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Transparency International Ireland



SPEAK UP

Speak Up Report 2015

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 interest of everyone. Our mission is to empower people with the support they need to promote integrity and stop corruption in all its forms.

www.transparency.ie

Cover photo of Maurice McCabe and John Wilson printed courtesy of the People of the Year Awards (Photographer: Robbie Reynolds).
Author: John Devitt and Susheela Math



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1. INTRODUCTION

This report draws from anonymised data collected from over 500 people who have approached Transparency International (TI) Ireland's Speak Up helpline for information, referrals or support since 2011.

The report provides information on the counties or regions many of our clients and callers are located in, as well as the gender and age profiles of people calling us. It highlights the types of concerns we are approached with, the processes that people believe are abused, and the sectors and institutions they consider to be vulnerable to corruption and other forms of wrongdoing. We offer an analysis of corruption risks based on this data and some recommendations to help address these risks. The report also analyses the Protected Disclosures Act 2014 and outlines some challenges and opportunities arising from the new whistleblowing legislation.

We hope that the report will be useful to policy makers, business and civil society leaders, law enforcement agents, regulators and employers in identifying red flags for future intervention. In particular, we hope it will help prompt more dialogue on how we can work together towards an Ireland that is open and fair, and where power is used in the interests of everyone.

About Speak Up

The Speak Up helpline is one of around 70 TI Advocacy and Legal Advice Centres around the world and was the first to be established by TI in Western Europe. TI has now provided support to over 130,000 people worldwide.

Speak Up was launched by TI Ireland in May 2011 to provide support to witnesses, whistleblowers and victims of corruption and other wrongdoing. Since then, it has provided information, referral and advice services to over 500 people. Our team has also provided advocacy support to Maurice McCabe, John Wilson, Noel Wardick and others, helping counter the narrative of these courageous people as 'trouble makers'.

The Team

The helpline is managed by TI Ireland's Legal Counsel, Susheela Math, a solicitor with extensive experience in public law.¹ Susheela 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 can offer to callers. Communications and advocacy advice is provided by TI Ireland's Chief Executive John Devitt.

How we work on cases

The majority of our clients are offered information or referral to the appropriate agency to intervene on their behalf. Many clients seek advice or information on how they can raise a concern either to their employer or to the authorities. Some have already sought legal advice and are looking for practical guidance on how to seek redress for any harm or help in dealing with reprisal they have suffered after they have reported wrongdoing.

We do not attempt to investigate the issues that have been brought to our attention but instead ensure that the client has sought to remedy the issue locally (directly with the organisation concerned/through their employer) if possible and/or through relevant regulatory bodies as appropriate.

Where we believe it's both in the public interest and the interest of the client, we will sometimes bring cases to members of the Oireachtas or to the attention of journalists. Over the past four years we have sometimes acted as a 'match maker' for whistleblowers and worked with journalists from the RTÉ Investigations Unit, TV3, the Irish Times, the Irish Examiner, the Sunday Independent, the Irish Daily Mail, the Sunday Times and the Financial Times in drawing attention to cases in the public interest.

¹ Susheela is a solicitor (Law Society of Scotland) and registered lawyer (Law Society of Ireland) and has managed the Speak Up helpline since February 2014.

“Unscrupulous employers have also sometimes targeted relatives, friends and colleagues of a whistleblower as a way of punishing them for speaking up. We successfully lobbied to see that the legislation was wide enough to provide a remedy for all organisations and individuals targeted in these ways.”

Institutional, Cultural and Legal Change

Just as importantly, we have helped shape new whistleblower legislation – the Protected Disclosures Act 2014 (the Act) – by advising the Government on the draft law, drawing on the experiences of those who have spoken up and suffered the consequences.

One of TI Ireland’s first clients in 2011 was Noel Wardick, former Director of International Department at the Irish Red Cross, who reported concerns about financial management and governance at the charity. It also sourced free legal advice for Olivia Greene who lost her job not long after blowing the whistle on lending practices at the disgraced Irish Nationwide Building Society. Noel and Olivia have since been unable to find full-time employment.

Noel and Olivia are not alone in finding it difficult to find work after blowing the whistle and the risk to one’s future career prospects often weighs heavily on the mind of anyone preparing to share a concern. It was for that reason that TI Ireland successfully argued for the inclusion of provisions in legislation that provide whistleblowers with redress against potential employers who discriminate against them.²

Many of TI Ireland’s clients have remained anonymous but their experiences have also helped influence additional protections in the Act. These clients include an agency nurse who called us in 2011 to tell us of how she had lost her job after blowing the whistle on abuse at a care home for the elderly. After blowing the whistle to the care home, the care home manager threatened the agency with the cancellation of their contract if the agency did not dismiss the nurse.

The agency nurse’s case highlighted the need for legal rights for anyone (including employers) who are threatened as a result

of a disclosure. Unscrupulous employers have also sometimes targeted relatives, friends and colleagues of a whistleblower as a way of punishing them for speaking up. We successfully lobbied to see that the legislation was wide enough to provide a remedy for all organisations and individuals targeted in these ways.³

The new legislation has been shaped in part by the recent stories of Garda Sergeant Maurice McCabe and former Garda John Wilson who came to TI Ireland for support in 2012 when blowing the whistle on widespread abuse in the management of police records. Their experience led to the introduction of new reporting procedures for the Gardaí.

There are weaknesses in the legislation, however, and we highlight these below including a failure to provide reliable protection to workers such as volunteers.

Acknowledgements

We are very grateful for the support of the Public Interest Law Alliance who have provided free legal support to TI Ireland and the many solicitors who have supported our clients over the years – including Andrew Sheridan Solicitors, Michael Finucane Solicitors and Whelan Murtagh Solicitors.

The essential support we provide could not be offered without the financial assistance of voluntary contributions from the public and our institutional donors including the Joseph Rowntree Charitable Trust, the European Commission Directorate Home Affairs and Atlantic Philanthropies.

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John Devitt and Susheela Math*

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Merry Parker and Elizabeth Tanner.*

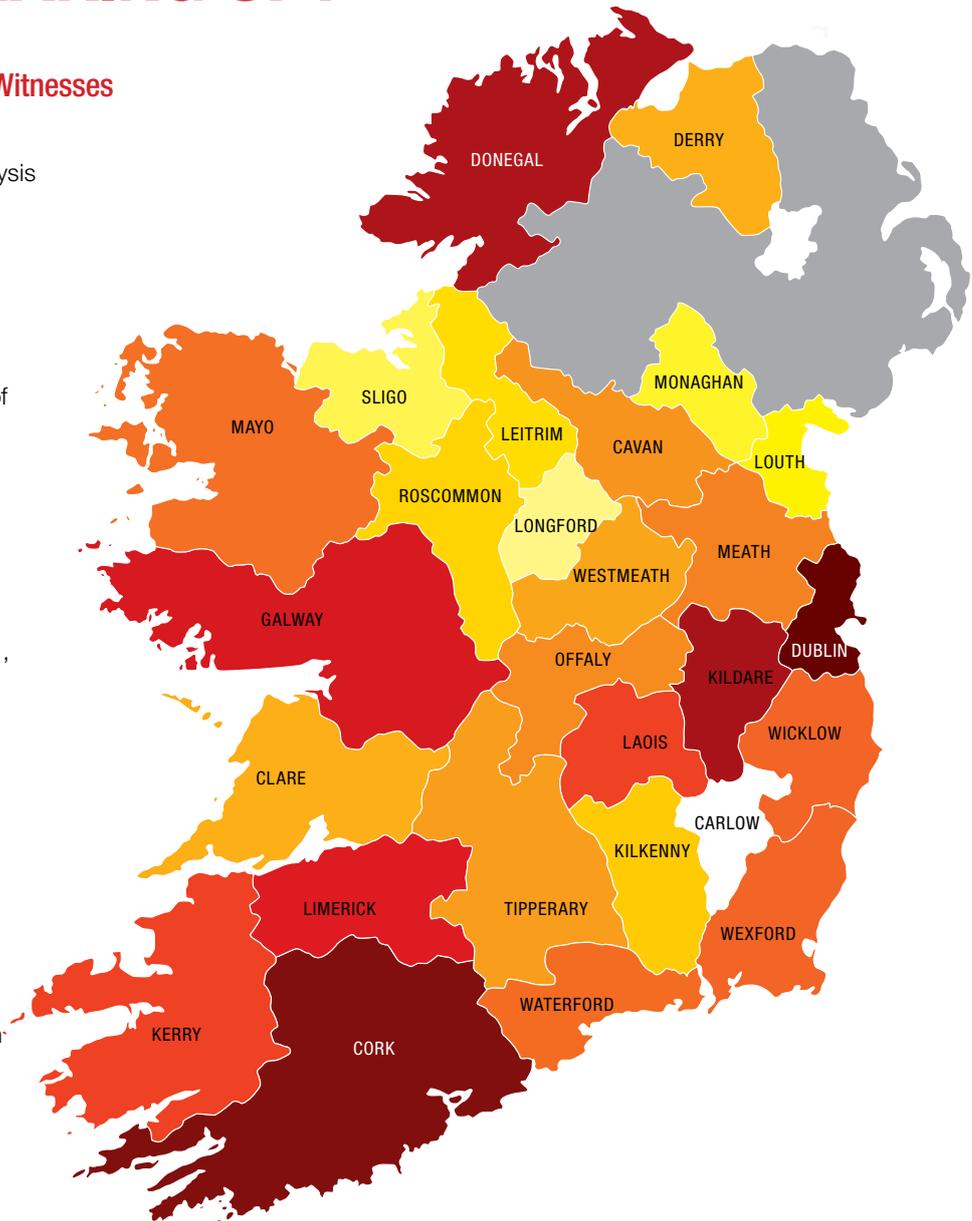
² See section 13 of the Act
³ Ibid.

2. WHO IS SPEAKING UP?

Victims, Whistleblowers and Witnesses

TI Ireland undertook an initial analysis of Speak Up calls in August 2012, fifteen months after the service was established. By that stage, 200 calls had been received. The analysis found that the majority of callers (38%) had claimed to have witnessed wrongdoing. Just 8% of these witnessed the wrongdoing at work and were therefore categorised as whistleblowers. 37% of callers claimed to have been victims of a range of abuses or misuse of position.

This pattern continued into 2015, with witnesses now accounting for 42% of callers. However, the number of callers who are classed as whistleblowers nearly doubled over this period to 15%. The percentage of 'victims' remains the same at 38%. The percentage increase in whistleblowers contacting us might be attributable to the 'Garda whistleblowers' case (outlined in further detail in section 4 of this report), the introduction of new whistleblowing legislation and increased awareness of that legislation.⁴



County	Number	Percentage	County	Number	Percentage	County	Number	Percentage
Dublin	88	16.6	Wexford	7	1.32	Derry	3	0.57
Cork	30	5.66	Wicklow	7	1.32	Kilkenny	3	0.57
Kildare	10	1.89	Mayo	6	1.13	Roscommon	3	0.57
Donegal	9	1.7	Meath	5	0.94	Leitrim	2	0.38
Galway	9	1.7	Offaly	5	0.94	Louth	2	0.38
Limerick	8	1.51	Cavan	4	0.75	Monaghan	2	0.38
Kerry	7	1.32	Tipperary	4	0.75	Sligo	2	0.38
Laois	7	1.32	Westmeath	4	0.75	Longford	1	0.19
Waterford	7	1.32	Clare	3	0.57	Carlow	0	0

⁴ Based on data from 2011 to 23 January 2015. Unless otherwise specified, this time period has been used throughout this report

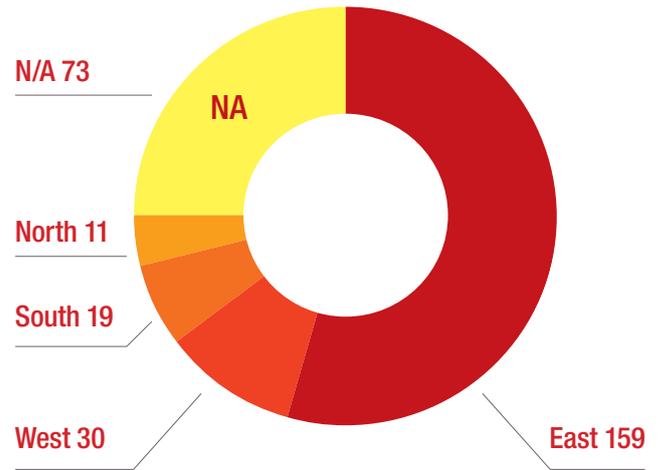
Demographic Profile

Region

As one might expect, the largest numbers of calls came from the two most populated areas of the country: Dublin and Cork.

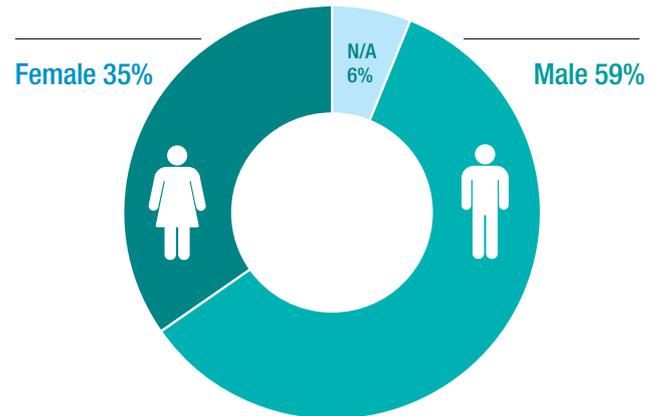
It would be overly simplistic to draw conclusions from the geographical location of callers alone. The number of calls from Kildare and Donegal is higher than may be expected based on the relative population sizes but this might be as a result of a stronger media profile for TI Ireland in the two counties. That said, further research is planned into measures aimed at stopping corruption in local authorities. Speak Up data may be used to identify any correlation between the quality of integrity measures and complaints received by geographical location.

Many callers did not specify the county or city in which they were based. Instead, they said they were from a particular region as follows:



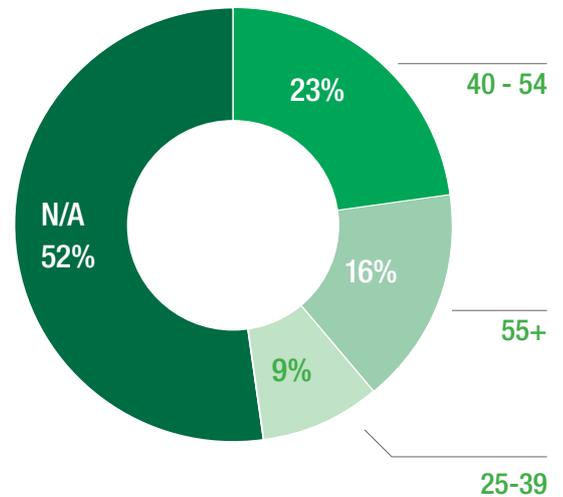
Gender of Speak Up Clients/Callers

Most Speak Up clients are men (59%). This reflects patterns observed by TI globally that indicate that men are more likely to report wrongdoing than women.⁵ The higher number of male callers may be partly a result of a greater number of men working in higher corruption-related-risk economic and professional sectors but there may be other factors at play which would justify further research.



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- 54.

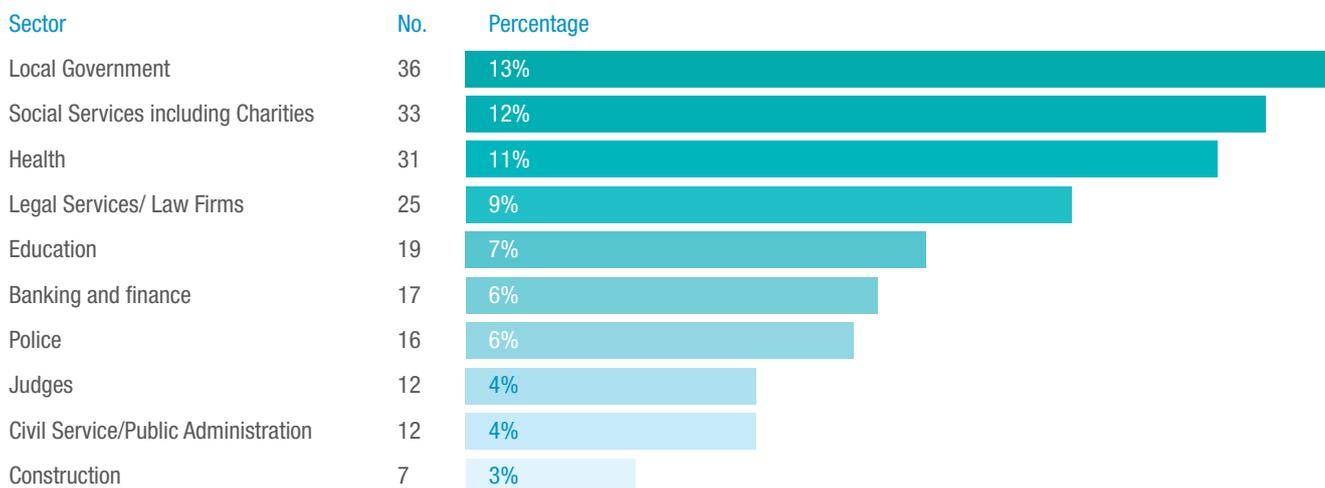


⁵ See http://www.transparency.org/whatwedo/publication/policy_position_01_2014_gender_equality_and_corruption_what_are_the_linkage

3. WHAT ARE SPEAK UP CLIENTS CALLING ABOUT?

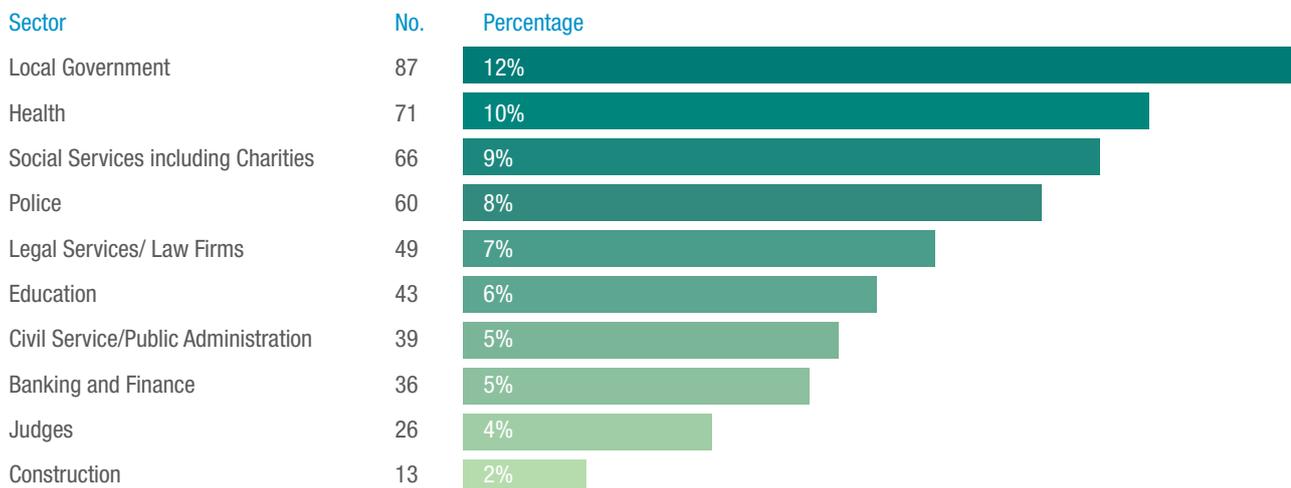
The 2012 analysis found that the ten most complained about sectors were:

Most reported sectors to 2012



Three years on, Local Government remains the sector which callers to the Speak Up helpline have been most concerned about. The Health Service represents the second highest number of calls, while Social Services/Charities have moved into third place. The fourth most common source of reports or complaints are the Garda Síochána, with Law Firms/Legal Services being the fifth most complained about category.⁶

Most reported sectors to 2015



It is virtually impossible to determine how problematic any one sector is in absolute terms and difficult to establish whether any one category is more 'corrupt' than the next. However, the data points to a lack of trust between institutions (both public and private sector) and the public. A steady decline in public trust towards government and private sector bodies, as well as charities, in Ireland has been observed by the public relations firm, Edelman, in their annual Trust Barometer.⁷ It is therefore an issue to which policy makers and leaders in the private and non-profit sectors should give serious consideration.

6 Cases can be included under more than one category of problem sector. Percentages have been rounded throughout the report.
7 <http://www.edelman.com/insights/intellectual-property/2015-edelman-trust-barometer/>

“It was made known that [criticising the Irish Red Cross] was not welcome, that it was a risky strategy to speak out, to criticise or to look for change. This was all-pervasive. And at various junctures during my time with the Irish Red Cross, this peaked, and at those times it was particularly intense, extremely uncomfortable, and unpleasant.”

“My situation would have been completely different if Ireland had had effective whistleblowing protection in place at the time. Instead, an employer, it would appear, was able to dismiss individuals for breach of repressive and all-encompassing disclosure agreements, regardless of the reason an employee decided to go public. Even if it was in the public interest to do so. They were presented with a stark choice: keep quiet or face immediate dismissal.”

“TI advocated on my behalf for the principles of fairness and equity. It informed the Irish Red Cross and the broader Irish public that the manner in which I have been treated for good-faith reporting was inappropriate. TI called for my immediate reinstatement until the veracity of my claims was determined. This support was crucial in providing credibility to my situation, but also in informing the Irish Red Cross that external bodies who were globally regarded were involved in the case.”

Noel Wardick,
Former Director of the International
Department of the Irish Red Cross



Determining Risk

The risk of corruption (or any form of wrongdoing) can be determined by a combination of factors. One can calculate the risk of corruption (rather simplistically) as a function of incentive, opportunity and inclination 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 involved and little chance of being caught. In determining the risk of corruption in Ireland, we have taken stock of the financial incentives for corruption and analysed the strengths and weaknesses of our institutions and laws that are designed to stop corruption. We did this in our National Integrity Systems Country Studies in 2009 and 2012.⁸ Both of these studies highlighted the high risk of corruption in local government and public procurement. This analysis appears to have been borne out by the number of Speak Up reports or complaints relating to both areas.

When analysing a case, we look holistically at a problem and try not only to determine whether there is an incentive and opportunity for abuse (risk), but also whether the individual calling us has been listened to (reporting mechanism). We also determine whether a case has been investigated or litigated fully (enforcement mechanism), and whether preventive controls are in place and remedies available to address the concern (integrity, accountability and transparency mechanism) that has been brought to our attention.

In assessing risk, we also look at patterns of wrongdoing or systemic weaknesses (such as institutional opacity) that might give rise to wrongdoing.

“ Callers who have reported a lack of transparency in the Health Service have sometimes accused health-care managers of covering up medical negligence and/or unlawfully denying them access to their own or their children’s medical records. Charities have also been accused of being less than forthcoming with financial data relating to expenditure, staff salaries and use of public funding.”

⁸ See www.transparency.ie/resources

Over the past four years, the types of concern raised with our helpline team have included:

Types of concern reported by Speak Up clients/callers

Types of Concern	No.	Percentage
Lack of Transparency	161	25.7%
Fraud/False Accounting	84	13.4%
Misuse of Public Position	57	9.1%
Whistleblower Retaliation	51	8.2%
Conflict of Interest	49	7.8%
Inefficiency/Red Tape	32	5.1%
Cronyism	24	3.8%
Mismanagement of Public Funds	18	2.9%
Clientelism/Patronage	16	2.6%
Favouritism	16	2.6%
Bribery	15	2.4%
Collusion/Cartels/Price Fixing	13	2.1%
Theft	13	2.1%
Misuse of Insider Information	11	1.8%
Welfare Fraud	9	1.4%
Withholding Public Information	9	1.4%
Embezzlement	8	1.3%
Nepotism	7	1.1%
Data Theft	5	0.8%
Kickback	4	0.6%
Money Laundering	4	0.6%
Vote Buying	4	0.6%
Facilitating Tax Evasion	3	0.5%

The most common allegation levelled at institutions was a lack of transparency, manifesting in a number of ways. In Local Government, clients have (for example) accused councils of providing too little information when making planning decisions or in failing to publish adequate information about contracts for works and services. Callers who have reported a lack of transparency in the Health Service have sometimes accused health-care managers of covering up medical negligence and/or unlawfully denying them access to their own or their children's medical records. Charities have also been accused of being less than forthcoming with financial data relating to expenditure, staff salaries and use of public funding.

Local Government

Local Government has been the subject or source of allegations of corruption for some time and has been the most complained about sector on our helpline. It remains a high risk sector in large part because of the role local authorities play in regulating land use in Ireland and the considerable budgets collectively managed by local authorities.

The Mahon Tribunal investigated allegations of corruption involving elected officials. Spanning the period from the mid-1980s to 1990s, it found that corruption involving the rezoning of land was 'systemic' in Dublin during this period.⁹ There is no reason to believe that corruption did not affect other parts of the country during this time or that it has not continued, albeit less routinely.

With the dramatic fall of property values since 2007, other corruption risks have become more prominent. Decisions that determine whether a property has access to public roads, adequate drainage, alterations to property, quarries, building or site inspections are made by appointed officials. The collection of development contributions and award of public contracts are also made by officials. There are potentially very significant financial incentives for corrupt transactions between appointed officials, property developers and ordinary homeowners whose financial welfare or quality of life is dependent on a decision by the same official.

Some callers have complained about the way in which planning decisions are made. Councillors have been accused

of pressuring officials into granting planning permission for developments despite a lack of supporting evidence. In other cases, planning officials have been alleged to have abused their own positions, acted in an arbitrary manner and/or solicited bribes.

One of the biggest risks of corruption in Local Government arises from the management and oversight of public procurement. Although TI Ireland does not seek and has not been presented with any evidence of bribery in relation to public contracts, there is a simmering distrust of the public procurement process that is reflected in a number of calls to the helpline about conflicts of interests and cronyism. One caller has claimed that 'contracts are being awarded to the same contractors despite tendering on every project'.

The lack of trust in procurement procedures – particularly at local level - is also reflected in successive Local Government Audit Service (LGAS) reports that have been critical of a number of County Councils for failing to follow accepted procurement practices.¹⁰ The continuing failure of a number of county councils to follow fair procedures can only deepen distrust and feed the suspicion that at least some contracts are being awarded to friends or associates of public servants. The LGAS has also pointed to other high risk areas arising from the failure to collect development contributions from property developers and governance of local authority-owned private companies. Although the number of Councils that have been reprimanded has reduced over a ten year period, the LGAS reports and calls to the Speak Up helpline indicate that there is still much to be done for local government to clean up its act.

9. Local councillors who are elected every five years, can control the use – and therefore the value – of land by voting on whether to rezone land from agricultural to commercial or residential use. Rezoning land in this way can increase its value exponentially (tenfold in some cases) and has proven to be one of the biggest area of concern for investigators and policy makers concerned with corruption over the past twenty years.

10. LGAS reports can be downloaded at <http://www.environ.ie/en/Publications/LocalGovernment/AuditService/>

Types of concern reported about Local Government

Lack of Transparency
35 Reports
36%

Misuse of Public Position
17 Reports
17%

Conflict of Interest
10 Reports
10%

Inefficiency/Red Tape
9 Reports
9%

Cronyism
7 Reports
7%

Favouritism 5 Reports 5%

Clientelism/Patronage 4 Reports 4%

Fraud/False Accounting 4 Reports 4%

Mismanagement of Public Funds 4 Reports 4%

Whistleblower Retaliation 3 Reports 3%

Social Services including Charities

The relatively high number of calls about the Irish charities and non-profit sector indicates serious fraud and corruption risks within that sector. This is particularly true for charities that are involved in the provision of social services and the procurement of land, housing, and emergency relief supplies. The risk of misappropriation through poor financial management in the non-profit sector needs to be addressed as a matter of urgency. Paradoxically, this will involve an increase in funding for the sector and an investment in the recruitment and up-skilling of administrative staff. Additional measures, including greater independent oversight of organisations' financial management, are also required. The establishment of the Charities Regulatory Authority – if properly resourced – should also go some way to raising and monitoring standards within the sector.

Additional Risks

While bribery and other forms of corruption-related offences account for around only 4% of calls/reports to our helpline, fraud and false accounting is the second highest category of alleged wrongdoing (13.4%) and appears to affect all sectors to a significant degree.

Likewise, although there have been very few prosecutions or convictions for fraud and corruption involving procurement of goods and services by public bodies, enough red flags have been raised by investigative bodies, including the Local Government Audit Service and Moriarty Tribunal, to warrant stringent measures aimed at preventing, detecting and prosecuting any abuse of the public contracting system.

Ireland's public contracting market is valued at €12 billion per year, yet few officials appear to have specialised anti-corruption training, and there is little information shared between state agencies to prevent or detect fraud and corruption in public contracting. The risk of abuse surrounds public contracting and procurement at all levels of government.

We have also noted an increase in allegations surrounding the misuse of information over the past year, including allegations that private investigators have been unlawfully receiving information from the Garda Pulse system. This trend is mirrored in

the recent prosecution of a private investigator.¹¹ Information can be a valuable commodity and, according to one estimate, a matching name and address for a car registration can be worth up to €500 to a private investigator.¹² In 2012, three insurance companies were each fined €20,000 for receiving private data that had been illegally obtained by investigators.¹³ Given that the public are compelled to share information with public bodies, the abuse of data for commercial gain could do irreparable damage to public trust in government.

Money doesn't have to change hands for a decision to be made corruptly. This is especially true where personal relationships and business or financial ties influence an official's decisions. We have noted that some 20% of calls to our helpline relate to 'softer' forms of corruption (referred in our National Integrity Systems Study of 2009 as 'Legal [or Lawful] Corruption'. Such abuse arises - and usually without any laws being broken - where public office is misused in the interests of friends or associates of officials (cronyism); where appointments are made not on merit but on the basis of family ties (nepotism); where public resources are allocated on the basis of party political allegiances or the constituency in which they live (patronage and clientelism); or through general favouritism.

Irrespective of how power is abused or for whatever the reason, the effect is the same: poorer outcomes for citizens and declining public trust in those to whom they lend power.

Finally, it is worth mentioning the high levels of reported whistleblower reprisal within the Health Services. The second biggest source of concern among complainants (17%) is from staff who report that they have suffered as a result of blowing the whistle on wrongdoing. This represents a six-fold increase in complaints about whistleblower reprisal since 2012. This is a worrying trend and contradicts the apparent emphasis placed on protecting health service staff making disclosures since the introduction of the Health Act in 2007. If international experience is an indicator, it is a trend that is likely to grow for the foreseeable future.¹⁴ Investigators, senior managers and board members in all sectors should consider whistleblower reprisal against staff as a risk category in its own right.

11. <http://www.irishtimes.com/news/crime-and-law/private-investigator-fined-5-000-for-accessing-garda-data-1.2012999>

12. Interview with Speak Up client

13. <http://www.thejournal.ie/hundreds-of-social-welfare-records-in-data-protection-breach-354385-Feb2012/>

14. See <http://www.kroll.com/who-we-are/news/press-releases/whistleblowing-on-the-rise>

Types of concern reported about
Social Services including Charities

Lack of Transparency
10 Reports
17%

Fraud/False Accounting
7 Reports
12%

Conflict of Interest 4 Reports 7%

Whistleblower Retaliation 3 Reports 5%

Clientism/Patronage 2 Reports 3%

Cronyism 2 Reports 3%

Embezzlement 2 Reports 3%

Favouritism 2 Reports 3%

Inefficiency 2 Reports 3%

Investigating Wrongdoing

While a significant number (14%) of complaints or reports may stem purely from an individual's personal dissatisfaction with a service or decision made by a public body, the majority of callers highlighted potential systemic inadequacies. Remarkably, one of the most reported concerns was inadequacy in the context of investigation of wrongdoing (9.6%).

A common theme among those who contacted us was frustration and confusion with the way in which complaints or reports are handled. In particular, those who have reported to law enforcement agencies including An Garda Síochána, the Data Protection Commissioner, the Standards in Public Office Commission or the Director for Public Prosecutions have expressed frustration with delays in investigating reports, the manner in which reports have been decided upon or refusals to open a formal investigate or prosecute.

Some allowance must be made for discretion on the part of law enforcement agents to decide whether there is sufficient evidence to justify an investigation or prosecution. However, a number of issues seem to resurface.

The first is procedure. One former client has informed us that when reporting fraud to the Garda Bureau of Fraud Investigation (GBFI), she was advised that unless her employer reported the alleged fraud they were unable to investigate. Given that the employer was accused of covering up the fraud in the first place, it was unlikely any formal report would be made. The rationale offered by the Gardaí appears to be that only the victim of a fraud can report the fraud. If however, the victim (a public body, for instance) is also the perpetrator, then the offence goes unpunished.

Secondly, as the Garda Inspectorate and Guerin reports into allegations of Garda malpractice by Sergeant Maurice McCabe indicate, State agencies can be reluctant to investigate allegations of wrongdoing by themselves.¹⁵ This

is particularly so where senior officials or officers are accused of mishandling or obstructing an investigation. Given the enormous suffering endured by the families of victims of murder and other serious crimes by delays or mishandled investigations, a different approach by State agencies might be warranted when dealing with allegations of government failures or cover-ups in the prevention or investigation into the death of its citizens.

Thirdly, a 'regulatory no man's land' appears to exist where (i) it can be unclear who is responsible for receiving complaints and (ii) there is no oversight by an independent body. This is readily apparent in the way reports of ethics breaches under the Local Government Act in local authorities are expected to be made to the local authority itself. Only where the local authority has referred the complaint to Standards in Public Office (SIPO) can the state ethics watchdog open a formal investigation. Likewise, SIPO are unable to investigate allegations of wrongdoing by Oireachtas members unless the relevant Oireachtas Committee of Members Interest refers it to them. We have also received complaints about the lack of comprehensive oversight in relation to private nursing homes. One client complained: 'it is not feasible or acceptable that those suffering abuses or those with complaints would have to bring these complaints to the person in charge of that establishment rather than a neutral party'. Although a new portal for complaints (www.healthcomplaints.ie) has been established to help citizens seek redress, the limited ability of oversight agencies to open investigations based on reliable information from the public means that many cases of abuse may remain unaddressed.

Box 2

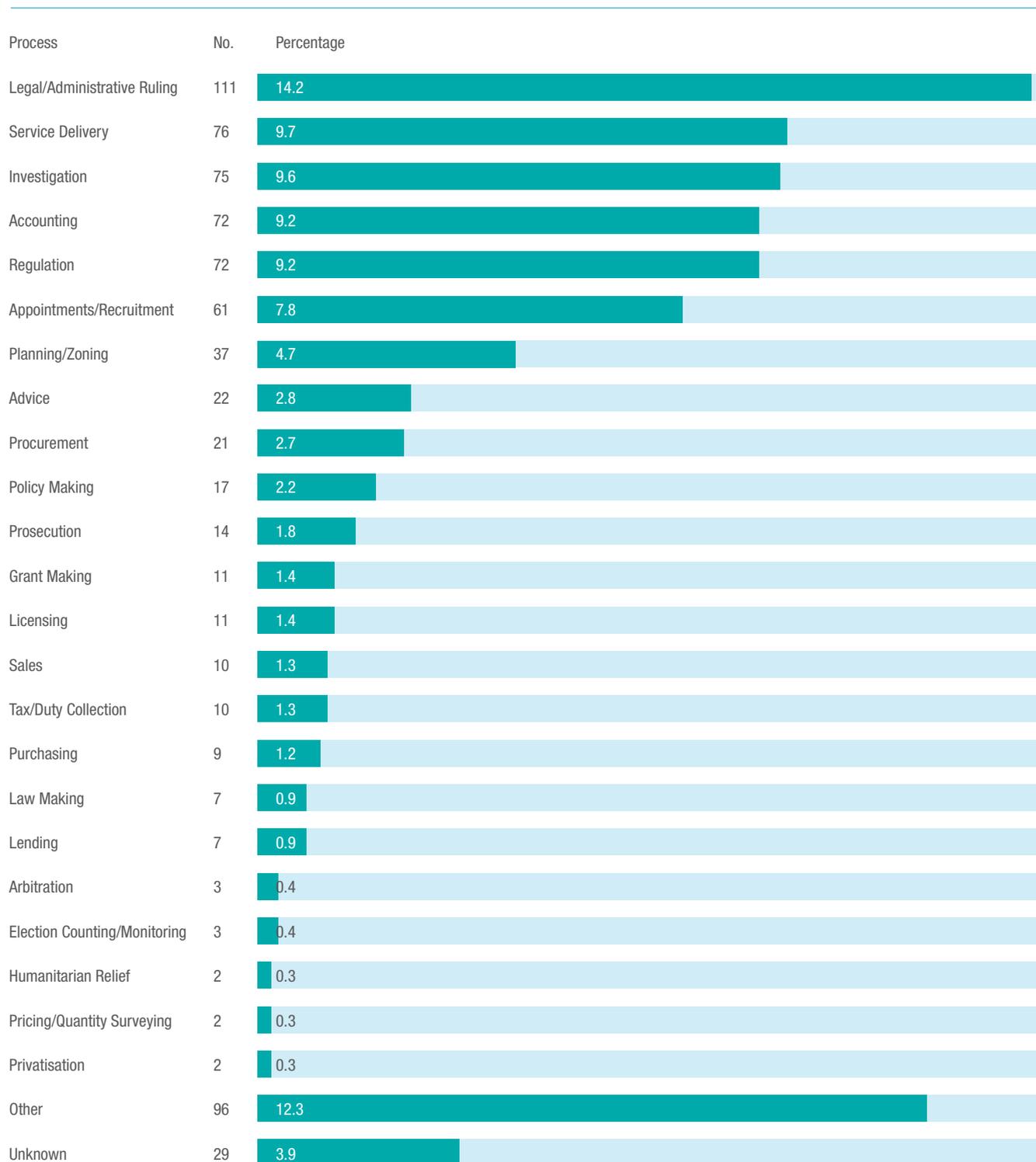
Investigating Murder

In Northern Ireland, the father of a young man killed in the Omagh bombing was recently granted leave to judicially review the British government's refusal to hold a public inquiry into the attack. The refusal was made on the basis that an investigation by the Northern Ireland Police Ombudsman was the best way to address any outstanding issues. At the leave hearing, the father argued that intelligence could have been used to stop the bombers and that the Government had duties under the right to life (Article 2 of the European Convention on Human Rights) to protect the lives of the victims and investigate the bombing. The Judge found that Article 2 duties were at least arguably engaged. He also decided an arguable case had been established that the state was in breach of its obligation to conduct an investigation into claims the attack could have been prevented.¹⁶ A full hearing will be held in due course. Guidelines could be introduced to take account of such case-law in Ireland and to make clearer the circumstances under which a Commission of Investigation or Tribunal of Inquiry will be proposed by a minister. In particular, consideration might be given to how cases involving evidence of State failure to protect life or investigating loss of life should be handled. Making the guidelines publicly available would also help build greater confidence in future investigations.

15. Report of the Garda Síochána Inspectorate, *The Fixed Charge Processing System A 21st Century Strategy* (Dublin: Garda Síochána Inspectorate, February 2014) <http://cdn.thejournal.ie/media/2014/03/the-fixed-charge-processing-system-a-21st-century-strategy.pdf>; Guerin SC, Seán, *Report to An Taoiseach, Enda Kenny TD on a Review of the Action Taken by An Garda Síochána pertaining to certain allegations made by Sergeant Maurice McCabe* (Dublin, 6 May 2014) <http://www.merrionstreet.ie/en/wp-content/uploads/2014/05/Final-Redacted-Guerin-Report.pdf>

16. Taken from Erwin, Alan, 'Omagh bombing relative wins right to challenge inquiry refusal', *Irish Times* (web), 21 January 2015 <http://www.irishtimes.com/news/crime-and-law/omagh-bombing-relative-wins-right-to-challenge-inquiry-refusal-1.2074009>

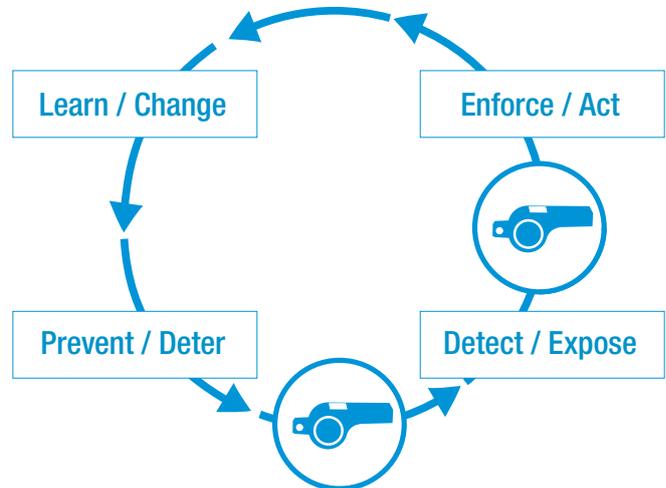
Processes believed to have been affected



4. SPOTLIGHT ON WHISTLEBLOWING

Why is whistleblowing important?

One of the priorities of the Speak Up helpline is supporting whistleblowers. This is because whistleblowing is acknowledged as one of the most effective ways of exposing and stopping wrongdoing.¹⁷ Many of the cases of corruption, fraud, and sexual abuse of children 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 actor – including the police or the media.¹⁸



“whistleblowing is acknowledged as one of the most effective ways of exposing and stopping wrongdoing”

As the diagram above illustrates, whistleblowing also plays important roles in effective enforcement and the prevention of further corruption and wrongdoing. For example, sometimes whistleblowers can be brought into an investigation to help an organisation find material evidence of wrongdoing. Where wrongdoing has reliably been identified following an investigation, they can be used as witnesses by investigators or prosecutors. 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 is 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 loss of reputation, stakeholder investment and profit. It also aids the prosecution of crimes such as fraud, leading to a healthier economy and society as a whole.

There is growing awareness of the economic and societal benefits of encouraging whistleblowing. However, many whistleblowers have reported that blowing the whistle has been a life changing experience for the worse, with a number of workers having been accused of being disloyal to the people they work with or for.

17. See National Whistleblowers Center, 'Proven Effectiveness of Whistleblowers' http://iib.ohchr.org/HRBodies/UPR/Documents/session9/US/NWC_NationalWhistleblowersCenter_Annex2.pdf for research findings in the context of fraud.

18. Ibid.



Photo of Maurice McCabe and John Wilson printed courtesy of the People of the Year Awards (Photographer: Robbie Reynolds).

Case Study 1: Maurice McCabe and John Wilson

I first contacted Transparency International Ireland in late 2012 when I became so afraid and annoyed. My family and I couldn't have survived this ordeal without the support of Transparency International Ireland. They stood behind me and my family and helped me properly expose the wrongdoing. I don't know what I would have done without Transparency International Ireland – my phone call to them changed the whole case.

Garda Sergeant
Maurice McCabe

While serving in the northeast of Ireland, Sergeant Maurice McCabe and Garda John Wilson reported that they had uncovered irregularities involving thousands of traffic police records. They alleged that senior Garda officers had improperly terminated penalties and fines awarded against motorists who had been caught speeding and committing other road traffic offences. It was believed that Garda officers, judges and celebrities were among those who had their penalties cancelled. Implausible excuses were often recorded on the database to justify the cancellation of fines. In one case, a male driver had his speeding fine cancelled on the basis he was “pregnant”.¹⁹ Others had their speeding fines waived for being “late for a swimming lesson”, for being on “urgent domestic business” or because the driver was preoccupied with a “cow dying on his farm”.²⁰ The annual cost to the taxpayer from terminated fines is estimated to be about €1.5 million.²¹ The mass cancellation of records also undermined

19. Interview with John Wilson.

20. Comptroller and Auditor General, Management of the Fixed Charge Notice System (Dublin: Comptroller and Auditor General, 2012) <http://audgen.gov.ie/documents/annualreports/2012/report/en/Chapter07.pdf>

21. Calculated from Comptroller and Auditor General data.

the integrity of the road safety system and meant that some repeat offenders were free to drive, posing serious risks to other road users.

The whistleblowers reported through internal reporting channels such as the Gardaí's 'Confidential Recipient' and thereafter externally to bodies such as the Dáil Public Accounts Committee. Contrary to what some might expect, McCabe and Wilson were not praised and rewarded for trying to stop the cancellations, which were resulting in losses to public resources at a time of financial crisis and an erosion of public trust in the police force. The two men reported that they found themselves ignored, isolated and ridiculed – and public statements were made which undermined their credibility. Their right to use the Garda database was officially withdrawn and the Garda Commissioner at the time, Martin Callinan, told the Dáil's Public Accounts Committee that he reserved his position on taking disciplinary action and described the men's actions as "disgusting."²² The Minister for Justice wrongly accused McCabe and Wilson of refusing to cooperate with inquiries and the Garda Commissioner stated that personal and sensitive information was inappropriately appearing in the public domain.²³

The two Gardaí approached TI Ireland through the Speak Up helpline in December 2012. The men had their own solicitors but TI Ireland supported them by offering practical advice on how to deal with the retaliation they suffered. With TI Ireland's help, the policemen and their legal representatives were able to make informed decisions about the best ways in which to disclose information and how to manage the risks they were likely to encounter. TI Ireland also drew public and official attention to the treatment of the whistleblowers.²⁴ The case dominated news headlines for months and TI Ireland publicly countered adverse claims made against the whistleblowers. TI Ireland's Chief Executive, John Devitt, was a regular commentator on national TV and radio and RTÉ

described him as a 'key contributor to the debate' that arose from the case.²⁵ In addition, Sergeant McCabe and Garda Wilson chose to occasionally make media statements through TI Ireland.²⁶

McCabe and Wilson were vindicated in official reports in late 2013 and in early 2014.²⁷ It was estimated that some 9,000 cases had been cancelled in questionable circumstances between 2011 and 2012 alone.²⁸ A Commission for Investigation was put in place to consider further serious allegations made by Sergeant McCabe and the Minister for Justice and Garda Commissioner resigned and took early retirement respectively over the case.²⁹ The government apologised for the way that McCabe was treated.³⁰ Significant reforms were also promised that would change how senior Gardaí are held to account and how they can report wrongdoing through external channels.³¹ Moreover, the whistleblowers were ultimately chosen by the public as "People of the Year".³²

Not an isolated incident

McCabe and Wilson were not the only callers to the Speak Up helpline who believed they were victimised for having spoken up about wrongdoing in the workplace. Around 50% of Speak Up callers categorised as whistleblowers reported that they had suffered 'whistleblower retaliation'. The three sectors that were most complained about in this context were Health, Local Government and Charities. 40% of these callers (or 28 individuals) had been dismissed and 30% reported intimidation and/or harassment.

It is worth noting that while a whistleblower is often thought of as someone who is disloyal or who goes straight to the media with their allegations, 75% of callers who reported whistleblower retaliation had taken the opportunity to report internally to their employers.

22. Full quote as taken from Houses of the Oireachtas, Committee Debates, 23 January 2014 <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/ACC2014012300013?opendocument>: "I am not for a moment suggesting that I will go down the road of exercising discipline in this particular case but it is certainly something on which I would have to reserve my position." See "Martin Callinan "Disgusting" comment to Public Accounts Committee" www.youtube.com/watch?v=hZn_TdJvF-U for the "disgusting" remark.

23. Kildare Street, 'Topic Issues Debate: Penalty Points System', 1 October 2013 www.kildarestreet.com/debates/?id=2013-10-01a.392; The Journal (web), 'Alan Shatter apologises to garda whistleblowers', 26 March 2014 www.rte.ie/news/2014/0326/604725-whistleblowers/; The Journal (web), 'Callinan says he didn't call whistleblowers disgusting', 12 March 2014 www.thejournal.ie/garda-commissioner-whistleblowers-disgusting-1359238-Mar2014/#comments; Transparency International Ireland (web), 'Garda Commissioner must do more than withdraw "disgusting" comments', 21 March 2014 http://transparency.ie/news_events/garda-commissioner-must-do-more-withdraw-%E2%80%98disgusting%E2%80%99-comments

24. See, for example, Clifford, Michael, 'Treatment of Whistleblowers May Have Put Senior Gardaí in Breach of Law', The Irish Examiner (web), 21 January 2014 <http://www.irishexaminer.com/ireland/treatment-of-whistleblowers-may-have-put-senior-gardai-in-breach-of-law-255975.html>

25. <http://www.rte.ie/news/player/morning-edition/2014/0325/#page=6>

26. See, for example, Transparency International Ireland (web), 'Minister's Apology to Garda Whistleblowers', 26 March 2014 http://transparency.ie/news_events/ministers-apology-garda-whistleblowers

27. Comptroller and Auditor General report op. cit.; Report of the Garda Síochána Inspectorate op. cit.

28. Calculated from data contained within the Comptroller and Auditor General report op. cit.

29. RTÉ News (web), 'Garda Commissioner Martin Callinan resigns', 25 March 2014 www.rte.ie/news/2014/0325/604369-garda-whistleblowers/; The Journal (web), 'Alan Shatter has resigned as Justice, Equality and Defence Minister', 7 May 2014 <http://www.thejournal.ie/alan-shatter-resigns-taoiseach-confirms-1452799-May2014/>

30. The Journal (web), 'Taoiseach and Justice Minister apologise to Garda whistleblower Sergeant Maurice McCabe', 13 May 2014 <http://www.thejournal.ie/taoiseach-apologises-to-maurice-mccabe-1463158-May2014/>

31. See Irish Examiner (web), 'Fitzgerald: 'New era of transparency and reform in the justice system'', 9 May 2014 www.irishexaminer.com/ireland/fitzgerald-new-era-of-transparency-and-reform-in-the-justice-system-267996.html

32. The Journal (web), 'Panti and Garda whistleblowers are three of the people of the year', 6 December 2014 <http://www.thejournal.ie/people-of-the-year-announced-1818917-Dec2014/>; People of the Year Awards (web): "Every winner has been chosen by the people of Ireland through a nominations process and finalised by an adjudicating committee comprising leading members of the public service, community, business and media sectors" <http://www.peopleoftheyear.com/About-the-Awards.aspx>

Case Study 2: Brian

In another case in which TI Ireland provided support over a number of months, an employee of a large company faced legal action and imprisonment after blowing the whistle to his employer. Brian reported his concerns about financial records to management but believed that they were not taking them seriously. As a result, he stored a copy of the financial data on a computer – which he took home with him. Soon afterwards, he was served with a court injunction to hand over any information, including the computer, to his employer. Brian was subsequently accused of taking a second copy of the company financial data on another laptop. He denied this was the case but the court sided with his employer and found him to be in contempt of court. Brian faced an indefinite period in prison and found himself homeless with no source of income.

TI Ireland did not take a position on whether Brian still had the computer equipment but believed that the court action taken against him was disproportionate. It also believed that it would have a chilling effect on other prospective whistleblowers at the company. TI Ireland offered assistance to Brian by finding new legal counsel and solicitors who offered him pro-bono advice and representation during the case. It also provided advocacy support during the course of the court action. TI Ireland drew attention to the case by briefing a well-respected journalist, who wrote about the disproportionate nature of the legal action, and joined with members of the Whistleblowing International Network³³ in calling on Brian's employer to end the legal action. After enduring six months of hardship, Brian's case was brought to an end.



“Once it became public knowledge that there was a problem in the Irish military with sexual abuse and harassment, I became persona non grata with my former colleagues and the military authorities.”

“Within a matter of 48 hours I found myself in a position to lose my job, lose my livelihood, I could lose my home. False allegations were repeated about me over and over again in the public domain by very powerful people in Irish society. Nothing in my previous experience on active service, even in Bosnia and the Middle East, prepared me for this trial.”

“TI was the only group in the Republic of Ireland to offer me support. It was TI that gave me the term ‘whistle blower reprisal’ to describe what had happened to me. I had no language to describe it until Transparency reached out to me. The support that Transparency provided was absolutely crucial and invaluable to my surviving this ordeal.”

Dr. Tom Clonan
Journalist, Author and Lecturer

33. www.whistleblowingnetwork.org

Legislation

An Alternative to Silence

Legislation plays a key role in protecting whistleblowers from reprisal. As such, we examined Ireland's legal landscape in the context of whistleblowing and launched a report entitled "An Alternative to Silence" in 2010.

The report, which included a number of case studies of Irish whistleblowers who had suffered as a result of speaking up, concluded that existing legislative protection for whistleblowers was piecemeal and inadequate. In particular, it highlighted the failure of Ireland's 'sectoral approach' to whistleblower legislation in protecting workers from retaliation. Not all workers were covered by the legislation; while some of those who were had few safeguards when speaking up. The different standards of protection created anxiety and confusion among employees.

The report called for new, comprehensive legislation and TI Ireland was subsequently invited by the Department of Public Expenditure and Reform to provide expert input and advice on a new law that would protect workers in all sectors of the economy.³⁴ The Act became law in July 2014, providing for the first time a safety net to all workers in Ireland who are brave enough to speak up.³⁵

Shaping the Law

In working closely with the Department on the new law, we drew upon our research findings, TI's International Principles for Whistleblower Legislation and the experiences of Speak Up callers. For example, as indicated in the Introduction to this report, one of the earliest calls to the helpline was from a whistleblower called Anne who worked as an agency nurse. After Anne blew the whistle on abuse of elderly patients at a private care-home she had been supplied to, the care-home threatened to break off its working relationship with the agency. As a result, TI Ireland asked the government to include within the new law a statutory right to seek compensation for damages which is wide enough to protect not just whistleblowers but also third parties (such as the agency in the above example). This is now reflected in section 13 of the Act.

Other successful submissions made by us to strengthen the Act include the following.

Protection for all Contractors

The original draft of the legislation followed the UK's approach of excluding certain types of contractors from whistleblower protection. Workers who may not be protected under this restricted definition include partners in auditors' firms.³⁶

TI Ireland successfully argued that it would be fairer for a wider definition of 'worker' to be covered by the Act, to include all contractors.³⁷

Fewer Technical Hurdles

Whistleblower legislation in other jurisdictions is sometimes limited to reports made by workers 'in the public interest' and/or 'in good faith'. Broadly speaking, the intentions behind such provisions are to:

- (i) exclude 'private' employment grievances from the ambit of whistleblowing legislation;
- (ii) ensure that only honest workers are covered; and/or
- (iii) protect only those who are motivated to speak up because they want the wrongdoing to be investigated (rather than because they are pursuing a personal agenda or vendetta).

Although these are understandable aims, 'public interest' can be a vague phrase. In addition, it has been recognised in the UK that the focus of whistleblower legislation should be "the message rather than the messenger".³⁸ A 'good faith' requirement contained within the law there was removed, reflecting the principle that whistleblowers may have a number of motives but should be protected if they are speaking up about matters which impact on others.

Taking the above into account, TI Ireland successfully argued that there was no need for formal 'public interest' and 'good faith' requirements in the Act.³⁹ Instead, the following provisions help ensure that only appropriate matters are covered by the new legislation:

34. As acknowledged by the Minister for Public Expenditure and Reform, Brendan Howlin. See Merrion Street (web), 'Publication of the Protected Disclosures Bill, 2013', 3 July 2013 <http://www.merrionstreet.ie/en/News-Room/Releases/publication-of-the-protected-disclosures-bill-2013.50920.shortcut.html>

35. Protected Disclosures Act 2014, as previously defined. An explanation of the Act, together with practical tips, can be found in our Speak Up Safely guide, available at: <http://transparency.ie/helpline/guides>

36. Bartram, Peter, 'Issue of concern' (ACCA, June 2013), page 18 (see page 19) http://issuu.com/accaglobal_publications/docs/ab_uk_june_2013

37. Other workers covered by the Act are employees, agency workers and certain work experience students/trainees.

38. Musgrave, Stephen and Dunn, Alice, 'Whistleblowing – Goodbye "in good faith", Hello "in the public interest" – and wider issues', Bird & Bird (web), 21 June 2013 <http://www.twobirds.com/en/news/articles/2013/uk/whistleblowing-goodbye-in-good-faith-hello-in-the-public-interest--and-wider-issues>; Dame Janet Smith DBE, Fifth Report, Safeguarding Patients: Lessons from the Past – Proposals for the Future, Command Paper CM 6394 (The Shipman Inquiry, 9 December 2004), paragraph 11.12 http://webarchive.nationalarchives.gov.uk/20090808154959/http://www.the-shipman-inquiry.org.uk/5r_page.asp?ch=11&pa=01#11.1

39. Compensation can, however, be reduced by up to 25% where a protected disclosure was not made in good faith.

- (i) breaches of the worker's own contract of employment cannot be reported under the Act;
- (ii) the worker must have a reasonable (and genuine) belief that 'relevant wrongdoing' is taking place; and
- (iii) the list of relevant wrongdoings which can be reported is focused on matters which impact on the public, such as damage to the environment and waste of public money.

A longer Time Limit for seeking Interim Relief

The draft legislation originally contained a seven day time limit for applying to the Circuit Court for a court order to continue an employee's employment in the event that they claimed they had been dismissed for making a protected disclosure ('interim relief').⁴⁰ A Speak Up helpline client drew TI Ireland's attention to the short time limit and considered that it could be difficult for workers to find and brief willing legal representatives in Ireland within this timescale. An amendment to a time limit of 21 days was therefore secured.

More generally, TI Ireland also assisted in making other provisions clearer and easier to understand. These included the definition of 'employer' and the circumstances in which a disclosure which was made before the Act became law is now a protected disclosure. It also helped strengthen other sections, including in relation to the protection of whistleblowers' identities.

Whistleblowing Today

The Act provides a framework for individuals to speak up when they witness wrongdoing at work and has already proved to be of assistance to Speak Up callers. However, there remain some potential gaps which should be addressed as soon as possible or at least when the legislation is reviewed in 2017.

Volunteers

The Act does not explicitly apply to voluntary workers and, while at least one law firm is interpreting the Act as covering volunteers, this remains untested in the courts.⁴¹ In addition, although the legislation is not the same as the UK's Public Interest Disclosures Act 1998 ("PIDA") and case law under that legislation is not binding here, it is worth noting that has been held in that jurisdiction that volunteers are not covered by PIDA.

In the circumstances, volunteers do not have the certainty of knowing that they are protected if they speak up in the workplace. We are aware, however, that volunteers are well placed to expose wrongdoing, particularly in the charitable sector. During the passage of the legislation, we argued that it is in the public interest to protect volunteers where they have reported a concern and face penalisation as a result. While labour law provisions such as unfair dismissal may not be appropriate in such cases, we stated that the legislation should at least provide volunteers with the other protections contained within the Act including the right to confidentiality, the ability to sue for damages and immunity against criminal/civil liability. These submissions were rejected on the basis that it is not the Government's current policy intention to protect volunteer whistleblowers but that the issue may be looked at again when the Act is reviewed.

In the meantime, the Speak Up helpline has received calls from volunteers who want to report wrongdoing but are unsure of who to turn to. Volunteer whistleblowers have said that they feel particularly vulnerable given the threat of legal action – and the potential reputational damage arising from 'dismissal'.

⁴⁰. Pending determination of a claim for unfair dismissal.

⁴¹. See Arthur Cox, 'Group Briefing September 2014 New Whistleblowing Legislation in Force' <http://www.arthurcox.com/wp-content/uploads/2014/09/Arthur-Cox-Protected-Disclosures-Act-2014-Sept-2014.pdf>
There may also be an argument in some cases that volunteers are in fact employees or contractors and are therefore covered by the legislation.

Case Study 3: Charity Shop Volunteers

Jim phoned the Speak Up helpline in late 2014 on behalf of a group of volunteers who worked in a charity shop. They had given up their time for free for years and took pride in making the shop as profitable as possible, winning praise for their results. The shop did well but the volunteers became concerned that not all of the money they were taking in through the cash registers was being accounted for in the charity's records. When they raised the issue with management, the locks on the shop were changed, with the result that the volunteers were effectively dismissed.

Similarly, Lesley called TI Ireland in early 2015 seeking assistance for three of her friends who worked in the local branch of a charity for a number of years. They became aware that money was 'going missing' and

spoke up about this to their supervisor, who threatened them. Despite this, the volunteers took the brave step of pursuing the issue with the head manager. The head manager organised an investigation but did not take any steps to address ongoing bullying and victimisation of the volunteers following the making of their reports. The volunteers also had concerns that the investigation was not independent and that it formed part of a cover-up.

TI Ireland continues to recommend the protection of volunteers under the legislation. More generally, consideration should be given to extending whistleblower protection to witnesses of wrongdoing in contexts other than the workplace, such as members of clubs and associations, and anyone subject to a mandatory reporting obligation.⁴²



“Historically, given that this country is such a young country, many people alive now have families who were actually involved in fighting for freedom at that time. Information given away very often meant that somebody was imprisoned or killed, so it was a life or death matter and seen as something more than just dishonesty for reward or money, but rather the betrayal of an ideal and that was something quite sacred.”

“Whistleblowing is often seen as a betrayal of comradeship, of the civil service, of the particular department you're working for, and this culture is encouraged. Whistleblowers would be seen as betraying their friends.”

Sam Smyth, Journalist and Broadcaster

⁴². Such as section 19 of the Criminal Justice Act 2011, which applies to all individuals rather than simply workers.

Types of Wrongdoing that can be reported

Even for those who are covered by the legislation, further barriers remain to blowing the whistle safely. One of these is that, although it is wide, the list of relevant wrongdoings which can be reported under the Act may not always cover ‘soft law’ mechanisms such as professional codes or ethical guidelines, which the public, customers and employers often rely on to protect themselves from risks and harmful practices. These practices include:

- mismanagement of 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);
- breaches of public sector codes such as the Code of Conduct for Office Holders, Code of Conduct for Members of Dáil Éireann, Code of Practice for the Governance of State Bodies and the Codes of Conduct for Employees of Local Authorities and Councillors; and
- the cover ups of such activities.

TI Ireland maintains its submission that the list of relevant wrongdoings in the Act should be expanded to include the above. We are aware that some organisations have sought to allow their workers to report such practices to them in the meantime but there has been confusion over whether or not those who do so will be adequately protected.

Lack of Action

Research shows that one of the reasons a worker might choose not to blow the whistle is a belief on the part of the worker that doing so would be futile.⁴³ The Act provides legal protections for whistleblowers but it does not compel regulatory bodies or employers to act on the disclosures they receive. We recommend that the Act is amended to include obligations on recipients of protected disclosures to:

- (i) ensure that thorough, timely and independent investigations are undertaken on receipt of protected disclosures; and
- (ii) inform workers of the outcome of any investigation following the making of a protected disclosure.⁴⁴

External Reporting

While the legislation encourages internal reporting to employers in the first instance, it also recognises the principle that external reporting channels should be available where internal reporting is not possible or where a worker has made an internal report that has not been properly investigated.

Under the Act, the first stop for those considering reporting externally is generally a list of ‘prescribed persons’ that includes regulators such as the Data Protection Commissioner and Commissioners for Energy Regulation. While the list is a good start, it should be expanded to include other bodies such as the Garda Bureau of Fraud Investigation, the Ombudsman and the newly established Charities Regulatory Authority. In addition, appropriate resources should be allocated to ensure that these bodies are able to receive protected disclosures and deal with them effectively.

The Act also allows protected disclosures to be made to individuals/organisations other than those on the list of prescribed persons but the conditions to be met by the worker are much higher. While TI Ireland agrees with the general principle of requiring workers to meet higher requirements to report externally than internally, it recommends that these conditions for reporting in ‘other cases’ should be examined again during the review period. Although they were simplified somewhat during the passage of the legislation through the Oireachtas, they remain complex and difficult to rely upon with any degree of certainty. This could have a chilling effect on those considering speaking up.

Protecting the Identity of Whistleblowers

Many whistleblowers understandably fear that their colleagues will find out that they have blown the whistle. This is particularly so when co-workers are implicated in the alleged wrongdoing. When the draft legislation was published, the Irish Human Rights Commission noted that the Council of Europe Parliamentary Assembly Recommendation on the Protection of Whistleblowers stated that “the identity of the whistle-blower ... [should] only [be] disclosed with his or her consent, or in order to avert serious and imminent threats to the public interest”.⁴⁵ It also pointed out that the United States of America’s Whistleblower

43. Conor Buckley and others, ‘Whistleblowing - The Case of a Financial Services Company’, *Corporate Ownership and Control*, 7 (2010), 275–83; Francesca West, Ciara Bottomley and Wim Vandekerckhove, *The Inside Story: A Study of the Experiences of 1,000 Whistleblowers* (London: Public Concern at Work and Greenwich University, 2013) <http://www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf>

44. This would be similar to, for example, section 24A(4) of the Communications Regulation Act 2002 which obliges the Commission for Communications Regulation to notify a person who has made an appropriate disclosure of the outcome of any investigation into the disclosure, so far as practicable and in accordance with the law.

45. Irish Human Rights Commission, *IHRC’s Observations on the Scheme of the Protected Disclosures in the Public Interest Bill 2012* (Dublin: Irish Human Rights Commission, June 2012) http://www.ihrc.ie/download/pdf/ihrc_observations_on_the_protected_disclosures_in_the_public_interest_bill_2012_june_2012.pdf (see page 12)

Protection Act stipulates that the identity of the whistleblower may not be disclosed without the individual's consent unless the Office of Special Counsel 'determines that disclosure is necessary to avoid imminent danger to health and safety or an imminent criminal violation.'

The Act does not provide this level of protection and we recommend that this issue is reconsidered.

Restricted Access to Employment Law System

The Act covers 'workers' rather than simply employees. However, under the Act only employees are able to seek remedies for whistleblower retaliation through the employment law system, including the Rights Commissioner and Labour Court. Other types of workers must sue 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. With the labour law system in Ireland soon to be reformed with forthcoming Workplace Relations legislation, steps should be taken to include all workers within this new framework for the purposes of the Act.

Unduly onerous Burden of Proof?

The Act provides that where there is an issue in legal proceedings over whether or not a disclosure is a protected disclosure, there is a presumption that it is a protected disclosure. In practical terms, this means that the onus is on the employer to show that the worker's report is not a protected disclosure, rather than the worker having to prove that it is.

This was welcomed by TI Ireland but we also recommend that where adverse measures have been taken which appear to be penalisation for having made a protected disclosure, the burden of proof should be on the employer to prove otherwise. This would be similar to the approach adopted in discrimination and sexual harassment cases.⁴⁶

Risk of adverse Legal Proceedings

Although the Act contains a wide civil "immunity" provision to protect whistleblowers from being sued, they are still subject to defamation proceedings.⁴⁷ It is open to a worker to seek to rely on a defence of 'qualified privilege' in such cases

but instructing a lawyer to put forward the defence can be expensive and there is no guarantee that the worker will ultimately be protected. Consideration should be given to amending the Act to repeal the carve-out for defamation.

Similarly, while section 15 of the Act aims to protect whistleblowers from criminal liability, GRECO has pointed out that (notwithstanding this provision) would-be whistleblowers may be reluctant to speak up when there are severe criminal sanctions in place for the disclosure of confidential information.⁴⁸

It has asked the government to clarify the scope of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 in this regard "so as to ensure that the protections and encouragement for whistleblowers contained in the Protected Disclosures Act 2014 are fully understood and implemented". We welcome this recommendation, particularly as protection under section 15 of the Act again relies on the whistleblower putting forward a defence. More widely, we recommend that the Office of the Director of Public Prosecutions takes the Act into account before bringing prosecutions for the disclosure of any information.

Financial Hardship

More generally, we are aware that whistleblowers can easily find themselves in dire financial difficulties, with one former client having resorted to sleeping in his car after losing his job. The Act allows employees to seek 'interim relief' where their jobs are on the line following the making of protected disclosures. It includes an option to seek a court order which continues his or her contract of employment until his or her claim for unfair dismissal is determined. This should provide some protection against hardship but employees must act fast and it is not an option which is available to all types of workers.⁴⁹ Future employment prospects are also often compromised after a worker speaks up, adding to financial strain. As indicated earlier in this report, a number of former TI Ireland clients remain unemployed years after making their disclosure.⁵⁰ There is therefore a need for access to a hardship fund for whistleblowers to meet both legal and living costs and replace the income that they are denied by speaking up. Such a fund could be financed directly from fines imposed by regulatory authorities arising from investigations.

46. See section 85A of the Employment Equality Act 1998 and section 38A of the Equal Status Act 2000

47. Section 14 of the Act.

48. GRECO Secretariat, Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report Ireland (Strasbourg: GRECO Secretariat, 10 October 2014) http://www.justice.ie/en/JELR/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf/Files/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf (see pages 19 and 20); see also Irish Independent (web), 'Jail threat 'deters whistleblowers'', 11 November 2014 <http://www.independent.ie/breaking-news/irish-news/jail-threat-deters-whistleblowers-30762148.html>

49. Only employees can claim unfair dismissal.

50. See also Smyth, Jamie, 'Ireland's lonely whistleblowers', Financial Times, 25 November 2013 <http://www.ft.com/cms/s/0/e5c1c4e-4876-11e3-a3ef-00144feabdc0.html#axzz3Ulvv7B0>

“Being a whistleblower is a very, very lonely place to be. It can have a huge impact on your health and you can find your professional and personal reputation under attack.”

“That said, it’s essential that medical professionals speak up when they witness wrongdoing. The wellbeing, health and safety of patients depends on it.”

Bernadette Sullivan
Executive Director of
Dignity 4 Patients



5. PREVENTING CORRUPTION, PROMOTING INTEGRITY

Ireland is considered to be one of the better performing countries in stopping corruption by international observers. More recently, the Government has been complimented for reforms aimed at greater transparency in political finance, new whistleblower legislation, revision of the Freedom of Information Act and forthcoming regulation of lobbyists. The European Union, Council of Europe and Transparency International have commented at some length on Ireland's efforts to stop corruption and this report does not attempt to review or analyse these measures in any further detail. That said, whistleblowers, witnesses and victims of wrongdoing continue to expose weaknesses in Ireland's integrity systems, some of which could be addressed by introducing some of the following reforms or initiatives:

Recommendations

1. 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. Either a national anti-corruption agency or an inter-agency task force on corruption and economic crime should be established. Such a measure should be introduced as part of a long-term national strategy aimed at preventing corruption and economic crime.
2. Agencies such as the Standards in Public Office Commission, the anticipated Planning Regulator and the Health Inspection Quality Authority should be provided with powers and resources to gather intelligence and investigate allegations of wrongdoing with or without a prior complaint from a member of the public.
3. 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.
4. 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.
5. Any changes to national ethics legislation should introduce a ban on any public official receiving gifts or entertainment during the course of their employment. Any new requirements to make declarations of interest should also cover any liabilities, as well as income and assets of public officials and their families.
6. The Protected Disclosures Act will not protect whistleblowers on its own. TI Ireland will launch a new initiative in 2015 titled 'Integrity at Work' that will bring employers, trade unions and regulators together to subscribe to standards by which workers will be treated when speaking up about wrongdoing. The initiative will allow workers to approach the Speak Up helpline in seeking advice and for TI Ireland to monitor employer or regulator compliance with the Integrity at Work standard. The goal is to ensure that employers and workers are able to make the most of the new legislation. TI Ireland will continue to monitor shortcomings in the Act and will make further submissions to government to address these.

We believe these six simple measures would not only be cheap to implement, but could help build public confidence in the ability of agencies to spend public resources wisely and serve the public interest effectively. For more detailed data, information, analysis and policy recommendations please visit <http://transparency.ie/resources>.

Donate

Your donation will help us provide support to whistleblowers, witnesses and victims of corruption and wrongdoing in Ireland. TI Ireland cannot perform this essential work without you. We want to build a fairer, more open Ireland – one where power is used in the interests of everyone. With your help, we can. Find out more at <http://transparency.ie/donate>

Get Involved

We are always looking for passionate, highly capable volunteers to help us make a difference. Check out <http://transparency.ie/content/get-involved> to find out how. You can keep up to date on what we're doing and show your support for our work by connecting with us on Facebook, Twitter, Youtube or LinkedIn.



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youtube.com/user/TransparencyIreland

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 also contact us online or download our free Speak Up Safely Guide and Video. Please see www.speakup.ie for further details.

For general queries email helpline@transparency.ie. If you are a worker, please call us or read our 'Dos and Don'ts' on www.speakup.ie before emailing us.

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