of whistleblowers. At the time of its enactment in 2014, the PDA was considered to offer some of the world's strongest whistleblower protections due to the absence of public interest and good faith test as well as other features.[76]

The Trade Secrets Directive was transposed into Irish law by a Statutory Instrument (SI) in June 2018.[77] Despite TI Ireland's recommendation, the SI amended the PDA to create a test for whistleblowers that required they show they made their disclosure in the general public interest even where the disclosure is true, related to a criminal offence, or they reported to their employer or the appropriate authorities. With the support of a network of international whistleblower advocates, TI Ireland wrote an open letter to the Minister for Business, Enterprise and Innovation Heather Humphreys TD in July 2018 calling on the Minister to amend the regulation.[78]

TI Ireland noted that the Government was under no obligation to introduce the public-interest-motivation test as other EU Member States, including France and Denmark, transposed the Directive without introducing a similar requirement. TI Ireland suggested that, if it was necessary to amend the PDA to introduce a motivation test in the case where whistleblowers disclosed trade secrets, it should be on the basis of the four purposes outlined in the Directive.[79] These included:

- for exercising the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media;
- for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest;
- disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise;
- for the purpose of protecting a legitimate interest recognised by Union or national law.

The introduction of the public interest test could lead to a whistleblower's employer or the 'trade-secret-holder' taking legal action for damages, seeking a court injunction or even pressing criminal charges by alleging that evidence that they consider commercially valuable was 'stolen' and that the whistleblower was motivated by something other than the general public interest. Even where a whistleblower could demonstrate that they were motivated solely in the public interest, they might not have the resources to defend themselves through the courts. This could have a chilling effect on potential whistleblowers.

The broad definition of 'Trade Secrets' under the regulation could be interpreted to mean emails, phone records or financial data – any information with a commercial value. Whistleblowers using this information could face three years in prison and a €50,000 fine unless they could defend their motives in disclosing it. This amendment created a Kafkaesque legal absurdity where a whistleblower could be committing a criminal offence themselves if they reported a criminal offence using evidence the perpetrator alleged was a trade secret unless they could show they were motivated solely out of protecting the general public interest.

In October 2019, the European Commission adopted the text of the EU Whistleblower's Directive.[80] Under the Directive, Member States are obliged to offer full immunity to whistleblowers in judicial proceedings, including for disclosure of trade secrets. The Directive should also remove the public interest motivation test in the PDA, as protected disclosures made under conditions of the Directive are considered lawful under the conditions of the Trade Secrets Directive.

THE EU WHISTLEBLOWING DIRECTIVE

The EU Directive on whistleblower protection was adopted on 7 October 2019. This will make some significant changes to whistleblowing legislation across the European Union, including in Ireland, when it is transposed.[81]

In the year preceding the Directive's adoption, TI Ireland worked with a number of other chapters of Transparency International, as well as other civil society organisations and trade unions to advocate for enhanced protections for whistleblowers in the Directive.

The push to institute EU-wide protection for whistleblowers can in part be traced back to the LuxLeaks and Panama Papers scandals, and a response to the plight of the former PricewaterhouseCoopers Luxembourg employees Antoine Deltour and Raphael Halet who helped expose a systemic tax-avoidance scheme in the Grand Duchy. Deltour and Halet were convicted by a Luxembourg court a year later of the theft of documents, violating secrecy laws, and illegal access of a database.[82] Although Luxembourg provided legal safeguards for the reporting of corruption, the case highlighted the need to have comprehensive protections in place to protect whistleblowers reporting a wider range of wrongdoings, including tax evasion and avoidance, that might not already be covered by national legislation.

Several EU Member States, including Ireland, had enacted, or legislated for comprehensive whistleblowing laws in the years preceding the European Parliament's call for the EU Directive. This demonstrated that comprehensive whistleblowing safeguards could work for both employers and employees and that many of the concerns around stronger whistleblower laws were unfounded. It was also recognised that a balance needed to be struck with the protections afforded to businesses under the Trade Secrets Directive with corresponding protections for workers who used confidential information when raising concerns about wrongdoing.

As demand grew for a whistleblowing directive, the European Commission and European Parliament engaged with civil society organisations, including TI Ireland, in drafting a framework text. Transparency International's advocacy was directed by the TI-EU Office, working closely with TI Ireland, other national chapters and the Whistleblowing International Network (WIN)[83] who had experience of advocating for legislation protecting whistleblowers in their countries. This understanding of the arguments and counter-arguments for enhanced whistleblower protections helped TI advocate for a text that was formally agreed by all 27 EU Member States in December 2019 and met with the broad approval of employers, trade unions and civil society.

Advocacy by civil society organisations and the Eurocadres professional and management union[84] was particularly instrumental in ensuring that whistleblowers would not be obliged to report to their employer before they would be entitled to report to a regulator or to make a public disclosure. During the final stages of negotiations on the Directive, some EU Member States argued that a disclosure should be made to an employer before a whistleblower could report to a regulator or journalist. Requiring a whistleblower to report internally before making an external disclosure would have represented a significant setback for whistleblower rights and the general public interest.

Whistleblowers would have been exposed to greater risks of retaliation and could have resulted in delayed action on reports of wrongdoing. The experience of Ireland, Sweden and the UK in trusting employees to report directly to regulators, and in some cases to the media, demonstrated that the vast majority of workers still prefer to report internally in the first instance even where legislation allowed for external disclosure.

The Directive is due to be transposed into national law across the EU by 17 December 2021. DPER opened a public consultation on the transposition of the Directive in July 2020 and TI Ireland was among 24 other organisations, whistleblowers and whistleblowing experts to make submissions on what amendments should be made to the PDA.[85] TI Ireland will continue to advocate on the transposition during 2021 and monitor its implementation thereafter.[86] In addition, WIN has published the EU Whistleblowing Meter to track the progress of transposition across all 27 Member States.[87]

How the Directive will amend the PDA

The Directive outlines minimum standards to protect whistleblowers reporting breaches of Union law specifically, although it is likely that the transposition will broaden the scope of protections provided to whistleblowers reporting under the PDA as well.

Changes to the burden of proof in legal claims for penalisation

One of the most significant changes the Directive will make to the PDA is the reversal of the burden of proof in legal claims brought for penalisation. Currently, whistleblowers taking legal action over penalisation must demonstrate that they would not have been penalised 'but for' the fact that they had made a protected disclosure. Under the Directive, the employer has to prove that any alleged detrimental measure taken against a whistleblower was based on 'duly justified grounds'.

Broad definition of 'worker'

The Directive significantly expands the range of people covered by the PDA. Volunteers, shareholders and non-executive directors will be able to make protected disclosures. The Directive protects people reporting 'information acquired in a work-based relationship', which can include job applicants where they encounter information about relevant wrongdoings during recruitment or pre-contractual negotiations.

Obligation to have policies and procedures

Section 21 of the PDA requires that public bodies have procedures for making protected disclosures. The Directive extends this to all workplaces with 50 or more employees, though EU Member States can extend if further. Companies working in areas governed by EU law on financial services, products and markets, prevention of money laundering and terrorist financing, transport safety and protection of the environment will have to maintain these procedures irrespective of their size or number of employees.

Tighter timeframes on investigation and response

The Directive will oblige 'competent authorities' and entities required to adopt whistleblowing procedures to process protected disclosures within specific timeframes. They will have to acknowledge receipt within seven days and 'diligently follow-up on disclosures'. They will have to give the whistleblower feedback within three to six months, although this may not necessarily be the outcome of an investigation.

New rules for 'competent authorities'

The Directive places new obligations on 'competent authorities', which will likely include prescribed persons and any relevant statutory bodies to whom disclosures can be made. These authorities will have to provide a variety of reporting channels, with dedicated and trained staff who are obliged to stay in touch with the whistleblower. They will have to maintain secure systems for receiving and recording these reports.

Competent authorities will be obliged to keep in touch with the whistleblower. They must acknowledge receipt of a disclosure within seven days unless the whistleblower requests otherwise, or they believe that acknowledging the report would jeopardise the whistleblower's confidentiality. They will also have to give the whistleblower some information on what actions are taken in response to the disclosure. This can include information on the final outcome in as far as the law allows. It could also be a response stating that the disclosure did not warrant further action. This can happen where the wrongdoing is judged to be minor, or in cases where they receive a number of reports about the same issue that do not include any new or meaningful information.

> **Member States will have to provide whistleblowers with access to free comprehensive and independent information on their rights, and advice on procedures and remedies available against retaliation.**

If competent authorities receive disclosures from whistleblowers about wrongdoings that fall outside of their remit to investigate, they must transfer the disclosure to the appropriate 'competent authority' within a reasonable timeframe. The whistleblower should be informed about the transfer without delay.

Competent authorities must publish easily accessible guidance on their websites. The guidance should inform whistleblowers about the types of disclosures that can be made to the authority, how they can be made, and how they will be processed. This can include information on the time frames for processing, and how feedback will be given. The guidance must outline how the whistleblower qualifies for protection and explain what measures they take to protect them from retaliation. They must also inform whistleblowers what remedies and procedures are available should they suffer retaliation.

Competent authorities' websites will have to have clear statements explaining when whistleblowers will not be liable for breaches of confidentiality for accessing the information they report. They must outline how disclosures will be kept confidential, and how personal data will be processed. They will also have to direct whistleblowers towards sources of confidential advice and other supports. This guidance must be kept up to date and will have to be reviewed every three years.

Definition of penalisation

Penalisation is defined under the PDA as any act or omission that affects a whistleblower to their detriment, and goes on to provide a non-exhaustive list of general examples such as suspension, lay-off or dismissal, and demotion or loss of promotion opportunity. The Directive supplements the definition of penalisation with the addition of more specific examples, including:

- Withholding of training;
- Negative performance assessment or employment references;
- Ostracism;
- Failure to convert a temporary employment contract into a permanent one where the worker had legitimate expectations that he or she would be offered permanent employment;
- Failure to renew or early termination of the temporary employment contract
- Damage to a person's reputation or financial loss, including loss of business and loss of income;
- Blacklisting;
- Early termination or cancellation of contract for goods and services;
- Cancellation of a licence or permit;
- Psychiatric or medical referral.

Some of these could fall within the broader definition of 'injury, damage or loss' or 'unfair treatment' under the PDA. This additional categorisation may help whistleblowers contemplating legal action.

'Measures of Support' for whistleblowers

Member States will have to provide whistleblowers with access to free comprehensive and independent information on their rights, and advice on procedures and remedies available against retaliation. While TI Ireland and TLAC already offer access to free legal advice, the Directive advocates that member States provide reporting persons with access to legal aid in accordance with national law. This may have implications for the legal aid regime in Ireland, which does not provide legal aid for representation before the WRC.

TI Ireland has advocated that these supports could be funded in part through fines imposed for wrongdoings uncovered through protected disclosures. This could be used to fund free legal aid and/or to recover legal costs where it can be determined that a whistleblower likely made a protected disclosure.

The Directive also encourages competent authorities to provide 'effective assistance' to whistleblowers before any relevant authority involved in their protection against retaliation such as courts or tribunals. One simple way competent authorities could assist whistleblowers would be to confirm, where appropriate, that the matter/wrongdoing disclosed is likely to be considered a relevant wrongdoing and provide evidence to courts in cases where there is any doubt that a protected disclosure was made.

Full immunity in defamation proceedings

The PDA provides immunity against most civil and criminal liability for anyone making protected disclosures. Whistleblowers might still be liable for defamation but they could rely on a 'qualified privilege' defence in defamation proceedings. The Directive expands this immunity to defamation proceedings. Whistleblowers will be able to rely on their disclosure to seek dismissal of these cases so long as they have reasonable grounds to believe that their disclosure was necessary to reveal a relevant wrongdoing. However, if the acquisition of or access to the relevant information constituted a self-standing criminal offence, such as under the Official Secrets Act, the whistleblower could be liable to criminal prosecution.

Trade Secrets

When the Trade Secrets Directive was transposed into Irish law, it amended the PDA by introducing a requirement that whistleblowers must show they were motivated by the general public interest if their disclosure included information deemed to be 'commercially sensitive'. This obligation applied even where the whistleblower reported a crime to relevant authorities and their allegations were true. As previously outlined on page 34, TI Ireland raised concerns over the potential impact the amendment could have on whistleblowers at the time, the Directive removes this obligation and disclosures made under the Directive will also be considered lawful under the conditions of the Trade Secrets Directive.

THE NEED FOR FURTHER REFORM

The Directive will make significant changes to the PDA and to the obligations of recipients of protected disclosures across the public, private and non-profit sectors. Many of the anticipated changes are in line with TI Ireland's recommendations for reform of the PDA over the past six years, although there are a few areas where the reforms might not go far enough.

In June 2020, DPER invited stakeholders to share their views on how voluntary elements of the Directive could be implemented.[88] TI Ireland and others made submissions for further reform in response, and TI Ireland's recommendations are summarised here.

Access to the employment law system

The PDA covers 'workers' rather than simply employees, and this means that self-employed and agency workers are also protected. However, under the legislation only employees are able to seek remedies for whistleblower retaliation through the employment law system, including the WRC. Other types of workers must take a claim for damages through the courts, which can be more expensive and time-consuming. This is in contrast with the UK, where redress for all workers (as defined) is through the employment tribunal system. TI Ireland has recommended that access to the employment law system for penalisation claims should be expanded to all workers as defined by the PDA and Directive.

Definition of Protected Disclosure

The PDA defines a protected disclosure as a disclosure of 'relevant information'. It is not unusual for workers to ask for advice from co-workers or managers in the course of considering or preparing to make a protected disclosure, without sharing relevant information. Likewise, it is common for workers to indicate that they intend to make protected disclosures or ask questions that divulge knowledge or a reason to believe that wrongdoing may be taking place. TI Ireland has argued that the definition of a protected disclosure should be broadened to include cases where a worker has clearly stated an intention to make a protected disclosure, or were believed or suspected to have made a protected disclosure. This scenario appears to have been anticipated and partly addressed for disclosures made under the Communications Regulation (Amendment) Act 2007.

The PDA also requires that the information being disclosed by the worker must come to the 'attention of the worker in connection with the worker's employment'. This is an issue that has been brought to the attention of the Speak Up Helpline and TLAC since 2016 and has posed a needless evidential burden for workers. TI Ireland has recommended that this provision be removed entirely to avoid any risk of the wording being interpreted unduly narrowly. Alternatively, the provision could be amended in line with the wording in the Directive, which states that relevant information must come to the 'attention of the reporting person in a work-related context'.

Compensation limits

The compensation limit in cases where a whistleblower is dismissed is likely to be inadequate in a number of circumstances. This limit should be removed to permit the WRC to award whatever level of compensation that is considered just and equitable in the circumstances as is provided under s.28.3(c) of The Safety, Health, and Welfare at Work Act 2005.

Prosecution guidelines

The PDA provides protections to whistleblowers from criminal liability, but this may not be enough where there are severe criminal sanctions in place for the disclosure of confidential information. TI Ireland recommends that the Office of the Director of Public Prosecutions (DPP) issue guidelines on how it would apply the PDA in cases before bringing prosecutions for the disclosure of any information. This would provide reassurance to potential whistleblowers disclosing confidential information.

Soft law

The list of relevant wrongdoings in section 5(3) of the PDA might not always cover breaches of soft law mechanisms such as professional codes or ethical guidelines, upon which the public, customers and employers often rely to protect themselves from risks and harmful practices. These practices include:

- The mismanagement of or failure to disclose conflicts of interest by providers of professional services;
- improper staff recruitment (including, for example, the appointment of family and friends who are not properly qualified for the role);
- the cover up of such activities and/or repeated misconduct.

The list should be expanded to explicitly include these. Alternatively, the list of relevant wrongdoings could be expanded to include breaches of professional codes of conduct, or any codes of conduct to which the worker is contractually bound and where it is in the public interest to disclose it.

Some employers have attempted to deal with the gap in the legislation by extending their policies to cover such wrongdoing. This can lead to a confusion and pose additional legal risks to workers in circumstances where the worker may only have the protection of their employer's policy and not the full cover of the PDA.

External reporting hurdles

The conditions in section 10 of the PDA are overly burdensome and difficult to rely upon. For example, when making a disclosure under section 10 of the PDA a worker can have no certainty that a court or tribunal would agree that their disclosure is 'reasonable in all the circumstances'.

It can also be challenging for workers to know the practical difference between having a reasonable belief of relevant wrongdoing (as required in all protected disclosures) and also having a reasonable belief that the information disclosed is substantially true. Where the worker has a reasonable belief that the information that they are disclosing tends to show relevant wrongdoing, it follows that they will invariably also believe that what they are disclosing is true.

Although it is generally preferable that workers disclose to an employer so that wrongdoing can be addressed as quickly as possible, there are circumstances where they will need to report outside their organisation (either to a competent authority, or to their public representatives or the media).

The Directive acknowledges this but neither Article 10 nor Article 15 requires that a whistleblower demonstrates that they had a reasonable belief that the relevant information is 'substantially true' when making a report to a competent authority, or that a public disclosure is 'reasonable in all the circumstances'. The primary evidential threshold is that the whistleblower had a 'reasonable belief' in making the disclosure. The PDA should be amended accordingly.

Corruption also has a serious impact on the economy and public finances. A 2016 study by the Rand Corporation estimates that corruption costs the European Union economy between €817 and €990 billion per year. They calculated the impact of corruption on the Irish Economy was between €6 billion and €18 billion per year.

Sectoral legislation

Although the PDA is the most comprehensive piece of legislation providing protections to those making disclosures of wrongdoings in Irish law, there are a number of provisions in other legislation relevant to specific sectors that also allow people to make protected disclosures in more limited circumstances. TI Ireland recommends that a comprehensive review of these sectoral protections be taken, and that any protections that are stronger than those in the PDA be included within that legislation for the benefit of all workers, and that the sectoral legislation should be repealed.

ANTI-FRAUD AND ANTI-CORRUPTION STRUCTURES

In April 2019, TI Ireland made a submission to the Department of Justice and Equality's Review Group advocating for a significant overhaul in Anti-Fraud and Anti-Corruption Structures.[89] Although Transparency International's Corruption Perceptions Index ranks Ireland relatively high, our position on the index is low comparative to other Northern European nations.[90] Contrasting international perceptions of corruption are also reflected in local perceptions and attitudes. In a 2017 survey by EY on fraud risk, 47% of Irish respondents believed bribery and corrupt practices are widespread in Ireland. This is significantly higher than the EU average of 33%. What is more, 22% of respondents said they would act unethically to benefit their career.[91] More recent surveys of business leaders in 2018 showed that 50% would act unethically to save their company in an economic downturn, although only 10% said that bribery and corruption happen widely in Ireland.[92]

The general public also perceive corruption as a problem in Ireland. 62% of Irish respondents to the 2017 Eurobarometer said corruption is a problem in our public institutions.[93] Although this was slightly lower than the EU average of 68%, it is higher than most of our Northern European counterparts. Some 65% of respondents believed that corruption is part of Ireland's business culture, which is slightly higher than the EU average of 62%.

Corruption also has a serious impact on the economy and public finances. A 2016 study by the Rand Corporation estimates that corruption costs the European Union economy between €817 and €990 billion per year.[94] They calculated the impact of corruption on the Irish Economy was between €6 billion and €18 billion per year.[95] These impacts were symptoms of broader risks to the health of democracy, as corruption was shown to increase with inequality. The study also shows a negative relationship between corruption and the rule of law. In other words: the less the law is enforced, the higher the risk of corruption, and the higher the level of corruption, the higher the risk that the law will not be enforced. Despite well-publicised findings of Tribunals of Inquiry in recent decades, prosecutions for corruption have been rare in Ireland. Little progress has been made in holding public officials and business-people to account since the 1970's, despite clear evidence of malpractice. This points to a long-term trend of neglect in tackling corruption by Ireland's criminal justice system.

The OECD has regularly highlighted Ireland's lack of enforcement of the foreign corruption offence, particularly in its failure to prosecute any foreign bribery cases. The OECD has urged Ireland to improve its capacity and level of resources to detect, investigate and prosecute cases of foreign bribery.[96] Although the Financial Action Task Force (FATF) has noted

Ireland's strong anti-money laundering (AML) offence, they raised concerns in 2017 over its reluctance to bring AML cases to court.[97] Although 22 convictions were secured, none of these followed a trial. Recent high-profile cases show the importance of increasing enforcement of AML offences in Ireland. In 2015, it was reported that US$6.5m worth of investments held for Mohammed Sani Abacha (son of former Nigerian President and dictator Sani Abacha) were invested in Ireland.[98] Gulnara Karimova, eldest daughter of the late Uzbek President Islam Karimov, allegedly invested proceeds of bribes received from telecom companies in Irish funds.[99] The Karimova and Abacha cases suggest that there is far more intelligence gathering and risk analysis needed to identify the proceeds of international corruption invested in Ireland. Detection of these types of corruption-related offences requires systemic gathering of criminal intelligence, mutual cooperation with law-enforcement overseas, as well as additional training and resources for investigators. Further analysis on Ireland's efforts to address the laundering and recovery of the proceeds of international corruption will be featured in TI Ireland's 'Safe Haven?' report to be published in early 2021.

Measures to combat corruption at a local level also need to be improved. In 2015, Local Government Audit Service auditors expressed concerns about the resourcing of internal audit functions in 15 of the 31 local authorities reviewed. An RTÉ Investigates exposé in the same year found that 'At council level, the under-declaration [of members' financial interests] was manifest with commercial interests and properties regularly going undeclared in annual declarations'.[100] Yet as TI Ireland's National Integrity Index studies for 2018 and 2019 showed there is much still left to do to ensure that local authorities have the adequate procedures in place to address corruption risks.[101]

TI Ireland made ten recommendations to the Department:

1. Develop a National Anti-Corruption Plan (NACP)
2. Establish a multi-agency taskforce on corruption
3. Hold multi-stakeholder forums on fraud and corruption
4. Establish a Corruption Immunity Programme to encourage participants to break ranks
5. Intelligence-led policing of public-sector corruption
6. Establish an independent National Anti-Corruption Bureau (NACB)
7. Expedite legal reforms, such as the Public Sector Standards Bill 2015
8. Publish disaggregated data to allow for analysis of enforcement of corruption-related offences.
9. Implement Deferred Prosecution Agreements (DPAs) as a means of holding corporations to account for corruption-related offences.
10. Publish guidelines for investigators to better communicate with witnesses of fraud and corruption.

National Anti-Corruption Plan

A National Anti-Corruption Plan (NACP) to implement a long-term and holistic approach should be developed by an anti-corruption policy unit at the Department of Justice and Equality. The NACP should be championed by the Department of the Taoiseach; co-sponsored by other bodies with responsibility for promoting public-sector transparency such as the Department of Public Expenditure and Reform; and be informed by a multi-stakeholder forum with representatives from government, business, the relevant professions and civil society.

Corruption Taskforce

A multi-agency taskforce on corruption would inform an annual national corruption risk assessment (which informs the NACP) and help share information and intelligence among appropriate agencies.

Multi-stakeholder forum

A multi-stakeholder forum on fraud and corruption would bring together representatives from government, An Garda Síochána and relevant regulatory bodies as well as representatives from the relevant professions, industry and civil society.

Corruption Immunity Programme and Rewards

In a jurisdiction such as Ireland, corruption is more often a conspiratorial crime and those engaging in it are unlikely to report unless there is a strong incentive to do so. Rewards for information leading to prosecutions or convictions for corruption offences that led to significant losses to the Exchequer should be considered. A Corruption Immunity Programme, based on the Cartel Immunity Programme,[102] could also encourage corrupt officials or those corrupting them to break ranks.

Intelligence-led policing

Intelligence-based enforcement is essential for agencies to identify red-flags and suspicious patterns. Sharing of data and intelligence between agencies such as the Standards in Public Office Commission (SIPO), the Comptroller and Auditor General, the Revenue Commissioners and An Garda Síochána is essential to uncover collusive corruption. Establishing a multi-agency taskforce would facilitate better planning and information-sharing among existing authorities. However, any agency that undertakes intelligence gathering on political and public-sector corruption would also need significant ring-fenced resources as well as political and operational independence if it is to undertake its work without undue interference.

National Anti-Corruption Bureau

In the absence of a properly funded anti-corruption bureau, the State frequently relies on Tribunals of Inquiry to identify wrongdoing. This has proven to be a lengthy, expensive and unsatisfactory means of exposing corruption.

The establishment of an Anti-Corruption Unit within the Garda National Economic Crime Bureau (GNECB) in 2018 was a welcome first step towards improving Ireland's capacity to prosecute corruption offences. However, the United Nations Convention against Corruption Implementation Review Group has criticised the unit's budget and human resources allocation as only three dedicated staff members had been allocated to the unit as of 2019.[103] The Unit can seek additional resources from the GNECB, but they might not have the capacity considering their existing workload. This could mean that the GNECB will only divert resources to investigate significant abuses of public office. The Law Reform Commission suggests merging the resources of existing agencies (including those of the GNECB and OECD) into a Corporate Crime Agency (CCA) with powers to investigate indictable offences under the Companies Acts, as well as money laundering and serious fraud.[104] Most corruption-related offences have a public-sector dimension however, and many cases do not involve corporations. A CCA would not be suited to investigating corruption in public office. To better facilitate intelligence-sharing between law enforcement agencies, it may be necessary to establish an independent National Anti-Corruption Bureau (NACB) in addition to a Corporate Enforcement Authority. TI Ireland has recommended establishing the NACB or a similar model to the Criminal Assets Bureau and the New South Wales Independent Commission against Corruption.[105] It should be established by statute and be answerable to the Oireachtas. It should be allocated budget and staffing levels similar to other jurisdictions of comparable size to Ireland.

Legal Reform

TI Ireland also renewed its call for long-awaited legal reforms to be introduced, including the Public Sector Standards Bill 2015 which had been delayed for three years before being allowed to lapse in 2020.[106] The Bill would have created a unified disclosure regime for public officials at national and local level, and require the disclosure of liabilities as well as assets by certain categories of officials. This information, in tandem with a modernised disclosure system, would be needed if investigators are to gather evidence or intelligence on potential corruption offences.[107] TI Ireland also advocated for a review of section 19 of the Criminal Justice Act 2011 (CJA 2011) which requires those with information that could be of material assistance in the investigation of fraud offences to report to An Garda Síochána. A worker reporting under the CJA 2011 does not have equivalent protections to those reporting under the PDA unless they can meet the tests set out in section 10. These tests require that the worker show they reported to their employer before reporting to the Gardaí unless they can prove they feared reprisal or an attempt to cover up or destroy evidence. Another option could be to list An Garda Síochána as a prescribed person under the PDA 2014.

Publishing data

TI Ireland has frequently noted that the publication of data on enforcement of corruption-related offences is insufficient and how it can make it challenging for public bodies and NGOs to conduct any thorough analysis. Relevant prosecutions are currently categorised under fraud offences only, and corruption offences are not distinguished in these figures. Data on the number of complaints law enforcement agencies receive, the investigations they carry out, and how many files are referred for prosecution or cases in which no prosecution is carried out are not published either. TI Ireland recommended that the DPP and An Garda Síochána publish disaggregated data under these categories.

Photo: shutterstock.com/Semmick Photo

Deferred Prosecution Agreements

Securing convictions of legal entities can be challenging and costly, which can deter prosecutors from taking enforcement action. TI Ireland advocated that Deferred Prosecution Agreements (DPAs) be introduced, as they can be an effective means of holding corporations to account for corruption-related offences.[108] DPAs are reached between prosecutors and organisations charged with corruption offences. DPAs suspend prosecution so long as the organisation meets certain conditions, such as paying fines, compensation, and co-operating with the prosecution of individuals within an organisation. DPAs should not be used to allow natural persons (i.e. management or employees) to avoid prosecution however, and their use should be executed with caution and agreed under judicial supervision as recommended by the Law Reform Commission.[109]

Publication of Guidelines

Perceived failures in conducting criminal investigations has been one of the most common concerns raised by victims of alleged crimes with TI Ireland's Speak Up Helpline since it was established.[110] Clear guidelines would go some way to addressing these concerns by helping potential witnesses understand their rights and responsibilities and help avoid public frustration arising from the conduct of investigations. Guidelines would also help investigators communicate more effectively with witnesses of fraud and corruption.[111] The guidelines should clearly outline the grounds for commencing investigations into serious fraud or corruption. These guidelines should also clarify what constitutes information that might be of 'material assistance' in reporting fraud for both witnesses and investigators, which would help clarify any mandatory reporting obligations they may have. In particular, this would be helpful where there is some dispute between an employee and employer over the nature of a concern (and whether it ought to be reported under section 19 of the CJA 2011) or over the length of time an employer should be allowed to undertake an internal investigation into alleged fraud or corruption before reporting it to the Gardaí.

8.

CONCLUSIONS AND GENERAL RECOMMENDATIONS

Irish businesses and workers will continue to face enormous challenges posed by Covid-19. The pandemic creates the conditions in which corruption can thrive and whistleblowers will be critical to identifying and addressing wrongdoing. They continue to face retaliation for speaking up, and the fear of adverse treatment is the biggest barrier to reporting wrongdoing.[112]

Policy-makers and employers should mitigate these risks by fostering environments where workers feel safe in speaking up. Another key barrier to reporting is the concern that disclosures will be met with inaction. The measures businesses take to mitigate the risk of Covid-19 transmission pose challenges for investigating reports of wrongdoing, but these difficulties are not insurmountable with the use of technological solutions that have now become commonplace.

There has been progress through legal reforms since the last report, such as the enactment of the Criminal Justice (Corruption Offences) Act 2018. Other key reforms have languished however, and there has been no movement in advancing important legislation such as the Public Sector Standards Bill 2015 which lapsed after the dissolution of the Oireachtas in 2020. This should be addressed as a matter of urgency by both the Government and Oireachtas members. In addition, there is a continued need to introduce a range of measures that will help prevent, detect and address corruption in all its forms:

- The Public Sector Standards Bill should be re-introduced by the Government and provide for a ban on any public official receiving gifts or entertainment above a token value during the course of their employment. Any new requirements to make declarations of interest should also cover liabilities, as well as income and assets of public officials and their families.[113]
- Proactive intelligence sharing among law enforcement agencies and other state bodies needs to improve if corruption and economic crime are to be properly detected and prosecuted. An independent national anti-corruption bureau should be established. Such a measure should be introduced as part of a long-term national strategy aimed at preventing corruption and economic crime.
- While Local Government auditing standards appear to have improved in recent years, there appears to be little or no promotion by local authorities of their statutory Fraud and Anti-Corruption Alert Plans. Promotion of these and other anti-corruption measures, including training and education, should be included as part of an independent overhaul of the local government ethics framework.
- More emphasis should be placed on education and awareness-raising on the risks and costs associated with corruption, and measures aimed at stopping corruption across Irish society. This should include sustained public awareness raising initiatives involving civil society organisations; ongoing ethics training and advice for public officials including elected representatives; and continuous research on the efficacy of existing anti-corruption measures.
- TI Ireland will continue to support whistleblowers through the Speak Up Helpline, IAW, and TLAC. The demand on these services is continually growing however, and this demand cannot be supported without increased resources. TI Ireland is continually building on the sustainability of these programmes, but continued government and public support will be essential to sustain these programmes in the short to medium term.

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

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

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SPEAK UP

If you would like further guidance on blowing the whistle, reporting wrongdoing or dealing with an ethical dilemma at work, please contact our Speak Up helpline on 1800 844 866 between 10am and 6pm, Monday to Friday. You can contact us securely online at www.speakup.ie or by using the Signal app to send us an encrypted message at 0873859996 (www.signal.org). Only Signal-encrypted messages will be responded to. You can also download our free Speak Up Safely Guide and Video.

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