The Criminal Justice Act 2011 ("the 2011 Act") came into effect on 9 August 2011. It introduces new procedures to facilitate Garda access to information and documentation that will assist in the investigation of white collar crime. The 2011 Act makes it an offence for a person not to report to Garda information which he knows or believes might be of material assistance in preventing the commission of certain offences or amongst other things securing the conviction of any persons for those relevant offences. The 2011 Act also makes significant amendments in relation to the detention and questioning of suspects.

Under Section 19(1) of the 2011 Act it is an offence for "a person" who has information which he knows or believes might be of material assistance in preventing the commission by another person of a relevant offence or securing the apprehension, prosecution or conviction of any person for a relevant offence and the person fails without reasonable excuse to disclose the information to the Gardaí. Failing to provide such information attracts penalties of a class A fine (maximum €5,000) and/or or 12 months imprisonment on summary conviction and an unlimited fine and/or imprisonment not exceeding a period of five years on conviction on indictment. The Gardaí can also arrest you without a warrant if a Garda suspects you are withholding information and detain you for up to 24 hours for questioning.

Approximately 130 separate offences are included in a schedule to the 2011 Act. The broad scope of the “relevant offences” is one of the most controversial aspects of the 2011 Act. These include offences relating to financial activities, company law, fraud, theft, and corruption, such as:

- the offence of financial assistance;
- offences of an officer of a company pursuant to Section 293 of the Companies Act 1963 when a company has been wound up;
- offences relating to failure to keep proper books of account;
- offences relating to recklessly making a statement to a company auditor that is misleading, false or deceptive;
» offences relating to authorising the issue of a prospectus which contains untrue statements or omits to include information;
» offences regarding insider dealing or market manipulation;
» offences of ordinary theft, false accounting, destroying, defacing or concealing valuable securities and forgery.

It has been widely reported that the 2011 Act was introduced to enhance Garda investigative and prosecution powers in respect of “complex crime, in particular white collar crime” and although it is reasonable to have assumed that theft offences under the Criminal Justice (Theft and Fraud Offences) Act 2001 would naturally come within the ambit of white collar crime, the inclusion of all offences under the 2001 Act has extended the application of the 2011 Act well into the everyday life of ordinary law abiding citizens.

The obligation in Section 19 applies to “a person”. The 2011 Act contains no definition refining the category of people intended to be burdened with the obligation to report. The natural meaning of the word would mean that all persons in any circumstance is included. The draconian effect of the legislation for the ordinary man on the street cannot be underestimated. It is arguable that if you overheard a conversation in a restaurant, shop or in the office that you will be obliged to give consideration to whether this is information that might be of material assistance to the Garda in preventing the commission of an offence or securing the apprehension, prosecution or conviction of a person for an offence.

The 2011 Act does not provide a time period within which the information must be disclosed but states that it must be provided to Garda “as soon as practicable”. As soon as practicable is not defined and therefore it is difficult to anticipate what attitude a court will take to “persons” who do not report information as soon as they hear it. There is also no provision in the 2011 Act that states it will only have prospective effect. As such, as soon as the 2011 Act came into force the “as soon as practicable” clock would have started in respect of all relevant offences committed prior to 9th August 2011. Further, it is unclear whether a company carrying out an internal investigation is obliged to report as soon as a suspicion of a relevant offence arises or whether they are entitled to carry out the investigation to determine whether there is any veracity behind the suspicion.

Liability under the 2011 Act will attach to any body corporate found guilty of the offence and also to any person who was a director, manager, secretary or other officer of the body corporate, or person purporting to act in that capacity where the offence was committed with their consent or connivance, or was attributable to their wilful neglect. The offence attracts penalties of a fine and/or imprisonment on summary conviction and on indictment.

There is a saver in the 2011 Act which absolves a person from the obligation to report where they have a “reasonable excuse”. The 2011 Act does not enlighten us any further as to what will constitute a reasonable excuse. Is the concept subjective or objective? Is it a reasonable excuse for a person not to report information that would incriminate a close relative?

Prosecutions brought under the 2011 Act will probably clarify what is considered a “reasonable excuse” but until that time, it would be prudent to interpret this restrictively.

The 2011 Act also provides protection for whistleblowers and prohibits the penalisation of employees by employers for disclosing information in respect of relevant offences to Gardaí. Employees who are wrongly dismissed following reporting information to the Gardaí are entitled to bring a claim to a rights commissioner or alternatively to seek redress under the Unfair Dismissals Acts 1997 to 2007 or at common law for wrongful dismissal. Further instances of penalisation are outlined in the legislation. Penalisation of employees in this manner constitutes an offence in itself and is punishable on summary conviction or on indictment by a fine and/or imprisonment.

An employee who makes a disclosure knowing it to be false or being reckless as to whether it is false shall be guilty of an offence and shall be liable on summary conviction or on indictment to a fine and/or imprisonment. An “employee” is defined in the legislation as any person who has entered into or works under (or, where the employment contract has ceased entered into or worked under) a contract of employment and references, in relation to an employer, to an employee shall be construed as references to an employee employed by that employer. A “disclosure” is defined, in relation to an employee, as a disclosure by the employee to a member of An Garda Síochána of information which he or she knows or believes might be of material assistance in preventing the commission by any other person of a relevant offence, or securing the apprehension, prosecution or conviction of any other person for a relevant offence. The legislation as drafted appears to provide that only an employed person, but not any other person, shall be guilty of this further offence of making a disclosure knowing or being reckless as to whether it is false. One would have to question if the intention of the legislation was to limit this offence to employees only.

During the course of an investigation of a relevant offence a member of the Gardaí can apply to the District Court for an order requiring the provision of particular documents or information by any person. Failing to comply with an order to produce documents or information attracts penalties.

A person will not be required to produce information or documents that is privileged legal material.
Under the 2011 Act it is an offence to falsify, conceal, destroy or otherwise dispose of a document which he knows or suspects to be relevant to a Garda investigation into a relevant offence. We believe the data protection policies of a corporate entity would be considerably relevant in this regard.

Failure by the legislature to define certain key terms within the 2011 Act could lead to High Court challenges. For example in the case of Dokie v DPP [2010] IEHC 110 Mr Justice Kearns declared unconstitutional an offence under section 12 of the Immigration Act 2004 which gives Gardaí the power to stop any non-national and demand the production of their passport and creates a criminal offence punishable by up to one year’s imprisonment where a person refuses to comply without “satisfactory explanation”. Justice Kearns held that failure to define the term “satisfactory explanation” in the legislation gave rise to vagueness and uncertainty and held the offence to be ambiguous, arbitrary and unconstitutional.

Conclusion
Despite the title “Criminal Justice Act 2011” you would be very wrong to assume that this piece of legislation penalises criminals and not the ordinary man. The net is cast so wide by the breadth of the offences which might be reportable by a person or a corporate entity. No one can safely assume, without proper consideration of the Act and on foot of legal advice, that they are not committing an offence punishable by fine and/or imprisonment.

Employers, employees and individuals alike will have to be extra vigilant that they do no fall foul of this legislation. The relevant offences referred to in the 2011 Act are extremely broad and arise in all manner of situations including in the course of ordinary business. Although it is difficult to be fully au fait with these offences employers, in particular, should ensure that they create and maintain policies and programmes to reduce the risks to them and to their employees. Employee rights are specifically protected in the legislation so employers need to ensure that they tread carefully. All persons need to err on the side of reporting than not reporting if you know or believe that information you have might be of material assistance to the Gardaí in preventing the commission of an offence or in apprehending persons responsible for such an offence. We wait with anticipation to see how the 2011 Act will operate in practice and what constitutional challenges will follow.

Contacts
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