TRANSPARENCY INTERNATIONAL
Transparency International Ireland

Submission to the Department of Justice and Law Reform Consultation on Organised and White Collar Crime

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I write on behalf of Transparency International (TI) Ireland to offer its submission on the forthcoming Department of Justice and Law Reform's White Paper on White Collar Crime.

This is a very welcome initiative and I am pleased to present you with an overview of TI Ireland's preliminary comments and recommendations on the issue.

Please let us know if you should like any further information or clarification in the meantime.

Yours faithfully,

Chief Executive
Transparency International Ireland

01 612 7064
info@transparency.ie
www.transparency.ie

1. Summary

This submission makes a number of observations on the current approach to tackling white collar crime, and more specifically, corruption related offences in Ireland. We also outline potential opportunities to address any shortcomings in the approach adopted to date which are summarised as key recommendations. In addition, we should draw your attention to the findings of our 2010 study on time-related barriers to the prosecution of corruption in the European Union and recommendations contained in the National Integrity Systems Country Study for Ireland published by Transparency International in 2009.

2. Key Recommendations

a. Establish comprehensive and clear corporate liability for corruption offences.

b. Introduce universal whistleblower protection for all workers in Ireland.

c. Ensure law enforcement and regulatory agencies are sufficiently resourced and have adequate legal powers to investigate and detect offences.

d. Provide sentencing guidelines for corruption-related offences.

3. Supplementary Recommendations

a. Review definitions of fraud.

b. Introduce a Corruption Immunity or Leniency Programme for certain witnesses who are also accomplices to offences.

c. Ratify the Council of Europe Civil Law Convention on Corruption and the United Nations Convention against Corruption.

4. General Observations

The table below outlines the number of corruption related offences detected and prosecuted by the Irish authorities in the five years since 2003.[1]

Key:

A – Number detected
B – Number of Court Proceedings
C – Number of convictions

Year	2003			2004			2005			2006			2007			2008		
Offences	a	b	c	a	B	c	a	b	C	A	b	c	a	b	c	a	b	c
Money Laundering	14	5	3	30	22	14	62	50	1	13	2	2	8	3	3	5	2	0
Corruption	5	2	1	3	2	2	6	2	2	1	1	0	3	2	2	2	0	0
Falsification of accounts	7	7	6	52	10	10	6	2	0	4	1	1	2	1	1	6	4	2
Companies Acts	38	37	31	12	1	1	8	2	1	3	2	2	2	1	1	0	0	0
Stock Exchange	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

While the introduction of the Prevention of Corruption Act 2010 and a small increase in the number of cases of corruption both detected and prosecuted in the Irish courts since 2001 are both encouraging developments, it is disappointing that the fight against fraud, corruption and white collar crime are not listed as priorities in the latest Garda Síochána policing strategy for 2011. The failure to bring any criminal prosecutions in certain categories is also a cause for concern. No cases have been pursued against Irish nationals or companies bribing foreign public officials. Given the clear risk of insider dealing and other regulatory failures exposed over the past two years, it is also noteworthy that no offences have been detected under the Stock Exchange Act 1995 and that no criminal conviction has been sought for any of the range of offences covered by the Companies Acts (1963 to 2006).

The failure to secure prosecutions or to prioritise the fight against corruption and white collar crime in Ireland may lead to the assumption that either the legal system or law enforcement agencies are ill-equipped to detect and punish offenders or that the fight against white collar crime is a low priority for government. This is reflected in the finding that more than 80 per cent of Irish people believe that the government has not done enough to fight corruption[2] and that 73 per cent people believe that sentences for corruption offences are too light. Furthermore, only 32 per cent believe that the prosecution rate is sufficient to deter people from engaging in corruption related offences.[3] The financial crisis has demonstrated a clear link between the economic welfare of the State and the need to enforce well designed laws and regulation. However neither the political will nor resources appear to have been applied to ensure this is the case.

[1] Source: Central Statistics Office, www.cso.ie
[2] Global Corruption Barometer 2010, Transparency International, 2010 - http://www.transparency.ie/news_events/gcb2010.htm
[3] pp. 41-43 Attitudes of Europeans Towards Corruption, European Commission, November 2009.

5. Observations on the Department of Justice and Law Reform's discussion paper on Organised and White Collar Crime (No.3)

The following observations are made on the Department of Justice and Law Reform's discussion paper on Organised and White Collar Crime (No.3) -

Pages 24-27 - While the discussion paper states that money laundering is broadly a concern with regards to terrorism and organised crime, it would also be worth acknowledging the likelihood that the proceeds of bribery, corruption and other forms of white collar crime (both domestic and foreign) are laundered in the Irish financial services and legitimate business sectors or overseas. It would also be helpful to explain the heightened risk of money laundering posed by transactions involving politically exposed persons[4] and the link between organised crime and corruption.

Page 40, Paragraph 3 - Arguments made that non-custodial offences for white collar criminals are preferable based on the notion of restitution alone is likely to reinforce the public perception noted on page 37 that 'white collar offenders are treated differently to 'street' criminals, with particular concerns expressed about the ...historical tendency for sanctions to be more lenient'.

Furthermore, the paper does not support the assertion that the 'naming and shaming' of a white collar criminal may amount to a substantial penalty in any event, especially if coupled with loss of position or professional status and privileges'. The reasonable conclusion to be drawn from this statement is that the reputational cost of a prosecution is adequate punishment in itself. We would instead draw attention to the need for proportionate responses in line with the gravity of the offence in line with Article 30 of the UN Convention against Corruption. This would involve a multi-dimensional approach to punishing corrupt or fraudulent behaviour which includes custodial sentences proportionate to the impact of the crime, together with a system of financial compensation for the victims of corruption related offences (consistent with Article 9 of the Council of Europe Civil Law Convention on Corruption). Such a system could be effectively informed by the use of socio-economic victim (including community) impact statements and relevant expert analysis.

Page 44, Paragraph 3 - The discussion paper highlights the potential value of a collaborative approach to tackling white collar crime. A collaborative approach that involves business, professionals, public servants and civil society in building knowledge and capacity to effectively address white collar crime would be very welcome. TI Ireland is well disposed to offering any advice or support on what form such a collaboration should take.

[4] Defined by the FATF as individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.

6. Key Recommendations

a. Establish clear corporate liability for corruption-related offences - including failure to prevent bribery.

There has been welcome progress in expanding the definitions of an agent and the jurisdiction of the state with regards to bribery in the Prevention of Corruption Amendment Act 2010.[5] However, comprehensive corporate liability is vital for the credibility of Ireland's measures against bribery, which have been criticised in international evaluations in the past. The OECD Working Group on Bribery has recommended that Ireland codify and clarify the liability of legal persons for bribery offences.[6]

The Department has argued that the 'identification doctrine', whereby the acts of the persons controlling a company can constitute acts of the company itself, is sufficient to cover corporate liability obligations under the Convention. This is despite the fact that both the UK and New Zealand have in the past relied upon the same legal doctrine in their submissions to the OECD Working Group on Bribery. The Working Group has stated that such a position is inconsistent with the Convention.[7] The UK is now in full compliance with the Convention but only became so after it expanded the criteria for what constitutes a legal person for the purposes of bribery legislation.[8]

The prosecution of legal as well as natural persons for corruption related offences will serve as a powerful deterrent against corporate complicity in bribery and corruption. The legal provision of corporate liability for preventing bribery by an agent of a company – such as is provided for under Section 7 of the UK Bribery Act 2010 - would also be welcome. Such a provision would help incentivise the introduction of adequate corporate procedures aimed at preventing bribery. A company would have to prove they had adequate procedures in place to mitigate any sanction imposed by a court.

b. Introduce comprehensive whistleblower protection.

While the discussion paper is correct to state that there is a welcome shift in attitudes towards whistleblowers, with the general public no longer considering them to be 'informers'[9], there is still no sign that government is willing to implement the necessary measures to ensure their protection.

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[5] Section 2 of the Prevention of Corruption Amendment Act 2010

[6] p18, Ireland: Follow-Up Report on the Implementation of the Phase 2 and 2 BIs Recommendations. OECD, March 2010.

[7] p21, OECD Report On The Application Of The Convention On Combating
Bribery Of Foreign Public Officals In International Business, United Kingdom phase 2bis report 2008 and p56, New Zealand phase 2 report 2006.

[8] p61, Progress Report on the Enforcement of the OECD Anti-Bribery Convention, Transparency International 2010.

[9] p5, An Alternative to Silence: Whistleblowing Protections in Ireland, Transparency International Ireland 2010

Irish legislation in this area is overly complex and only allows certain categories of persons to report very specific offences. Although the former Minister for Justice announced 'blanket' whistleblower protections in May 2010[10], these protections are not comprehensive and are a continuation of the 'sectoral approach' adopted by the Government, a fact acknowledged by the Minister in Dáil Éireann in June 2010.[11]

TI Ireland issued a statement at the time the proposals were announced which identified their main shortcoming:

'The Government proposals will not protect anyone in Anglo Irish Bank who presents confidential information to the authorities even if the information helps the Gardaí in their current investigation into the bank. Neither will they protect a civil servant who reports a cover-up or misleading information given by her department to the public'.[12]

By contrast, the response in the United Kingdom to wrongdoing in the financial sector has been to actively support and encourage whistleblowers. The Serious Fraud Office (SFO) has established a hotline for whistleblowers and undertook an advertising campaign to appeal for persons to come forward with information.[13] The legislative environment in the UK is also much more conducive to whistleblowing as the Public Interest Disclosure Act applies to all industries and to the public sector. In this jurisdiction, the Government has adopted a 'sectoral' approach, whereby selected protections are offered to certain sectors for reporting of specific offences.[14] This approach has left, and will continue to leave, a lacuna in protective provisions for whistleblowers.[15]

Whistleblower protection for employees within the banking and financial services sectors is also urgently needed.[16] However this in itself will remain inadequate to encourage honest reporting across both the public and private sectors. This can only be addressed through the introduction of comprehensive legal safeguards similar to those afforded to workers in the United Kingdom.

c. Ensure law enforcement, regulatory agencies and the courts are sufficiently resourced and have adequate legal powers.

Further investment into the enforcement of laws and regulations preventing economic crime is imperative. Effective law enforcement will aid economic growth, and boost investor and market confidence in the ability of the State to police its business and financial sectors. Any fines or settlements arising from prosecutions of white collar criminals and corporations should therefore be allocated to a ring-fenced central fund which could be used for future investigations and prevention measures. Likewise, any embargoes on recruitment to positions providing essential investigation services in law enforcement agencies should be removed.

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[10] Speech by the Minister for Justice, Dermot Ahern TD, to the Law Society 21/05/2010.
[11] Written Answer by the Minister for Justice to Question 28237/10, 30/06/2010.
[12] "Government proposals to protect whistleblowers described as misleading", Available at http://www.transparency.ie/news_events/wbwhitecollar2010.htm
[13] "SFO sets up whistleblowers' helpline to beat City fraudsters", The Guardian, 14/04/2009.
[14] p4, An Alternative to Silence: Whistleblowing Protections in Ireland, Transparency International Ireland 2010.
[15] p14, ibid.
[16] p45, White Paper on Crime Discussion Document No. 3, Organised and white collar crime.

An inter-agency approach has been highlighted as a key to success in other areas such as tackling illegal smuggling.[17] Inter-agency task forces are already in place for money laundering and foreign bribery. A similar task force dedicated to stopping domestic corruption – with meaningful civil society participation - would allow for greater coordination of national anti-corruption efforts.

Other state bodies responsible for investigating corruption should also have enhanced powers. The Standards in Public Office Commission (SIPO) currently needs to wait for a formal complaint to be lodged before conducting an investigation, meaning investigations are conducted in the full glare of publicity. SIPO should be granted the authority to adopt less formal procedures in order to make initial inquiries into apparent breaches of the Electoral and Ethics Acts by Office Holders. This would go some way to cutting the cost and time involved in launching a formal investigation; avert any unnecessary publicity surrounding an Office Holder; and help to safeguard the reputation of those subject to any inquiry.

In addition to the demands on resources, there are legal and time-related barriers which may significantly compromise the ability of the State to effectively investigate white collar crimes and prosecute offenders.[18] These barriers are currently subject to a review by Transparency International Ireland. The challenge posed by current limits on lawful detention periods has been a recurring theme in interviews and review of literature and it would be worthwhile to review the effectiveness of current detention periods in assisting the fair and efficient investigation of white collar offences.

d. Provide sentencing guidelines for corruption-related offences.

Perhaps the most contentious aspect of the debate on white-collar crime is the issue of sentencing, as it goes to the heart of the fairness of the criminal justice system. At the Department of Justice and Law Reform's consultation seminar on the 5th of December, Professor Sandeep Gopalan argued that the damage to reputation suffered by senior professionals, as well as the small size of communities of CEOs and other such persons, ensured diminishing returns in terms of deterrence as the length of sentences was increased.[19] He advocated for other solutions such as restitution by criminals to victims or house arrest.

The argument that white-collar criminals should be offered alternatives to imprisonment due to overcrowding which are denied to persons who commit other serious offences, challenges the value of equality before the law. In particular this will reinforce the perception that offenders of lower social status are less likely to be treated fairly in comparison to those in higher income-brackets and of professional standing. This view is also expressed recently by Dr. Shane Kilcommins, speaking at an event organised by Irish Women Lawyers Association.

'The commitment given to adapting the criminal law has been enormous in recent years. We have broadened criminal offences, extended the use of mandatory sentences, restricted bail, extended detention times etc. I don't see the same commitment to dealing with white-collar

[17] p17, White Paper on Crime Discussion Document No. 3, Organised and white collar crime.
[18] p38, ibid.
[19] Prof. Gopalan was presenting on his paper: 'Skilling's Martyrdom: The Case for Criminalization Without Incarceration' The University of San Francisco Law Review 44 (2010)

crime'.[20]

The need to treat serious economic crime on the same level as other serious offences is also an argument made by Mr Justice McKechnie in DPP v Duffy.[21] The case involved price fixing, which was described by Justice McKechnie as 'a crime against all consumers'. Justice McKechnie also presided over DPP v Manning[22] where he stated that 'the only real and effective deterrent for those involved in this type of unlawful behaviour might have to include a prison sentence' and that 'fines, unless severe and severely impacting, are not a sufficient deterrent'.

By contrast, in Director of Corporate Enforcement v Curran[23], an application for disbarment under the companies act was made by the ODCE. The application was made against Mr. Kevin Curran, a regional manager in National Irish Bank in relation to the bank's use of non-resident accounts to avoid paying DIRT. The application was not granted by Mr. Justice Murphy on the basis that such behaviour was widespread within the banking system and that 'Mr Curran on his own could not have eliminated the problem'.[24]

Sentencing guidelines that draw attention to the socio-economic impact of white-collar crime and corruption would assist in ensuring consistency and fairness in sentencing. They would also help underscore the intended deterrent effect of sanctions contained in existing legislation.

7. Supplementary Recommendations

a. Review definitions of fraud.

Inconsistencies in the Irish Statute Book have been addressed in a number of international reviews of Ireland's laws on corruption related offences. A related example is the law on fraud. Fraud related offences are covered by more than 34 different acts with different sanctions prescribed for each separate offence. While types of fraud continue to evolve and change as new technologies develop, there are nevertheless some key features which they have in common and which can be legislated for.

The United Kingdom has had difficulty in establishing guilt with fraud offences under the Theft Act 1978.[25] The Fraud Act 2006[26] repealed most of the offences under the 1978 act and instead gave three definitions of fraud:

- 'Fraud by false representation' is defined as a case where a person makes 'any representation as to fact or law ... express or implied' which they know to be untrue or misleading.

[20] http://www.irishtimes.com/newspaper/Ireland/2010/0705/1224274035720.html
[21] DPP v Duffy [2009] IEHC 208
[22] DPP v Manning [2007] Unreported, High Court, 9th of Febuary 2007.
[23] Director of Corporate Enforcement v Curran, [2007] IEHC 181
[24] Elaine Byrne, 30 March 2010, 'Uncertain public sleepwalking into Nama', The Irish Times http://www.irishtimes.com/newspaper/opinion/2010/0330/1224267341161.html
[25] UK Law Commission Consulatation Paper No 155, available at http://www.lawcom.gov.uk/docs/cp155.pdf
[26] Fraud act 2006 c.35

- 'Fraud by failing to disclose information' is defined as a case where a person fails to disclose any information to a third party when they are under a legal duty to disclose such information.

- 'Fraud by abuse of position' is defined by Section 4 of the Act as a case where a person occupies a position where they are expected to safeguard the financial interests of another person, and abuses that position; this includes cases where the abuse consisted of an omission rather than an overt act.

It is claimed that the act has enabled prosecutors to prosecute crimes which would have previously gone unpunished due to their lack of a clearly identifiable victim or the confusion in definitions and sanctions under the old legal regime.[27] For instance in Regina v Paul Chase[28], an employee who defrauded Harrow Council of £10,000 was convicted of fraud by abuse of position. In R. v Gayle[29], an employee of DHL was convicted of taking a bribe and using his position to allow an illegal cargo to pass to the United States from the UK.

Although no major cases have arisen in relation to corporations within the UK jurisdiction, commentators have formed the opinion that the fraud by abuse of position charge could prove particularly useful to prosecutors in cases where there are allegations that senior executives have acted dishonestly and to the detriment of their company and its stakeholders.[30]

b. Introduce an Immunity/Leniency Programme for corruption related offences.

The opportunity to engage in corrupt behaviour is increased where there is a high degree of predictability.[31] Research has demonstrated that the size of corrupt transactions is larger where there is predictability between parties and lower where effective monitoring ensures the transaction may not be carried out without alerting the authorities.[32] Additionally, the frequency of bribes decreases if firms have effective recourse through government channels or a managerial superior to obtain proper treatment without making unofficial payments.[33]

An immunity or leniency programme aimed at encouraging conspirators to 'break ranks' and improve rates of detection should be introduced to complement any whistleblower legislation to promote honest reporting. A Cartel Immunity Programme offering immunity to witnesses involved in price fixing and bid rigging already exists and has been described by officials as a success.[34] Witnesses to Tribunals of Inquiry are also immune from prosecution arising from evidence they present to the Tribunal, a measure which has led to the release of a great deal more information than might otherwise have been released.

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[27] Pickworth, J. The Fraud Act 2006: a death knell for conspiracy to defraud - the "prosecutor's darling"? European Newsletter: August 2009.
[28] [2010], EWCA Crim 1630.
[29] [2008] EWCA Crim 1344;
[30] Supra at 3
[31] P53, Lambsdorff, J (2007) The Institutional Economics of Corruption and Reform: Theory, Evidence, and Policy. Cambridge University Press: Cambridge.
[32] Herrera,A and Rodriguez, P (2007). Bribery and the Nature of Corruption. Working paper. Available at https://www.msu.edu/~herrer20/documents/HLR_may07.pdf
[33] Ibid.
[34] Interview with Competition Authority, 2008 and 2011.

Applications for immunity or leniency under such a programme would still have to be made on the basis of full disclosure to the relevant law enforcement/ anti-corruption agency before a complete file is submitted to the Director of Public Prosecutions (DPP).

c. Ratify international conventions against corruption.

The Irish Government has already signed the Council of Europe (CoE) Civil Law Convention on Corruption and the United Nations Convention against Corruption but has yet to ratify either of these international treaties.

The CoE Civil Law Convention on Corruption provides for compensation to victims of corruption, including where they suffer a loss as a result of a corrupt action by a public official[35], as well as protections for whistleblowers.[36]

Ireland is one of only three European Union states not to have ratified the UN Convention against Corruption, which is a broader instrument that obligates states to introduce preventative and criminal measures to prevent corruption. The Convention provides for properly resourced and independent anti-corruption bodies[37], commits states to introduce safeguards for individuals within the public sector who wish to report corrupt behaviour.[38] Crucially, ratification requires the criminalisation of trading of influence[39], where public officials are given undue benefits to use their influence to affect government decisions. It is not clear whether this risk is adequately addressed by current legislation. In addition, no register of lobbyists exists in Ireland which would allow for closer scrutiny of the links between public representatives, lobbyists and economic interests.

8. Additional Resources

Further resources and links on this issue and related issues can be found at http://www.transparency.ie/resources/pubs.htm

[35] Articles 3 and 5 of the Council of Europe Civil Law Convention on Corruption.
[36] Article 9, ibid.
[37] Article 6 of the United Nations Convention against Corruption.
[38] Article 8, ibid.
[39] Article 18, ibid.