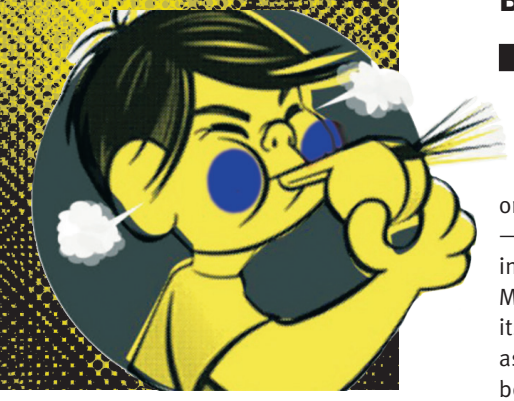
BLOWING THE WHISTLE



Whistleblew in the Face

The Protected Disclosures Act 2022 is a few steps forward and a few steps backwards when there was a need to legislate for real distance

By David Langwallner

Robert Pitt

THE PROTECTED Disclosures (Amendment) Act 2022 passed in July, will come into effect shortly and aims to meet Ireland's obligations to transpose EU Directive 2019/1937 on whistleblowing into Irish law. The Directive —the first, and therefore a welcome, EU initiative on whistleblowing — encourages Member States to go beyond the provisions in its text and introduce measures that will offer assurance to whistleblowers that they will not be penalised as a result of speaking up. The new legislation will, creditably, extend whistleblowing protections to volunteers and shareholders, and to information obtained during a recruitment process and impose new obligations on private sector and charity employers with more than 50 staff to provide formal channels for whistleblowers. A convoluted amendment provided that the Minister shall "have regard to the need to ensure that companies performing high value public contracts" establish internal reporting channels regardless of the number of employees they have".

The Joint Finance Committee which made detailed recommendations on the Bill felt the priority should be to make the legislation retroactive, to address the concerns of existing whistleblowers. The Attorney General inevitably ruled this unlawful.

As to defects in the Act the first point to note is that the Directive is widely regarded as deficient because it did not follow the case law of the European Court of Human Rights (ECHR) which had established that a whistleblower must report the wrongdoing to 1) the employer or competent authorities and only if that fails to 2) the public and media, which are in effect the last resort. The EU Directive distinguishes between employer and competent authorities in 1), creating a third category. So, the Directive makes it mandatory for the whistleblower to report internally within the organisation while the ECHR equally encourages reporting to a competent authority other than the employer. In other words the Directive imposes an undesirable constraint on the whistleblower's options.

The purpose of this article is to highlight outstanding problems with the whistleblowing vista, even after enactment of the new provisions, Many of them originate in this failure to follow the ECHR regime.

> The legislation extends whistleblowing protections to volunteers and shareholders, and to information obtained during a recruitment process and imposes its obligations on private sector employers with more than 50 staff

There are at least ten problems:

Problem 1

In many high-profile cases, whistleblowers, risk losing their jobs, perhaps because of confusion about the legislation, complexity of the circumstancies, payoffs or fatigue.

For example, the Department of Health whistleblower whose disclosures revealed financial dysfunction at the heart of the health system was recently suspended.

Shane Corr, a civil servant at the Department of Health, submitted several disclosures to the Public Accounts Committee (PAC) in recent months, all based on recordings of internal Departmental meetings which revealed civil service concern about "fake targets", "horrors of waste", and concerns about the HSE's financial "sloppiness" including that there were "big lumps of money sloshing around" and the credibility of health budgets.

In 2017, Robert Pitt a former CEO of INM, a large media group, made allegations concerning an apparent attempt by Newstalk's CEO to buy the radio station, owned by INM's biggest shareholder Denis O'Brien, at an inflated price. Pitt was sidelined in the organisation and ultimately left with a hefty pay-off. That should not have been possible under the 2014 Act.

Similarly, one of the 2017 Banking Inquiry's researchers herself subsequently became a whistleblower about the deliberate exclusion of Jonathan Sugarman and the Central Bank's Frank Browne, from the Inquiry. She was reputationally destroyed in the final report and the suggestion was made that she was delusional and a fabricator. She lost her job and in effect was run out of town for telling the truth.

Problem 2

There is an over-emphasis on exhausting internal procedures.

Another fundamental problem is that whistleblowers can only complain outside of their organisation if the worker reasonably believes the worker will be subject to penalisation by the employer and the relevant wrongdoing is of an exceptionally serious nature, or where there is a low prospect of the relevant wrongdoing being effectively addressed, due to the particular circumstances of the case, such as where evidence may be concealed or destroyed.

The 2022 Act adds, as an alternative, the following grounds: where the employee (ii) reasonably believes that the relevant wrongdoing concerned may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage, or there is a low prospect of the relevant wrongdoing being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where a prescribed person may be in collusion with the perpetrator of the wrongdoing or involved in the wrongdoing.

Jonathan Sugarman- Central Bank noted he could be prosecuted for his evidence

> it does not follow the case law of the ECHR that a whistleblower must report the wrongdoing to 1) the employer or competent authorities and only if that fails to 2) the public and media, which are in effect the last resort

The requirement for an internal procedure ignores anti-whistleblower culture in Ireland, perhaps rooted in post-colonial antipathy to 'snitching'. This is explicated in 'Whistleblowing: Towards a New Theory' by Kate Kenny (2019).

Pursuing the internal procedure did not work in the cases of Pitt, Corr or the Banking Inquiry investigator. Those who apply the internal procedure are often part of a collective anti-whistleblower culture and defensive of the employer.

Tolerance of whistleblowing depends often on popular attitudes to corruption. In Nordic countries whistleblowers are often celebrated. In the US substantial financial rewards are available for financial whistleblowing.

Problem 3

The legislation is not implemented when it comes to the sidelining, which could be interpreted as constructive dismissal (even though no case is taken), as opposed to firing of staff.

Disclosures were made in 2017 by the CEO and chief financial officer Ryan Preston of INM, Ireland's biggest media company.

ODCE director Ian Drennan expressed concern about the apparent discussion of how Pitt could be sacked by a committee of INM's board set up to investigate his disclosure and that the identities of Pitt and Preston as whistleblowers had been disclosed to people outside the company. Despite these post-legislation problems, illustratively Pitt and Preston were both able to remain in their jobs long after making protected disclosures though tellingly Pitt, as CEO, threatened to vote against motions promoted by the Company at its 2017 agm. Shortly afterwards Pitt left to work for an industrial property developer in Prague.

Problem 4

The legislation does not protect whistleblowers from criminal prosecution though an amendment by Senator Alice Mary Higgins does at least purport to provide, under the heading "Protection of reporting persons", that: "For the avoidance of doubt and without prejudice to natural justice, any investigation carried out under this Act shall not involve a person named in a disclosure of a relevant wrongdoing, save where that person is required to provide information or testimony in the course of such an investigation".

For example, the Central Bank expressly noted that any evidence Jonathan Sugarman, gave it about criminality of his employer, Unicredit bank, such as that he had suppressed evidence of his employer's criminality albeit very temporarily and under pressure, could be used against him in a criminal prosecution.

Whistleblower Chay Bowes who alleged criminal activity by Tánaiste Leo Varadkar in securing a document for a friend was also at risk and was himself interviewed under caution following his revelation since Bowes worked for the organisation that would benefit from the potentially criminal transfer.

It should provide protection where the alleged criminality of the whistleblower is minor in comparison to, or subsidiary to, the alleged criminality of the person they are impugning. In such cases whistleblowers should not face prosecution. While prosecutorial authorities need a degree of discretion in their handling of these matters, some guidance in advance of action is essential for inculpated whistleblowers.

Problem 5

The legislation does not cover bellringers (whistleblowers with no connection to the employer), or journalists.

Wrongdoing is widely defined in the Protected Disclosures Act 2014 to include not just traditional employees but aims to protect people who raise concerns about possible wrongdoing in the workplace. and has been expanded by the 2022 Act a broad range of reporting persons, including shareholders and volunteers but the legislation should address anyone who can help draw attention to wrongdoing but who may be compromised in coming forward.

Problem 6

A new heading justifies disclosure to the public and media where the whistle-blower has reasonable belief that there is an imminent or manifest danger to the public interest, such as where there is an emergency or a risk of irreversible damage.

Reasonableness of belief is the wrong criterion: it is the subjective view of the whistleblower that matters.

Whistleblowers take enough of a risk in the public interest. The risk should not be aggravated by imposing external standards of justification.

The corollary of this approach, with notable benefits is that if the information is proved to be incorrect, the whistleblower is still protected by the Act provided there was a reasonable belief in the information.

Problem 7

The new Act may demand over-stringent standards for whistleblowers' beliefs and co-operation.

The requirement for a reporting person to believe that the perceived wrongdoing "was substantially true ", rather than simply "true" as under the current act may raise the current threshold for reporting externally. On the other hand, depending on the circumstances it may actually reduce that threshold. The old standard was deemed to be incompatible with the EU directive.

The Joint Finance Committee also found the requirement to "cooperate, as required" with an investigation into wrongdoing should be removed, as there could be valid reasons for not co-operating with such an investigation.

The Directive deals with EU issues such as consumerism, product liability and EU wrongdoing. It is now being used potentially to undermine existing protections and provide an elevated standard for a public whistleblower.

Problem 8

A pointed government amendment to the legislation unfortunately provided that matter

> It fails to protect where the alleged criminality of the whistleblower is minor in comparison to the alleged criminality of the person they are impugning or to whistleblowers whose belief that there is an imminent danger to the public interest are deemed unreasonable

concerning interpersonal grievances exclusively affecting a reporting person are excluded from whistleblower protections (though it may qualify if interpersonal grievance is only one component of the motivation). Motivation should be irrelevant. It should be made clear that, irrespective of the motivation of the whistleblower, no good-faith requirement nor public interest criteria should be built in as a requirement considering the capability of attributing a multitude of meanings to such terms. The motivations of the whistleblower are entirely irrelevant if the disclosures are found to be truthful.

The recent Norwegian Act applies the superior criterion of "non-negligent good faith", albeit in the context of disclosing to media.

Problem 9

There is a lack of incentives and support for whistleblowers

New protections including provision for interim relief for penalisation are welcome. However, in the absence of financial rewards for making disclosures, workers in the banking sector in particular are unlikely to be incentivised to make protected disclosures or to take the financial risk of, for example, employing lawyers to advance their case. In the US, by contrast, since 1981 they have been provided with double back pay, witness fess and lawyers' fees. Exemplary damages are often awarded in their favour and also employers severely punished. Employers who impose gagging orders are sanctioned as in the Sandridge case.

Most controversially they are given a financial inducement to blow the whistle – by the Securities and Exchange Commission and the IRS among others. The US has given financial incentives to whistleblowers since the civil war in the nineteenth century. incentives for whistleblowers. Incentives start at 15%, of the amounts ultimately recovered by government and can go as high as 30% when the whistleblower pursues a case that the Government declined to pursue. 90% of workers in the US financial sector now say they would blow the whistle on fraud because of the incentives.

In Ireland, the Safety, Health and Welfare at Work Act 2005 section 28 (3) c provides that the WRC may require an employer who has unjustifiably penalised an employee to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances. The provision is general and could usefully refer expressly refer to protected disclosures. But, US experience shows, it would increase the numbers coming forward to blow the whistle if it were made explicitly clear in advance that a percentage of funds recovered is available to whistleblowers.

The Finance Joint Committee recommended that "consideration be given to the removal of caps on awards for those seeking financial redress; and that free legal and psychological counselling services be provided to those making protected disclosures". But no mention of these recommendations appears in the final Act.

Crucial considerations are the need for financial and psychological supports through an elongated and traumatic process. In this respect, in line with other worldwide statutes, the whistle-blower needs interim financial relief throughout the process, such as granted in The Sarbanes Oxley Act in the US.

The provision of funded not free representation within the structure of the existing legal aid scheme is also necessary; and existing provisions of the Criminal Legal Aid scheme should be extended to deal with whistle-blowers.

As a follow on the provision of aggravated and/or exemplary damages as a remedy and the right not to go through the WRC (Work Relations Commission) with a cap on damages, but to go to the courts must be expressly stipulated.

Problem 10

There is a risk in the new Act's stipulation that a disclosure may only be made to a Minister if the worker has previously made a disclosure of substantially the same information either internally to their employer or externally to a prescribed person and no appropriate action has been taken — unless the information concerns wrongdoing by the Head of a public body or is an emergency situation where there is an imminent or manifest danger to the public interest. It also provides that all disclosures made to Ministers shall be transmitted to the Protected Disclosures Commissioner for direct follow-up. This is fraught. The added tier could allow the Minister to 'see no evil, hear no evil, speak no evil'.