

DRAFT REPORT

Good Faith Reporting

A. Introduction

In 1999, Mr Pat Rabbitte, T.D., introduced a Private Members' Bill in the Oireachtas entitled the Whistleblowers' Protection Bill 1999. The Government subsequently indicated that it was broadly supportive of the purpose of the Bill and would introduce its own legislative measure in due course.

In March 2006, the Government decided that it would not proceed with a general legislative provision. Its decision was described in the following terms by the then Minister for Labour Affairs, Mr Tony Killeen, T.D:

“The Government decided on 7 March 2006 to formalise the sectoral approach as part of its policy on addressing the issue of whistleblowing by requiring Ministers, in consultation with the Office of the Parliamentary Counsel, with legislation either on the Government’s legislative programme for the current Oireachtas session or currently in the course of preparation to include, where appropriate, whistleblowing provisions therein. Such an approach also acknowledges situations where the provision of whistleblowing provisions may not be appropriate.”¹

At the suggestion of the Irish Congress of Trade Unions (ICTU), Mr Michael Ahern, T.D., the then Minister for Trade and Commerce, agreed in February 2007 that the Company Law Review Group (CLRG) would examine in its 2007 Work Programme the possible introduction of a whistle-blowing provision (otherwise known as ‘good faith reporting’) in Irish company law.

The following report represents the results of the Group’s research on the general subject of good faith reporting and its consideration of the appropriateness of including such a provision in the Companies Acts. In this context, the Chairman of the CLRG Sub-Committee which considered this issue would like to acknowledge the assistance provided to him by the members of the Sub-Committee and by the CLRG Secretariat. Mr Karole Cuddihy, a legal intern in the ODCE, was of particular assistance to him in researching case law in the area and identifying similar provisions in other jurisdictions.

¹ Minister of State at the Department of Enterprise, Trade and Employment, Mr Tony Killeen, T.D., Dáil Éireann, 4 April 2006.

B. The Duty of an Employee to disclose Misconduct – Case Law

(Note: Tom Mallon, B.L., has been asked to advise on the content of this Section and in particular on the apparent absence of relevant Irish case law with respect to good faith reporting in employer/employee disputes.)

While our legal research has not uncovered any Irish case law dealing with good faith reporting in the context of disputes between an employer and employee, the Courts have considered in two cases the appropriate balance between disclosure of matters of public interest and the private interests of the relevant companies. In both cases which involved disclosures by RTÉ (i.e., National Irish Bank in 1998 and Leas Cross in 2006), the Courts refused applications by the companies in question seeking injunctions prohibiting the disclosure of the material. The Leas Cross case was interesting in that it involved information gathered by an employee of the nursing home who had been embedded in the institution by RTÉ. In the circumstances of these cases which permitted the broadcasting of evidence of improper conduct, it seems unlikely that the Courts would intervene to block the disclosure of indicated misconduct to an appropriate regulatory authority for investigation. (Further material on the cases may be added.)

Before examining the national and international incidence of good faith reporting legal frameworks, it is useful to clarify initially what is the legal duty (if any) of an employee with respect to the disclosure of malpractice within the company in which s/he is employed. From research to date, there does not appear to be any relevant Irish case law surrounding the duty of an employee to report misconduct, either internally within the company or externally to an appropriate authority. However, the following English and other case law might be influential, in the event that a matter of this character came before an Irish Court.

A case often cited, regarding the question of whether an employee has a duty to disclose misconduct to his employer, is *Bell v Lever Brothers*.² Although, as Stephenson LJ noted a half-century later,³ the matter was not argued by counsel or indeed addressed to the facts of *Bell* by any of the judges involved, Lord Atkin (in whose speech Lord Blanesburgh concurred) made the following *obiter* remarks:

*“It is said that there is a contractual duty of the servant to disclose his past faults. I agree that the duty in the servant to protect his master's property may involve the duty to report a fellow servant whom he knows to be wrongfully dealing with that property. The servant owes a duty not to steal, but, having stolen, is there superadded a duty to confess that he has stolen? I am satisfied that to imply such a duty would be a departure from the well established usage of mankind and would be to create obligations entirely outside the normal contemplation of the parties concerned.”*⁴

In several later cases, the argument has been made that a director-employee's duty of loyalty to the company requires disclosure of certain conduct. Usually, however, Courts seem to have preferred to decide the matter on the basis of a duty as a director,

² *Bell v Lever Brothers* [1932] A.C. 161

³ *Sybron Corporation v Rochem Ltd* [1984] Ch 112 *per* Stephenson LJ

⁴ *Bell v Lever Brothers* [1932] A.C. 161, 228

rather than as an employee. In these cases, the issue has usually been whether a director-employee is under a duty to disclose *his own* misconduct (such as breach of fiduciary duties). A recent example is *Item Software (UK) v Fassihi*,⁵ in which a company brought an action against its former managing director claiming that he had breached his duty as a director and as an employee to act in good faith in the claimant's best interests in that he sought to divert a contract to a company of his own. At first instance Nicholas Strauss QC (sitting as a deputy judge of the High Court) held that the defendant was under a duty to disclose his own misconduct *qua* employee,⁶ but the Court of Appeal did not reach the question of whether an employee who was not a director would have an obligation to disclose his own misconduct,⁷ having already held that the first defendant's director's duty of loyalty required disclosure of the fact that he was seeking to divert the company's main contract to a company which he himself owned.

Mr Strauss QC's decision that there was a duty of disclosure *qua* employee (quite apart from any duty owed by a director) was an application of the decision in *Sybron Corporation v. Rochem Ltd*.⁸ In that case, the issue which arose was whether a senior employee, who was not a director, was bound to disclose the misconduct of his fellow employees at a time when a decision was being taken as to the payment to be made to him under the terms of a pension scheme. The possibility of instead deciding the case on the question of directors' duties (availed of by the Court of Appeal in *Item Software*) was not open. In *Sybron*, it was held that although a contract of employment was not a contract *uberrimae fidei* requiring disclosure by an employee of his own past misconduct and that there was no general requirement for an employee to disclose misconduct, the employee in the particular circumstances of the case was under a duty to disclose the misconduct of his fellow employees and that this was so even though it inevitably involved disclosure of his own misconduct. The fact that the employees' own complicity would thereby be revealed was irrelevant.

Stephenson LJ stated that:

*"...there is no general duty to report the fellow-servant's misconduct or breach of contract; whether there is such a duty depends on the contract and on the terms of employment of the particular servant. He may be so placed in the hierarchy as to have a duty to report either the misconduct of his superior, as in Swain v West (Butchers) Limited [1936] 3 ALL ER 261, or the misconduct of his inferiors as in this case."*⁹

Having said that, Stephenson LJ went on to say:

"However, where there is an hierarchical system, particularly where the person in the hierarchy whose conduct is called into question is the person near the top who is responsible to his employers for the whole of the operation of a complete sector of the employers' business then in my view entirely different considerations apply"

⁵ *Item Software (UK) v Fassihi and others* [2004] EWCA Civ 1244.

⁶ *Item Software (UK) v Fassihi and others* [2003] IRLR 769

⁷ *Item Software (UK) v Fassihi and others* [2004] EWCA Civ 1244, paragraph 60

⁸ *Sybron Corporation v. Rochem Ltd* [1984] Ch 112, [1983] 2 All ER 707 (CA)

⁹ *Sybron Corporation v. Rochem Ltd* [1984] Ch 112, 126

A person in a managerial position cannot possibly stand by and allow fellow servants to pilfer the company's assets and do nothing about it, which is really what Mr Munby's submissions would come to when applied to the present type of case. Certainly at all events where the misconduct is serious and the servant is not discharged immediately it must be quite obvious that, as part of his duties and generally, the senior employee is under a duty to report what has happened as soon as he finds out, and further to indicate which steps (if any) he has taken to prevent a repetition thereof

*I therefore reach the not very surprising conclusion that [the defendant employee] was under a duty to report all he knew about the misdeeds of his subordinate employees as soon as he found out about them, and that he did not do so, deliberately and fraudulently, because he was one of the conspirators himself. The duty which lay upon him was, I repeat, not a duty to report his own misdeeds - this may well be regarded as negated by *Bell v Lever Brothers Limited* - but to report those of his fellow conspirators.”¹⁰*

This position has been reiterated in *British Midland Tool Limited v Midland International Tooling Limited and others*.¹¹

Before passing from *Sybron*, however, one comment should perhaps be made: It may not be correct for Stephenson LJ to say that the existence of a duty to report “his own misdeeds” is “negated” by *Bell v Lever Brothers Limited*.

The *Sybron* court itself followed the direct authority of *Swain v. West (Butchers) Ltd.*¹² The judgment of Stephenson LJ in *Sybron* summarised that prior case as follows:

“There the plaintiff was employed for a term of five years as a general manager of the defendant company. His contract of service provided, inter alia, that he would do all in his power to promote, extend and develop the interests of the company. The managing director gave the plaintiff certain unlawful orders, which orders the plaintiff carried out. The matter came to the notice of the chairman of the board of directors who, in an interview with the plaintiff, told the plaintiff that if he gave conclusive proof of the managing director's dishonesty he would not be dismissed. The plaintiff duly supplied the information required and was then dismissed, the defendants alleging fraud and dishonesty. The plaintiff did not deny the allegations, but he brought an action for breach of contract and wrongful dismissal on the grounds that under the terms of a verbal agreement between the plaintiff and the chairman it was not open to the defendants to rely upon information given by the plaintiff relating to his own fraud and dishonesty. It was held that it was the plaintiff's duty, as part of his contract of service, to report to the board of directors.”

¹⁰ *Sybron Corporation v. Rochem Ltd* [1984] Ch 112, 127-128

¹¹ *British Midland Tool Limited v Midland International Tooling Limited and others* [2003] All ER (D) 174

¹² *Swain v. West (Butchers) Ltd.* [1936] 1 All E.R. 224, [1936] 3 All E.R. 261 (CA)

The Court of Appeal accordingly held that there was no consideration for the verbal agreement between the plaintiff and the chairman and that therefore the defendant company was not prevented from relying upon the information received from the plaintiff.

A recent case, *Tesco Stores Limited v Pook and others*,¹³ suggests that a senior employee is probably under the same duty of disclosure as a director. However, it should be noted that the judge's observations on this point in *Tesco Stores* were not entirely necessary for his decision, and of course the case is an English precedent. In addition, the case concerned the defendant's failure to disclose *his own* misconduct. It is interesting, however, that the English High Court considered a senior manager to owe a similar duty to that owed by a director.

In that latter case, Mr Simon Pook, a senior manager, though not a director, created false invoices on behalf of a company owned and controlled by him, approved them for payment and accepted a bribe from a customer. On learning of this, the company suspended his employment. However, the day before his suspension was due to begin Mr Pook activated options open to him under an employee share option scheme. The company refused to allow the options to be exercised. The company brought proceedings seeking to recover sums paid out under the false invoices; Mr Pook counter-claimed entitlement to the share options. The Court implied a term into the employee share option scheme rules to the effect that options would not be exercisable if the employee had breached his contract to the extent that the employer would have been able to end his employment. Pook was therefore not entitled to exercise his share options, because disclosure of his conduct would have led to summary dismissal, without disciplinary proceedings. The judge considered that it would be absurd if senior employees were obliged to disclose colleagues' wrongdoing but not their own breaches of fiduciary duty.

Of course, further questions then arise. Would the case have been similarly decided if the misconduct not disclosed by the defendant was not his own, but a colleague's? *Sybron* suggests that, if an employee (or at least a senior employee, as was the case in that instance) is aware that co-employees are involved in misconduct, he must disclose this, even where he himself is implicated. Does it therefore follow that the duty to disclose applies equally where an employee who has no involvement in the misconduct nevertheless becomes aware of it?

Paul Goulding QC, commenting on recent English case law, has said:

*“Following Sybron v Rochem [1983] ICR 801, no logical distinction can be drawn between a rule that an employee should disclose his own wrongdoing and a rule that he should disclose the wrongdoing of his fellow employees even if that involves disclosing his own wrongdoing too (see Tesco v Pook [2004] IRLR 618).”*¹⁴

¹³ *Tesco Stores Limited v Pook and others* [2003] EWHC 823 (Ch) [2004] IRLR 618

¹⁴ Paul Goulding QC, “Breaking up is hard to do: some recent cases on employee competition”, (Industrial Law Society, April 25th 2006) <http://www.industriallawsociety.org.uk/papers/goulding.htm>

In *RBG Resources Plc v Rastogi*,¹⁵ Laddie J held that it was arguable that, in addition to a “general obligation to whistleblow”, an employee (who was a very senior executive in the company) may be under a duty to investigate and take steps to prevent the misconduct of other employees. As regards when a duty of disclosure might arise, Laddie J, having cited *Sybron*, states:

“Whether or not Mr Patel was under a duty to report wrongdoing by his co-defendants is a matter of fact which is dependent upon a multitude of factors, including the terms of his contract of employment, his duties and his seniority in the company. One of the relevant factors will be the nature of the wrongdoing and its potential adverse affect on the company. Where, as here, the alleged wrongdoing went to the very survival of the company, it is more likely that the court would imply a duty to report. As the extract from the judgment of Stephenson LJ set out above indicates, such a duty may include a duty to report the wrongdoing of his superiors. At all material times, Mr Patel was a very senior executive of RBG concerned with arranging the bank borrowing. His level of seniority was just below that of the other three defendants. Even without regard to the special duties he was given immediately following PwC’s resignation, which I will touch upon in a moment, it is readily arguable that he was under an obligation to report wrongdoing or suspected wrongdoing by others.”

If it is taken that an employee does have a disclosure duty, what is the remedy for a breach of that duty? Mr Goulding in his paper notes that *Item Software v Fassihi* involved a claim for damages. An account for profits was also sought. But could a company be entitled to injunct an employee to disclose his own misconduct or that of others of which he is aware? In relation to the latter question, Mr Goulding cites *Intelsec Systems Ltd v Grech-Cini*,¹⁶ in which the Court granted a discovery order requiring former employees of a company to disclose the names and addresses of business contacts with whom they had had discussions after leaving the company’s employment.

Further afield, the Supreme Court of Appeal of South Africa addressed this issue in *Phillips v Fieldstone Africa Pty Ltd* (Case 516/02, judgment delivered November 28th 2003).¹⁷ The Court noted a statement in a prior case to the effect that “the lowlier or more restricted in discretion the position held the less likely that the facts will support such a conclusion.” However, the Court said that this dictum “provides no support for the submission that an employee is per se to be approached on a different basis from any other supposed fiduciary whose relationship with another is being examined.” (See paragraph 33).

What about the law of confidentiality?

The traditional position was that a contract of employment is not one of utmost good faith, and employees, in general, have no duty to reveal their own misconduct: *Walton v T. A. C. Ltd* [1981] IRLR 357. An employee may not disclose information obtained confidentially.

¹⁵ [2002] EWHC 2782 (December)

¹⁶ *Intelsec Systems Ltd v Grech-Cini* [1999] 4 All ER 11, [2000] 1 WLR 1190

¹⁷ http://www.supremecourtofappeal.gov.za/judgments/sca_judg/sca_2003/51602.pdf

So how is the law of confidentiality to be reconciled with a duty to disclose misconduct? In *RGB Resources Plc v Rastogi*, Laddie J, addressing this point, said:

“If what the employee knows or suspects amounts to wrongful acts committed by other employees against the company, such acts are not protected from disclosure by an obligation of confidence. As Lord Goff said in the *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109, 268 (the Spycatcher case), the courts have always refused to uphold the right to confidence where to do so would be to cover up wrongdoing. He referred to a number of cases which illustrate that policy including *Initial Services Limited v Putterill* [1968] 1 QB 396, [1967] 3 All ER 145 and *Gartside v Outram* (1857) 26 LJ Ch 113, the latter being the authority which is the origin of the saying that there is no confidence in an iniquity. It follows that an employee who reports the wrongdoing of a fellow employee to the company is not breaching any obligation of confidence to it. Therefore, the imposition of the duty alleged by RGB would not require Mr Patel to do anything wrongful vis-à-vis his employer.”

In *Initial Services v Putterill*,¹⁸ the English Court of Appeal permitted an exception where there is “any misconduct of such a nature that it ought in the public interest to be disclosed to others.” Lord Denning MR stated that:

“the disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press.”

Lord Goff expressed similar views in the Spycatcher case.¹⁹

In *Putterill*, the exception benefited a sales manager who passed confidential information evidencing unlawful price-fixing to a national newspaper.²⁰ Also in England, the High Court has refused to grant an injunction preventing an employee in the financial services sector from disclosing confidential information about his company to a regulatory body, notwithstanding that the disclosure might be motivated by malice: *Re a Company's Application*.²¹ The following summary of the decision in that case is taken from the headnote:

“The court would not grant an injunction preventing an employee of a financial services company from disclosing confidential information about the company to a regulatory authority such as FIMBRA or to the Inland Revenue, notwithstanding that the disclosure might be motivated by malice on the part

¹⁸ *Initial Services v Putterill* [1968] 1 QB 396

¹⁹ *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109, 282

²⁰ See similarly, *Lion Laboratories v Evan* [1985] QB 526 (court refused to grant injunction preventing laboratory employees giving internal documents doubting the reliability of breathalysers manufactured by the company to a national newspaper)

²¹ *Re a Company's Application* 1989 1 Ch 477, [1989] 2 All ER 248, [1989] 3 WLR 265, [1989] IRLR 477, [1989] BCLC 462, [1989] ICR 449

of the employee, because the employee's undoubted duty of confidence did not prevent him disclosing to the regulatory authority or the Inland Revenue matters which it was the province of those authorities to investigate, and because it would be contrary to the public interest if employees of such companies were inhibited in reporting possible breaches of the regulatory system or fiscal irregularities. The plaintiff's application for an injunction would therefore be granted subject to the qualification that it would not apply to communications to FIMBRA or the Inland Revenue.”

Conclusion of Case Law Review

While our legal research has not uncovered any Irish case law dealing with good faith reporting in the context of disputes with respect to employer/employee relationships, the Courts have favoured in the two RTÉ cases mentioned above the disclosure of matters of public interest over the private interests of the relevant companies to suppress the information. It seems unlikely therefore that the Courts would intervene to block the disclosure of indicated misconduct to an appropriate regulatory authority for investigation.

Insofar as good faith reporting has arisen in the context of disputes with respect to employer/employee relationships, the following appears therefore to be settled law in England.

A director or other officer or senior employee may in certain circumstances be under a duty to disclose internally his/her own misconduct and the misconduct of any others within the company by virtue of his/her prudential duties to the company.

An employee (who is not a director or officer or senior employee) may in certain circumstances be similarly duty-bound to disclose internally his/her own misconduct as well as the misconduct of his/her fellow employees by virtue of his/her contractual duty to the company.

Officers and employees are permitted to disclose misconduct to an appropriate external authority or the press if it involves a breach of law or is otherwise in the public interest. There is, as has been held, no confidence in an iniquity.

C. International Obligations

No international agreement or convention necessarily mandates a good faith reporting requirement in company law *per se*.

However, the **OECD²² Guidelines for Multinational Enterprises** have relevance to the issue. The Guidelines are a set of multilateral rules for business which have been negotiated and accepted by Governments. Enterprises are obliged to comply with the recommendations, which represent a shared view of what OECD Governments consider to constitute good corporate behaviour.

Section II of the Guidelines dealing with General Policies states *inter alia* that:

“Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

1.
9. *Refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise’s policies.”²³*

Similarly in discussing the role of stakeholders in corporate governance, the **OECD Principles of Corporate Governance** state:

“E. Stakeholders, including individual employees and their representative bodies, should be able to freely communicate their concerns about illegal or unethical practices to the board and their rights should not be compromised for doing this.”²⁴

In peer reviews of Member States’ adherence to its **Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**, the OECD regularly recommends that Member States take steps to protect employees who report suspicious facts involving bribery in order to encourage them to report such facts without fear of retribution. It should be noted, however, that quite apart from the fact that it does not concern company law *per se*, nothing in the Convention itself mandates the introduction of whistleblower protection provisions into Member States’ domestic laws.

Ireland has signed, but not ratified, the **U.N. Convention Against Corruption**. Ratification is apparently under consideration but is for the purposes of the CLRG immaterial, as this Convention deals solely with corruption of public officials. In this regard, it is similar to the OECD Bribery Convention.

²² OECD is the Organisation for Economic Cooperation and Development.

²³ The OECD Guidelines for Multinational Enterprises (Revision 2000), page 19.

²⁴ The OECD Principles of Corporate Governance (2004), page 21.

Ireland has signed the **Council of Europe Civil Law Convention on Corruption** but has not ratified it. On one reading, Article 5 of the Convention could be said to extend beyond the public sector to non-State corruption. Article 2 of the Convention defines "corruption" as "*requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof.*" If that is indeed the intention behind Article 5, then Article 9 would come into play. This states: "*Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.*" However given that the Convention has not been ratified, its scope does not need to be resolved.

However, the **Council of Europe Criminal Law Convention on Corruption** was transposed into Irish law by means of the Prevention of Corruption (Amendment) Act 2001. Articles 7 and 8 of this Convention unambiguously cover corruption that takes place in the private sector. On this basis, then it would seem to cover much the same ground as the OECD Bribery Convention. The Criminal Convention does contain, in Article 22, a requirement to protect "*collaborators of justice and witnesses*" who report offences, but the 2001 Act does not appear to contain any such provision.

D. Prevalence of Good Faith Reporting Provisions – Internationally

English-speaking countries, such as the **United States**²⁵, **United Kingdom**²⁶, **Canada**, **Australia**, **New Zealand**²⁷ and **South Africa**²⁸, have enacted statutes prohibiting an employer from retaliating against employees for disclosing unlawful conduct. All of these statutes cover both the public and private sectors to some extent. Australia and the United States have specific protection for the reporting of company law breaches along the lines being considered by CLRG in the Corporations Act 2001 and in the Corporate and Criminal Fraud Accountability (Sarbanes-Oxley) Act 2002. **Ireland** of course is something of an exception among English-speaking States in having no general employee disclosure protection statute.

Continental European countries have, by and large, not taken the statutory route, although **Norway** and **Slovakia**, for instance, are exceptions. **Switzerland** is also pursuing the statutory route at present. Cultural opposition is evident in several States as a consequence apparently of recent historical experience.²⁹ However, the influence of the whistle-blowing provisions in Sarbanes-Oxley in the United States has seen several European countries (e.g., **Belgium**, **the Netherlands** and **Spain**) adopt some analogous legal provisions, while **France** and **Germany** have recently issued guidelines for companies in their jurisdictions that wish to implement internal whistle-blowing policies without violating EU data protection law. Neither **Denmark** nor **Sweden** has whistle-blowing legislation, although according to the OECD, they did not detect in Sweden a lack of protection for whistleblowers from reprisals by their employers, because trade union representatives considered “*that general labour law and collective agreements appear to provide adequate protections.*”³⁰ However as regards Denmark, the OECD commented that “*Danish employees have a wide-ranging duty of loyalty towards their employer and can be legally dismissed for reporting in good faith suspicions of crimes committed by their corporate entity or by colleagues and superiors.*”³¹

Further afield, **Israel** and **Japan**³² have general employee disclosure protection provisions, while **South Korea**'s³³ is limited to the reporting of corruption by employees in State-owned companies.

Overall therefore, four broad approaches may be discerned:

²⁵ The US requires listed companies' audit committees to establish procedures for “(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.” Corporate and Criminal Fraud Accountability (Sarbanes-Oxley) Act 2002, § 301 (4). The US also

²⁶ The Public Interest Disclosure Act 1998.

²⁷ The Protected Disclosures Act 2000.

²⁸ The Protected Disclosures Act 2000.

²⁹ This statement is based on OECD's reports on the implementation of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* See e.g. OECD Bribery Convention phase 2 implementation report on the Czech Republic (November 2006).

³⁰ Paragraph 550, OECD's Mid-Term Study of Phase 2 Reports in respect of the Bribery Convention.

³¹ Source for statement to be added.

³² Whistleblower Protection Law 2004

³³ Anti-Corruption Act 2005

1. States with general employee disclosure protection statutes for the disclosure of misconduct by or on behalf of entities in the public and/or private sectors;
2. States which have adopted whistle-blower protection provisions in national company law;
3. States which facilitate companies introducing whistleblower protection policies on a voluntary non-statutory basis;
4. States which have taken none of the above approaches but impose a general duty to report suspected crime, without any protection of private sector employees from the consequences of such reporting.

E. Comparison of Statutes enacted in Australia, Japan, New Zealand, U.K. and U.S.

Before considering good faith provisions in Irish legislation, it would be useful to examine in a little more detail what types of provision apply in other international jurisdictions. The following material compares and contrasts the statutory provisions in Australia, Japan, New Zealand, the U.K. and the U.S. under a number of headings.

Disclosure Characteristics

- **Australia:** Information may be disclosed which the discloser has reasonable grounds to believe indicates that the company (or an officer or employee of the company) has, or may have, contravened a provision of the Corporations legislation. The discloser must make the disclosure in good faith.
- **Japan:** Relevant disclosure information means information pertaining to criminal conduct or statutory violations relating to the protection of consumer interests, the environment, fair competition and generally the “*life, body and property of the general public*”. Under the Schedule, this includes *inter alia* a breach of the Securities Exchange Act. Disclosure must not be for unfair or illegitimate purposes, e.g., in order to cause detriment to a third party.
- **New Zealand:** Serious wrongdoing may be disclosed which includes conduct constituting an offence, conduct posing a serious risk to health, safety or the environment, a misappropriation of funds, gross negligence, improper discrimination or oppressive conduct by a public official. The content of the disclosure must be true or likely to true; the purpose must be to allow serious wrongdoing to be investigated, and the employee wishes the disclosure to be protected. False or bad faith reporting is not protected. Under a proposed 2007 amendment, reasonable but mistaken disclosure would also be protected. The amendment would clarify that there is no need for an employee to specifically refer to the Act by name in order to enjoy protection under the law.
- **U.K:** Information may be disclosed which the worker reasonably believes tends to show a criminal offence, a failure to meet any legal obligation, a miscarriage of justice, a health and safety or environmental breach or concealment of any of the above. Disclosure must be in good faith, substantially true, not for the purpose of personal gain and reasonable in all the circumstances. Disclosure must not itself be an offence.
- **United States:** Disclosure is permitted of a suspected breach of federal rule or of the law relating to fraud. This does not include failure to comply with internal policy, ethical standards or GAAP. An employee must reasonably believe that the practices complained of are illegal under federal securities and fraud laws. An employee must establish a causal relationship between adverse employer reaction and whistle-blowing; s/he must “*show that the protected activity was a ‘contributing factor’ in the employer’s decision to take adverse action against the employee. The whistleblower’s protected activity does not have to be the employer’s sole reason or even a significant reason for the*

adverse action but only has to play some role in the employer's decision, however minor.”³⁴

Disclosure by whom, to whom?

- **Australia:** The ‘discloser’ must be an employee or officer of the company, a person having a contract for the supply of goods or services to the company or an employee of a person who has a contract for supply of goods or services to the company. Disclosure may be made to the Australian Securities and Investments Commission (ASIC), the company’s auditor or a member of an audit team conducting an audit of the company, a director, secretary or senior manager of the company or a person authorised by the company to receive disclosures of this kind.
- **Japan:** ‘Worker’ is defined broadly to include permanent and temporary employees, public officers, retirees and former employees. Disclosure in-house is preferred; “sufficient cause” requirement must be met before external disclosure (i.e., to a government agency) is justified.
- **New Zealand:** The definition of ‘employee’ includes a former employee, a homemaker (as defined in other legislation), a person on secondment and a contractor. Disclosure must abide by internal procedures established within the organisation to deal with the information. If there are no internal procedures, disclosure may be made to the head or deputy head of the organisation. If the matter is urgent or there are exceptional circumstances or there has been no action after 20 days, then disclosure may be made to an appropriate public authority. Under a proposed 2007 amendment, technical non-compliance with an organisation’s internal procedures, e.g., disclosure to a regional manager instead of a general manager, would no longer prevent an employee enjoying protection under the Act.
- **U.K:** A broad definition of “worker” is employed. Disclosure may be made to the employer or a responsible person or person authorised by the employer.
- **United States:** Employees of publicly traded companies and their subcontractors are covered under the statute. The definition of “employee” is broad and generally includes present and former workers, supervisors, managers, officers and independent contractors. Former employees are protected when their protected activity occurs during the course of their employment. The extent of the protection for independent contractors depends on the degree to which the publicly traded company exerts control over the contractor’s work. Disclosure may be made to a federal regulatory or law enforcement agency, any member or committee of Congress, a person with supervisory authority over the employee (or such other person working with the employer who has authority to investigate, discover or terminate misconduct). Participation by employees in investigations is also protected.

³⁴ David J. Marshall and Nicole J. Williams, *Katz, Marshall & Banks, LLP Washington, D.C.* “Blowing the Whistle on Accounting Fraud: The Sarbanes-Oxley Whistleblower Protections at a Glance: A *White Paper for Finance Professionals*” http://www.kmblegal.com/publications_sep_01_07.php

What is prohibited?

- **Australia:** Threatening behaviour, or behaviour intentionally causing detriment to the person who made the disclosure or another person because of the disclosure is prohibited. The threat may be express or implied, conditional or unconditional.
- **New Zealand:** It is prohibited to victimise a person who intends to make a protected disclosure or who has made one or who has encouraged another to do so or who has given information or evidence arising out of a disclosure.
- **U.K.:** A worker has the right not to suffer any detriment by any act of an employer done on the ground that the worker made a protected disclosure.
- **United States:** Neither the company nor any officer, employee, contractor, subcontractor or agent of the company may discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee for engaging in “protected activity”, i.e., making a qualifying disclosure or assisting an investigation. Following applicable U.S. Supreme Court precedent in a similar context, employer action must be “materially adverse”, i.e., such as would dissuade a reasonable finance professional from raising concerns about practices that he or she believes to constitute fraud on shareholders. In the view of a legal commentator, “[t]his would certainly include firings, demotions, cuts in pay or denial of promotions, but it can also include reassignment of job duties and responsibilities, assignment of undesirable shifts, harassment, micromanagement, excessive supervision, or exclusion from important company activities.”³⁵

What duty to investigate, if any, attaches to the person to whom disclosure is made?

- The **Australian, New Zealand** and **U.K.** statutes contain no affirmative duty on the person or body to whom disclosure is made to undertake any investigation of the report.
- **Japan:** The employer or government agency (as the case may be) must “without delay” notify worker in writing what steps it will take to remedy the situation or whether there is insufficient evidence to sustain a complaint.

Confidentiality/Anonymity

- **Australia:** It is an offence for the recipient of a protected disclosure to disclose the identity of the discloser, the information disclosed or information likely to lead to the identification of the discloser (“confidential information”), unless the confidential information is disclosed with the consent of the discloser or is disclosed to ASIC, the Australian Prudential Regulatory Authority or the Australian Federal Police. Anonymity of the person making the disclosure is generally not assured. Under the Corporations Act, anonymity is only protected if the whistleblower gives his/her name.

³⁵ http://www.kmblegal.com/publications_sep_01_07.php

- **New Zealand:** Every person to whom a disclosure is made or referred must use their best endeavours not to disclose information that might identify the person who made the protected disclosure, unless the latter consents or it is essential to an investigation of the allegations made or to prevent serious risk to public health or safety or having regard to the principles of natural justice.
- **U.K:** Any contractual confidentiality clause is void, insofar as it purports to preclude a protected disclosure.
- **United States:** Audit committees are required to establish internal procedures enabling confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

Employment Tribunal

- **New Zealand:** An employee who is retaliated against for making a protected disclosure may go to the Employment Relations Tribunal.
- **U.K:** A worker may complain to an employment tribunal of detriment done to him or her because of a disclosure.
- **United States:** An employee must file a written complaint with any office of the Occupational Safety and Health Administration (OSHA) which is part of the Department of Labour within 90 days of the retaliatory action. OSHA conducts a preliminary investigation and makes a finding. An employee may appeal the case to an Administrative Judge.

What protections (apart from those that may be granted by an employment tribunal) attach to a person making a protected disclosure?

- **Australia:** The person is not to be subject any civil or criminal liability for making a disclosure. No contractual remedy may be enforced, and no other contractual right (including termination of employment) may be exercised against that person on the basis of the disclosure. The person making the disclosure has qualified privilege in respect of any defamation claim arising from the disclosure. A Court may order the reinstatement of an employee who makes a protected disclosure. An employee who is threatened with, or intentionally caused, detriment on account of his or her disclosure is entitled to compensation.
- **Japan:** Workers are protected from retribution in the form of dismissals, demotions, salary cuts and other detriments.
- **New Zealand:** The employee enjoys immunity from civil and criminal proceedings, irrespective of any restriction or prohibition under any enactment, rule of law, contract, oath or practice.
- **U.K:** Compensation for reprisal is available to an employee – the amount is statutorily limited. The availability or otherwise of civil and criminal immunity is not specified.

- **United States:** Employees who prevail in a Sarbanes-Oxley action are entitled to a full “make whole” remedy including reinstatement, back pay, “front pay” for lost wages going forward, attorney fees and litigation costs. The law also provides for the payment of special damages, which would include non-economic damages, such as compensation for emotional distress. Criminal prosecution and administrative investigation and/or sanction may follow the civil case.

F. Some Reports on International Experience with Good Faith Reporting

Aside from OECD materials associated in particular with the Bribery Convention (from which much of the above information at D above has been obtained), there is little international commentary on the general subject. The Group is however aware of two international studies, both of which are in principle well disposed to good faith reporting.³⁶

Having reviewed experience internationally, the **PSIRU study** (page 47) contains a number of conclusions, including:

“Whilst the preceding sections have shown that there is no one model for protecting whistleblowers and that the experts disagree in relation to a number of issues including the relative strengths and roles of internal and external disclosure routes and whether or not protection should be conditioned on motivation, there are nonetheless some clear areas of agreement:

- *Legislation that protects whistleblowers from retaliation de-stigmatises, provides legitimacy and facilitates a change in culture;*
- *There is a need to protect private sector as well as public sector employees – voluntary codes of conduct are helpful (particularly if externally enforced) but are not a substitute for legislation;*
- *That there is a need to go beyond the provision of internal and prescribed and disclosure routes and allow for external disclosures to MPs and the Press;*
- *That there is a need to ensure that the full range of workers are included – especially contractors – particularly in the context of today’s changing labour practices and the new public management model of government that is spawning privatisations and contracting out.”*

The scope and general thesis of the **De Maria paper** is evident in its title (see footnote below).³⁷ One of his propositions is that through secrecy legislation, “Governments deny or frustrate access by the people to policy intelligence” and that in consequence, governments “cannot afford to have effective whistleblower legislation.” The paper seeks to rate each of the laws by reference to some 27 performance criteria, e.g., private sector coverage, application to the media, etc.

A general comment that might be made on this paper is that it appears to be based on the content of the legislative provisions in the five countries in question. It is difficult to see how a proper assessment of the actual performance of the legislation could have been possible given that in one case (Ireland), the Bill was never enacted and in two

³⁶ One is entitled “Whistle Blowing and Corruption – An Initial and Comparative Review” by Kirstine Drew (January 2003) on behalf of the UK-based Public Services International Research Unit (PSIRU) which is stated to manage ‘Unicorn: a Global Trade Unions Anti-Corruption Project’.

³⁷ “Common Law – Common Mistakes: The Dismal Failure of Whistleblower Laws in Australia, New Zealand, South Africa, Ireland and the United Kingdom”, Dr William De Maria, Centre for Public Administration, The University of Queensland, Australia (April 2002).

other cases (New Zealand and South Africa), the legislation was no more than two years old when the paper was completed.

Leaving aside these comparative studies, there was a specific review undertaken of New Zealand's Protected Disclosures Act 2000 which, as indicated earlier, is a general employee disclosure protection statute. In the report³⁸, **Mary Scholtens QC** concluded while there was "*evidence of inconsistent application of the Act*", issues regarding appropriate authorities to whom disclosure should be made, and "*a strong perception, possibly a reality, that it was unlikely that the identity of the person making a protected disclosure would remain confidential*". Overall "*where the provisions of the Act had been incorporated into an organisation's culture of risk management and its institutions relating to appropriate ethical conduct, the procedures worked well.*" Ms Scholtens reported "*signs that the Act would benefit in particular from a greater involvement by a body such as the Office of the Ombudsmen, if that is appropriate, to assist and support those wishing to make protected disclosures, to co-ordinate the referral of matters to appropriate agencies and to monitor the operation of the Act.*" (Review, pp. 1-2).

Ms Scholtens' discussions with employment law practitioners on the operation of the Act raised concerns about the speed of investigations. Another point noted was that employees making protected disclosures should, if at all possible, be consulted regarding the terms of reference of any internal inquiry (if such inquiry is to dispose of the issue in a fair manner) and given an opportunity to comment on the draft report of the investigation. One practitioner considered the legislation to be unduly complicated and was of the view that in practice confidentiality is not maintained and "*that, despite the alleged confidential nature of the process, inevitably the complainant is identified as a consequence of the investigative process.*" The two practitioners consulted "*advised that they would not recommend any prospective client in future to use the Act.*" The reasons for this included a lack of accountability by the investigator, difficulty in actually maintaining confidentiality, difficulty of linking retaliatory action to disclosure, the cost of professional advice, the high standard of proof typically required (higher than "*reasonable belief*"). Also, employees tended to end the process unemployed. (Review pp 30-33)

One conclusion that might be drawn from the above is that, if a good faith reporting protection scheme is to have any reality, an employee making a protected disclosure should have a statutory entitlement to a fair and expeditious investigation of his complaint. This would also be in the interests of the employer who would scarcely stand to benefit from a protracted investigation diverting management and other resources. A fair and expeditious internal investigation would also remove the possibility of unwanted external investigation - again a good result from an employer's perspective.

A second conclusion to be drawn is that confidentiality and anonymity matter greatly to persons considering making a good faith report. It would surely not be a satisfactory outcome if, as suggested by practitioners speaking to Ms Scholtens, employees virtually always ended up unemployed.

³⁸ "Review of the Operation of the Protected Disclosures Act 2000" (Report to the Minister of State Services, tabled in Parliament on December 16th 2003); available at <http://www.ssc.govt.nz/display/document.asp?NavID=82&DocID=3672>

Arising from Ms Scholtens' report, the New Zealand Government has recently tabled the Protected Disclosures Amendment Bill 2007 which, as indicated earlier, proposes inter alia that:

- the definition of "employee" be expanded to include a member of the governing board of the organisation and a person who works voluntarily for the organisation or otherwise without expectation of reward;
- reasonable but mistaken disclosure of wrongdoing would not lose protection under the Act.

The 2007 Bill also contains a series of amendments to give additional powers of oversight to the Ombudsman.

G. Prevalence of Good Faith Reporting Provisions - Nationally

Having reviewed the position internationally, it is time to consider the incidence of good faith reporting at home.

In examining the issue, the Group was aware that good faith reporting provisions already existed in the following Irish legislation:

- Section 5 of the Ethics in Public Office Acts 1995 to 2001;
- Section 4 of the Protections for Persons Reporting Child Abuse Act 1998;
- Section 50 of the Competition Act 2002;
- Section 124 of the Garda Síochána Act 2005;
- Section 27 of the Safety Health and Welfare at Work Act 2005;
- Section 26 of the Employment Permits Act 2006;
- Section 87 of the Consumer Protection Act 2007;
- Section 103 of the Health Act 2007;
- Section 7 of the Communications Regulation (Amendment) Act 2007;
- Sections 54 to 56 of the Charities Bill 2007.

It will be evident that many of these provisions predate the recent Government decision in favour of a sectoral approach and that it will take time to implement the decision in suitable codes of Irish law. However, it is also evident that good faith reporting provisions have increasingly become a part of recent Government legislation. In respect of the impact of these provisions to date, the Group is not aware of any published information which discusses the value of the good faith reporting provisions in the above codes to date. Moreover, the recent enactment of many of these provisions would not have allowed sufficient time for a proper assessment to be undertaken of their impact. However, bilateral contacts with a number of supervisory agencies suggest that good faith reporting has given rise to a small number of useful reports which would not otherwise have come to attention.

In its initial consideration of the scope of a good faith reporting provision in Irish company law, the Group gave particular attention to the individual provisions in the above legislation. Its examination noted the following.

Disclosure Characteristics

Most of the legislation permits the disclosure in good faith of certain matters. Reasonable belief is also a pre-condition for securing protection from penalisation in many cases. While the Communications Regulation (Amendment) Act does not use the term 'good faith', the provision stipulates that Comreg may decline to deal with a disclosure if it satisfied on reasonable grounds that the information is false or misleading or that the disclosure is frivolous or vexatious. Both the Employment Permits Act and the Safety Health and Welfare at Work Act seem to provide protection to an employee for a disclosure unconditionally, i.e., without reference to whether or not the disclosure is reasonable or made in good faith.

In four of the nine cases (e.g., the Competition Act, the Consumer Protection Act, the Employment Permits Act and the Charities Bill), specific reference is made to an offence of the parent Act or other contravention as being a permissible disclosure. In

the other cases, broader terms like conduct, complaint and actions posing a risk are used.

Disclosure by whom, to whom?

In five cases (i.e., the Competition Act, the Consumer Protection Act, the Communications Regulation (Amendment) Act, the Ethics in Public Office Act and the Charities Bill), a ‘person’ may make a protected disclosure. In the four other cases, this is limited to ‘employee’. In most of these instances (i.e., the Competition Act, the Protections for Persons Reporting Child Abuse Act and the Safety Health and Welfare at Work Act), the term ‘employee’ is based on that contained in the Terms of Employment (Information) Act 1994.

In seven cases, the disclosure is protected when it is made to the relevant external authority. No recognition is given in most of this legislation to the making of internal disclosures. However, the Safety Health and Welfare at Work Act explicitly protects internal disclosures, while the Employment Permits Act also gives protection where the employee gives advance notice to his employer of his or her intention to make a report to an external authority. In respect of the Protections for Persons Reporting Child Abuse Act and the Health Act, the disclosure is made to an ‘authorised person’ which conceivably could be both an internal and external authority.

What is prohibited?

All provisions (other than the Communications Regulation (Amendment) Act which is silent on the issue) prohibit penalisation of the person who makes the good faith report. Penalisation or the equivalent term is often defined in a manner similar to that contained in the Safety Health and Welfare at Work Act.

What duty to investigate, if any, attaches to the person to whom the disclosure is made?

Seven of the Acts make no specific provision requiring the recipient of a good faith report to investigate the matter. The Communications Regulation (Amendment) Act stipulates that Comreg shall “so far as practicable and in accordance with law” notify the person of the outcome of its investigation of the matters to which the disclosure related. The Health Act requires the authorised person to investigate the subject matter of the disclosure and gives them discretion, for instance, to disclose the subject matter to other parties.

Confidentiality/Anonymity

Eight of the Acts provide no explicit requirement that the identity of the person making the ‘good faith report’ be protected or that the information supplied be kept confidential. However, it is likely that in many cases, a general secrecy provision operates to this effect in the parent legislation governing the body in question. Uniquely, the Communications Regulation (Amendment) Act provides in the whistleblowing provision that Comreg may not divulge the identity of the person who made the disclosure without first obtaining his or her consent “except in so far as it may be necessary to ensure proper investigation of the matters to which the disclosure relates”.

Employment Tribunal

Six of the Acts provide recourse to the established employment rights structures (e.g., a Rights Commissioner or the Employment Appeals Tribunal) for an employee who complains of penalisation by his employer. However, no such option appears to be included in the Communications Regulation (Amendment) Act, the Ethics in Public Office Act or the Safety Health and Welfare at Work Act.

What protections (apart from those that may be granted by an employment tribunal) attach to a person making a protected disclosure?

Reference has been made earlier to the prohibition in many of the Acts to the penalisation of persons making good faith reports and the provision of remedies via employment rights structures to enable the adjudication of any claims of penalisation by employees. In addition, six of the Acts (i.e., the Competition Act, the Consumer Protection Act, the Communications Regulation (Amendment) Act, the Ethics in Public Office Act, the Health Act and the Charities Bill) provide generally that a person making a good faith report shall be protected from civil liability (claims for damages, etc.) in respect of that communication. In fact, the Ethics in Public Office Act and the Charities Bill specifies that “no cause of action” shall lie against the person in question. The Communications Regulation (Amendment) Act explicitly states that in addition to being protected from civil liability, the person incurs no criminal liability for having made such a communication.

However, all of the above Acts specify that the person making the report would be liable in respect of information which was false or misleading or in respect of disclosures which were made in bad faith or which were frivolous or vexatious.

Conclusion

Prior to the Government decision in March 2006 with respect to whistle-blowing provisions, there was only a small number of Acts which included such provisions. However since then, a number of codes of law have adopted such provisions including in legislation regulating commercial entities. The Government decision does therefore seem to have generated some momentum in favour of the inclusion of good faith reporting provisions in appropriate legislation.

H. The Need for a Good Faith Reporting Provision in Irish Company Law

The main purpose of a good faith reporting provision is to promote the public interest by:

- facilitating the disclosure and investigation of suspected misconduct in, by or on behalf of public and private sector organisations;
- protecting the officers and employees of the organisations who make disclosures of information suggesting possible misconduct in, by or on behalf of such organisations.

Misconduct in Company Law

There are some 400 offence provisions in Irish company law at present, about 200 of which are indictable. In the Companies Consolidation Bill, the offences provisions have been usefully rationalised into four principal categories.

Some figures on the incidence of company law breaches are available since the enactment of the Company Law Enforcement Act 2001 which has provided a focus for the disclosure of possible company law breaches. Auditors and prescribed accounting bodies are required to disclose to the Office of the Director of Corporate Enforcement (ODCE) suspected breaches of indictable offences under the Companies Acts. There is also a mandatory reporting obligation on the liquidators of insolvent companies to report to the ODCE. And the ODCE now offers an outlet for public complaints and regulator information-sharing in respect of possible company law breaches.

Some information on the incidence of auditor, liquidator and other reporting to the ODCE in 2005 and 2006 is provided in the following table.

Reports to the ODCE	2005	2006
Auditor Reports	363	268
Initial Liquidator Reports under Section 56	327	316
Public Complaints	284	344
Other Reports and Detections	85	91
TOTAL	1,059	1,019

The character of the issues coming to attention varies depending on the source of the report. In respect of the 240 first reports by liquidators on which a definitive ODCE decision was made in 2006, 50 (or 21%) were considered to involve detected irresponsibility by one or more company directors in complying with their various company law obligations and therefore warranted consideration by the High Court. Approximately 80% of directors who come before the Court end up being restricted. No breakdown of the type of defaults in question is readily available.

In respect of auditor reporting, some 90% of detected offences are currently related to just two offences, namely infringements of the directors' loan obligations or a failure to keep proper books of account. As no reliable figures are available for the number of company audits undertaken, it is not possible to say what proportion of audits gave rise to a report to the ODCE, although the number is thought to be a small percentage of the total.

The character of the 406 matters brought voluntarily to ODCE attention in 2006 by the general public provided a greater spread of potential company law issues for consideration. Many of the complaints related to improper trading, alleged non-payment of monies due, conduct prejudicial to directors or shareholders, the provision of false information and a range of other matters. However, ODCE experience is that roughly a third of complaints do not relate to company law breaches at all and are not therefore a matter for ODCE attention.

The powers of the ODCE in detecting company law non-compliance must also be taken into account. Unlike many other regulators, the Director has no general right of inspection of a company's premises or records and is largely dependent on others to bring to attention matters of potential significance in the context of his remit. Accordingly, the character of the Director's role is necessarily reactive to the vast bulk of concerns communicated to his Office.

The great majority of those who report to the ODCE are company stakeholders (i.e., auditors, liquidators, creditors, shareholders, etc.). In other words, they are outside the day-to-day operations of the company but are in a position to offer some form of informed view of the conduct of the company or company officer of which they are complaining.

In summary therefore, it is possible to say that:

1. The true incidence of misconduct vis-à-vis the Companies Acts is not known;
2. Those company stakeholders who are not involved in day-to-day company operations can only obtain an imperfect view of the nature and extent of any misconduct;
3. The reactive character of the ODCE's role cannot compensate for any information deficits which may be present;
4. Officers and employees within companies are likely to be the most well informed of any actions or omissions by or on behalf of companies with respect to the Companies Acts.

Assessment of the Absence of Good Faith Reporting

The last ten years have seen a number of instances where the absence of a regime of good faith reporting caused significant difficulties, reputational damage and cost for companies. The disclosure of internal National Irish Bank documentation to RTÉ in 1997 and 1998 led to a major High Court Inquiry under the Companies Acts into the Bank's involvement in facilitating tax evasion by its customers and into interest loading and fee surcharging on some of its customer accounts.

A number of years later, evidence came to light that among other things, excessive foreign exchange charges were imposed on some of the customers of AIB plc which resulted in the Bank conducting an expensive programme to repay due monies to those customers.

In AIB at least, these incidents prompted the development of a good faith reporting regime for the Bank's employees which involved the engagement by the Bank of an independent third party to receive and assess concerns being voiced by its staff about Bank conduct.

In contrast, misconduct has also come to light following investigations which were not directly prompted by stakeholder concerns. The prime example is the Ansbacher operation which was managed for some 25 years in the State without the knowledge of the relevant banking, tax and company law authorities. It was only after the publication of a High Court Inspectors' Report conducted under the Companies Acts that people came to learn of the extent of the misconduct which had occurred under the Companies Acts and other legislation over that long period.

In addition, there is anecdotal evidence to suggest that employees who become aware of suspected unlawful conduct may choose to turn a blind eye to it or leave the organisation in question rather than challenge that misconduct. In circumstances where the Oireachtas has determined that some 400 matters constitute a criminal offence in company law, it would accordingly be preferable for public interest reasons that any suspected misconduct in, by or on behalf of companies or company officers should be capable of being disclosed and addressed internally within the companies or if necessary by an appropriate external authority like the ODCE.

In conclusion, it is possible to say that:

1. these are well-known instances of situations where the usual external stakeholders failed to detect a problem;
2. the 'whistle' was apparently 'blown' in a number of these cases by insiders, in particular employees;
3. unlawful activity under the Companies Acts is more likely to be remedied, deterred (and if necessary exposed) by creating some form of protective environment in which 'insiders' can report misconduct via a good faith reporting mechanism. It is likely that most companies and senior managements would welcome employees drawing internal attention to suspected defaults vis-à-vis the Companies Acts.

I. Possible Features of a Good Faith Reporting Provision

(Note: A number of issues in this Section are not yet resolved by the Group. The relevant draft conclusions are accordingly placed in square brackets in this text.)

In discussing the parameters of an appropriate good faith provision in the Companies Acts, the Group recognised that it was not without its difficulties (e.g., the prospect of abuse), but they proceeded to develop the possible features of a suitable provision which could mitigate some of those difficulties. The following represents the outcome of the Group's consideration of a number of key issues.

Disclosure of What?

One of the views expressed was that there should be no good faith reporting provision in the Companies Acts. Another view argued that any good faith reporting provision should have a wide scope and should include disclosure of environmental issues/pollution, 'dodgy' commercial practices, consumer issues, breaches of employment rights and health and safety issues, including the safety of products and services sold by companies. However, the majority of the Group saw merit in principle in a good faith reporting provision and took the view that while they favoured high standards of legal compliance by companies, the CLRG would have to work within the confines of the Government decision of March 2006 which advocated a sectoral approach. Noting also that previous Government efforts to progress a broad provision had ended in failure, the majority were prepared to contemplate a good faith reporting provision which would be confined to the Companies Acts.

In further discussions on details, there was general support for a provision which conferred protection on the making in good faith of a report in respect of past, present [and anticipated future] breaches of the Companies Acts. [The Group considered if protection should be confined to certain serious offences in company law. In deciding that the primary purpose of this provision was to bring to internal company attention any past, current or anticipated future non-compliance, the Group favoured the disclosure of all suspected breaches of the law.]

The Group also considered if the provision should only apply to certain major companies, e.g., listed public limited companies, but felt that it would not be appropriate to so delimit the provision on the basis that all forms of company may potentially breach company law.

[The Group also considered if the disclosure in good faith would have to be true to qualify for the protection envisaged. The Group felt that this would be excessive. It accordingly took the view that a disclosure made on reasonable grounds and in good faith of suspected misconduct (even if the opinion were mistaken) should be protected under the provision.]

Disclosure by Whom?

One of the views expressed was that considerable latitude was necessary in defining the categories of persons who could make a 'good faith' report. It should include suppliers of goods and services to a company as well as the company's 'employees' which definition would include contract workers, the self-employed and others offering services to companies in whatever capacity. Reference was made to the

corresponding UK legislation which gave a detailed list of classes of persons who could report.

While it was acknowledged that equivalent terms in some other good faith reporting provisions were cast widely, the Group was not generally in favour of extending protection against penalisation to independent suppliers of goods and services or other third parties on the basis inter alia that they would not generally need or benefit from the type of protection envisaged under the measure. The scope for abuse by competitors or by aggrieved suppliers of goods or services in commercial relationships was also acknowledged.

[Insofar as the definition of ‘employee’ itself was concerned, the Group acknowledged that there were many forms of employee/employer relationships at present beyond the traditional one. In recognition of that fact, the Group considered that any persons working within a company with knowledge of company law breaches should be permitted to make a ‘good faith’ report and that the protection afforded to an employee should extend to all those working within the company regardless of the form of employment. Accordingly, the Group has recommended that a broad definition of employee should be included in the provision and supported the inclusion of a definition similar to that contained in the New Zealand Protected Disclosures Act.]

Disclosure to Whom?

The Group was of the view that the good faith reporting provision should apply both to internal disclosures and certain external disclosures. Responsible internal disclosures would include disclosures to an internal or external auditor, any company director or senior manager, a member of any audit committee or any other person who has been allocated the responsibility of receiving good faith disclosures.

In considering the recipients of external disclosures, the Group was agreed that they should be the appropriate responsible authorities, specifically the ODCE and the Garda Síochána. For reasons of simplicity, the Group agreed that the ODCE would determine if any other authority recognised in company law (e.g., the Financial Regulator, IAASA, the Irish Takeover Panel, the Registrar of Companies, etc.). If that was appropriate, the ODCE could use its existing information-sharing machinery to refer appropriate reports to those bodies. There was also merit in a single authority for statistical collation and review purposes.

The Group agreed that any regime of good faith reporting of company law offences should not extend legal protection to reporting made to journalists, members of the Oireachtas or other external parties.

In setting an appropriate balance between internal and external disclosures, the Group agreed that the bias in the provision should be towards encouraging internal disclosures so that a responsible company management would be given the opportunity to address and correct any reported defaults which may exist. While acknowledging that a mandatory requirement for internal disclosure would not be appropriate where directors and senior managers were responsible for the detected breaches, the Group was attracted to the provision in New Zealand law which identified a number of defined circumstances under which an external disclosure

could be made without prior recourse to an internal report. Accordingly, it decided to recommend a provision of this character.

Scope of Definition of Penalisation

The Group agreed that the penalisation of an employee should be prohibited in respect of the making in good faith of any internal or external disclosure with respect to a company law offence. The definition of penalisation should be a wide one and should include dismissal, discrimination, bullying, harassment, denial of promotion [or training], etc. The Group accordingly resolved to model it on the equivalent provision in Section 27 of the Safety Health and Welfare at Work Act 2005 as this seemed to substantially meet the need for a comprehensive and defined set of detrimental actions.

Nature of Remedies in respect of Penalisation

The Group considered to what extent a penalised employee would have available remedies in tort for, say, loss of earnings and the offence of harassment and recourse to a less legal environment to seek redress of any detrimental treatment via a Rights Commissioner and the Employment Appeals Tribunal. [While it was expected that most employees in that position would choose to resolve their dispute outside of the Courts, it was acknowledged that in certain circumstances, employees could not be precluded from seeking compensation in the Courts. Accordingly, it was proposed that the provision would adopt the type of remedial provisions found in the Competition Act 2002.] The Group gave consideration to creating a statutory tort-like remedy for penalisation along the lines of that contained for other purposes in the Consumer Protection Act, but having acknowledged that no similar provision existed in good faith reporting provisions, they ultimately decided not to pursue this.

Immunity from Prosecution

The Group acknowledged that the parameters of any programme of immunity from prosecution in respect of any co-conspirator to a contravention of company law fell within the prosecutorial discretion of the Director of Public Prosecutions. In the same way as the Competition Act 2002 was silent on the Competition Authority's Cartel Immunity Programme, this was not a matter which was appropriate for inclusion in a good faith provision in company law. The Group noted that the ODCE intends pursuing with the DPP the possible development of a programme of immunity from prosecution in respect of company law offences.

Offences

[The Group considered what form of Companies Acts obligations should come within any good faith reporting provision. In considering this matter, the Group was conscious that the Inspectors' Report into Ansbacher (Cayman) Ltd. which Inquiry was conducted under the Companies Acts had only identified certain technical contraventions of company law (registration, nameplate, etc. issues). The Group also noted that many legislative provisions internationally were broad inclusive provisions. Having regard also to the fact that all contraventions of the Companies Acts should be capable of being brought to the attention of company management by their staff without a fear of penalisation, the Group took the view that it would not be appropriate to have a good faith reporting regime distinguish between certain types of contraventions.]

The Group also considered if it should constitute a criminal offence for:

- an employee to make a false or misleading report of a contravention of the Companies Acts and
- an employer to penalise an employee in respect of the making of a good faith report.

In the former case, it was considered that the internal making of a false report would be a legitimate cause for the taking of disciplinary action by an employer and that it was unnecessary to make such a disclosure subject to criminal liability. Insofar as the making of a false or misleading report to an external authority was concerned, it was noted that under the Companies Acts at present, no criminal liability attached to a person who made, for instance, a false or misleading complaint to the ODCE. In the circumstances, the Group decided that it would be sufficient that a person making any false or misleading disclosure should be civilly liable only.

In the latter case, the Group felt that it would not be appropriate for criminal liability to attach to an employer for penalising an employee on the basis that the employee would have an adequate remedy to pursue any complaint against the employer via a Rights Commissioner or the Employment Appeals Tribunal.

[The Group acknowledged that it would be important for the operation of a good faith reporting regime that the employee identify him/herself in making the report either internally within the company or externally, but that this should be balanced by a provision which would preclude the recipient of a good faith report from disclosing the identity of the employee or information which would lead to his/her identity unless, for instance, the recipient had given prior agreement to the disclosure of his/her identity. Accordingly, the Group considered that having regard to the breach of trust involved and the serious implications for an employee of the disclosure of his/her identity, an offence provision would be warranted.]

J. Conclusion and Recommendation

(To be completed. Matters to be discussed here include the extent to which a good faith reporting provision would be (or would not be) desirable in company law, the need for it and its potential value or adverse impact, including on FDI, etc.)