

The 2009 Code of Practice for the governance of state bodies and whistle blowing

Imelda Reynolds assesses the code's impact on whistle blowing

In general terms, whistle blowing describes a situation where a person makes a disclosure to an employer or regulator about a dangerous or illegal activity or omission in the workplace. Other terms used include good faith reporting, protected disclosures and confidential disclosures. It is important to distinguish between situations where someone is making a complaint, and where someone is 'blowing the whistle'. When someone blows the whistle, they are raising a concern that does not necessarily affect them personally. They are trying to alert others to an alleged malpractice. With a complaint, on the other hand, the person making the complaint has a vested interest in the outcome and is expected to be able to prove his or her case.

The 2009 Code of Practice for the Governance of State Bodies

The 2009 Code refers, under the heading of "the Board", to "confidential disclosures". In particular, Clause 2.11 requires the board to put in place procedures whereby employees of the State body may, in confidence, raise concerns about possible irregularities in financial reporting or other matters and for ensuring meaningful follow up. The 2009 Code refers only to employees but does not define them. It would therefore seem to exclude contractors or other workers in an organisation who might not be employees.

As with the earlier versions of the code, state bodies and their subsidiaries are required to confirm to the relevant Minister that they comply with the up to date requirements of the code in their governance procedures, and as appropriate, in joint ventures with State bodies. There is a caveat in paragraph 1.1 of the 2009 Code entitling a relevant body to reach agreement with its parent department on the extent to which the requirements of the 2009 Code in general might be adapted in their case. This agreement must be noted and explained in the State body's annual report, with the Department of Finance being informed of this in advance.



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Private and public companies

For commercial state bodies or their subsidiaries involved in strategic alliances, joint ventures or other arrangements with shareholders other than the state, paragraph 1.2 of the Code states that they may consider certain aspects of the code are not easily enforceable in those ventures. In those circumstances the code states that a commercial state body should take 'all reasonable steps' to ensure that such ventures comply with the 'principles of corporate governance applicable to commercial bodies/companies generally' and confirm to the relevant Minister that this has been done.

However private companies have no obligation to make provision for confidential disclosures. Indeed, the

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Company Law Review Group (CLRG) has recommended that a company law-specific whistle-blowing provision should not be included in the forthcoming Companies Consolidation and Reform Bill.

Public companies are expected to comply with the provisions of the Financial Reporting Council's Combined Code on Corporate Governance. In cases where the plc does not comply with its provisions, it is expected to explain why it does not do so.

Clause C3.4 of the Combined Code, which deals with audit committees and auditors, allows staff to raise concerns about possible improprieties in financial reporting or other matters. As such, it reflects the 2009 Code provision.

The Combined Code is supplemented by the Turnbull Guidance (FRC Internal Control – Revised Guidance for Directors on the Combined Code) which deals in more detail with audit committees and systems of internal control for plcs and has similar provisions.

Therefore, a commercial state body in a joint venture with a plc may well have to consider the requirements of the Combined Code and the Turnbull Guidance.

Current whistle-blowing provisions

In contrast to the UK, which enacted the Public Interest Disclosure Act in 1998, and to the policy approach taken in several other jurisdictions, the Irish Government decided in 2006 that it would not implement a specific piece of whistle-blowing legislation. It decided it would instead pursue a sector by sector approach. As a result, whistle-blowing legislation is being implemented in a piecemeal fashion in Ireland. As a consequence, whistle blowing provisions have been included in a number of pieces of legislation, and are also proposed in several draft Bills.

There are good faith reporting provisions included in 11 pieces of enacted legislation, as follows: the Ethics in Public Office Acts 1995 -2001; the Protections for Persons Reporting Child Abuse Act 1998; the Competition Act 2002; the Garda Síochána Act 2005; the Safety Health and Welfare At Work Act 2005; the Employment Permits Act 2006; the Health Act 2007; the Consumer Protection

Act 2007; the Communications Regulation (Amendment) Act 2007 the Chemicals Act 2008 and finally, the Charities Act 2009, which has been enacted but not yet commenced..

The Bills before the Oireachtas which include confidential disclosure provisions are the Prevention of Corruption (Amendment) Bill 2008; the Property Services (Regulation) Bill 2009; the Employment Agency Regulation Bill 2009; and the Labour Services (Amendment) Bill 2009.

An evaluation of the legislative provisions above, both enacted and proposed, demonstrates that:

- Most of the legislation permits disclosure in good faith of certain matters;
- Reasonable belief is also a pre-condition for securing protection from penalisation in many cases, although both the Employment Permits Act 2006 and the Safety Health and Welfare At Work Act 2005 seem to provide unconditional protection, that is, without reference to whether the disclosure is reasonable and made in good faith.
- In some cases a ‘person’ may make a protected disclosure, in others it is an employee, and in some cases it is both.
- In most cases the disclosure is protected when it is made to the relevant designated external authority. The Safety Health and Welfare at Work Act 2005 explicitly protects internal disclosures, and the Employment Permits Act 2006 gives protection where the employee gives advance notice to his employer of intention to make a report to an external authority. In some cases the disclosure is to an ‘authorised person’, which could be either an internal or external authority.
- All the provisions (save the Communications Regulation (Amendment) Act 2007 which is silent on the issue) prohibit penalisation (e.g. by dismissal, denial of promotion, etc.) of the person who makes the good faith disclosure.
- Many of the Acts have no specific provision requiring the recipient of the good faith report to investigate the matter. The Communications Regulation (Amendment) Act requires that Comreg shall, so far as practicable, and in accordance with the law notify the person of the outcome of the investigation. The Health Act 2007 requires the authorised person to investigate the subject matter of the disclosure and gives them some discretion, for instance, to disclose the subject matter to other parties.
- Most of the Acts or Bills contain no explicit requirement that the identity of the person making the report be protected or that the information supplied be

kept confidential. The Communications Regulation (Amendment) Act is an exception to this.

- Several Acts provide recourse to the established employment rights structures, that is, the EAT/Rights Commissioner, for an employee who claims penalisation.
- In addition to protection from penalisation by an employer, several of the Acts such as Ethics in Public Office Acts provide generally that a person making a good faith report shall be protected from civil liability claims (such as claims for damages) in respect of the disclosure.
- The Communications Regulation (Amendment) Act states that in addition to being protected from civil liability no criminal liability shall attach for having made a disclosure.

What does ‘good faith’ mean?

The justifiability of whistle blowing revolves around issues such as the manner of the disclosure, the reasons for it and the motives behind it. It would seem reasonable to assert that whistle blowing is only justifiable where it does more good than harm, and serves in correcting or preventing wrong doing. It must also be done in a responsible manner, following on from the exhaustion of internal channels of complaint. Establishing whether these criteria are met can be problematic, particularly for the potential whistleblower.

Data protection concerns

The Data Protection Commissioner note on its website on whistle-blower schemes acknowledges that data protection issues can arise in the context of whistle-blowing. It notes that whistle-blowing only becomes a data protection issue when personal data are involved. The legislation therefore does not apply where no record is kept in electronic or manual form of:

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- The content of a whistle blowing report; or
- The person either making the report or the subject of the report; or
- Where a whistle blowing report relates to an irregularity in an organisation but responsibility for the irregularity is not and cannot readily be attributed from the content of the report.

It recommends that the best practice approach for an organisation introducing a whistle-blowing scheme is to arrange that the data produced refers to issues rather than individuals.

In conclusion the key distinguishing feature between what is proposed by the 2009 Code, and the existing ‘whistle blowing’ landscape is that all of the good faith reporting regimes reviewed above arise by virtue of statute. Arguably the general imposition of the obligation to put in place a procedure for taking confidential reports, without any other guidance or assistance, is a big ask for state agencies. It is, in fact, placing a greater responsibility on such entities than presently exists, or is even proposed by the CLRG for private companies.

As the 2009 Code specifically requires state bodies to put in place provisions relating to confidential disclosures it is important that in designing the process due consideration is given to the following:

- The disclosure characteristics required: for example, must the reporter be acting in good faith and with reasonable belief?
- Who may disclose: employees only or contractors also?
- To whom do they report – to someone internal? Consideration does need to be given to the requirements of the Official Secrets Act 1963 in this regard.
- What is prohibited – penalisation of the employee?
- Consider whether there a duty to investigate will be imposed.
- Consider how confidentiality/anonymity will be dealt with – is it realistic to agree to these?
- Take account of data protection concerns.

Effective risk management demands that employees are confident they can raise concerns with their employer without suffering any detriment. A positive whistle-blowing culture has numerous advantages. It detects and deters wrongdoing, gives managers the information they need to make decisions and control risk and demonstrates to stakeholders and regulators that as a State body, you are serious about good governance.

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