Observations and Recommendations on the General Scheme of the Protected Disclosures (Amendment) Bill 2021

Irish Human Rights and Equality Commission

November 2021

Coimisiún na hÉireann um Chearta an Duine agus Comhionannas
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Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014* (the '2014 Act'). In accordance with its founding legislation, the Commission is mandated to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality and to examine any legislative proposal and report its views on any implications for human rights or, equality.[1]

The purpose of the *Protected Disclosures (Amendment) Bill 2021* is to provide for the transposition of the *EU Whistleblowing Directive (EU) 2019/1937* ('the Directive') into Irish law.[2] It purports to strengthen the existing legal protections for whistle-blowers under the *Protected Disclosures Act 2014* ('the PDA'). The Commission notes the international leadership role that Ireland has taken to date in the area of protected disclosures,[3] and there is much to be welcomed in the General Scheme. However, there are also provisions in the proposed legislation which adhere rigidly to the minimum standards set out in the Directive, or where the discretion permitted under the Directive has been exercised in a restrictive manner, suggesting an unnecessarily cautious approach has been taken in some instances rather than the opportunity to further enhance the existing legislative framework. The Commission is concerned that some existing protections in national law have been reduced, in contravention of the Directive.

In the Commission's view, it is in the public interest and important from a decent work and access to justice perspective that, to the greatest extent possible, workers are facilitated to make protected disclosures and are protected in the process.[4] This is

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[1] Section 10(2) (c) of the Irish Human Rights and Equality Commission Act 2014.

[2] The Directive must be transposed into Irish law by 17 December 2021 - EU Whistleblowing Directive, Directive (EU) 2019/1937

[3] Ireland is one of just 10 EU Member States to already have comprehensive legal protections for whistleblowers in the form of the Protected Disclosures Act 2014.

[4] Under Head 7 of the General Scheme the definition of "worker" includes a shareholder, a member of administrative, management or supervisory body of an undertaking, including non-executive members; a volunteer or an unpaid trainee; an individual who acquires information on a relevant wrongdoing during a recruitment process or other pre-contractual process.

particularly pertinent for women, minorities and people in precarious work situations who:

> "can face specific and daunting obstacles when voicing concerns."[5]

Background

The legal framework in Ireland for protected disclosures is set out in the PDA. It protects workers in the public, private and not-for-profit sectors from retaliation if they speak up about wrongdoings in the workplace. Under the PDA, all public bodies are required to establish and maintain procedures for the making of protected disclosures by their employees. The Minister for Public Expenditure and Reform has issued guidance to assist public bodies in this regard.[6] In addition, the Workplace Relations Commission has published a statutory code of practice on the PDA.[7]

As required under section 2 of the PDA, a statutory review of the impact and effectiveness of the Act was carried out and published in July 2018.[8] While the review found that overall the Act is having a positive benefit for Irish society, it also raised a number of issues.[9]

International Standards

Several international instruments on anti-corruption recognise whistleblowing as an early warning sign and an important and effective tool in the combating of corruption, fraud and mismanagement. The whistleblowing legislation also engages the right to

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[5] Prof. Kate Kenny, 'Women Whistleblowers – paying a greater price', accessible at: https://impact.nuigalway.ie/business/women-whistleblowers-paying-a-greater-price/. See also the report by the UK's All Party Parliamentary Group for Whistleblowing which examined Employment Tribunal judgements in England and Wales, for cases that included a Public Interest Disclosure claim, between 2015 and 2018. The report found that there is an important gender dimension for whistle-blowers. Compared to male whistle-blowers, female whistle-blowers are more likely to report health issues, less likely to have legal representation, and even when the judge upholds the protected disclosures, they are less likely to see their unfair dismissal claim upheld – All Party Parliamentary Group for Whistleblowing, Making Whistleblowing Work for Society (July 2020) at p.3. Available at: https://a02f9c2f-03a1-4206-859b-ff2b21dd81.filesusr.com/ugd/88d04c_56b3ca80a07e4f5e8ace79e0488a24ef.pdf

[6] See DPER, Guidance under Section 21(1) of the Protected Disclosures Act 2014.

[7] See WRC, Codes of Practice on Protected Disclosures Act 2014.

[8] See DPER, Statutory Review of the Protected Disclosures Act 2014 (2018).

[9] The year-on-year increase in the numbers of disclosures made show that workers feel more confident to speak up about wrongdoing. See Statutory Review of the Protected Disclosures Act 2014 (2018).

freedom of expression under the *European Convention on Human Rights* ('the ECHR') and the *EU Charter on Fundamental Rights* ('the Charter').[10]

United Nations

The most significant international instrument on anti-corruption and whistleblowing is the *United Nations Convention against Corruption* ('UNCAC').[11] It was adopted in December 2005 and was ratified by Ireland in November 2011. Article 32 on the protection of witnesses, experts and victims provides for protections of witnesses and experts and their relatives from retaliation, including limits on disclosure of their identities.

Article 33 on the protection of reporting persons envisions countries adopting protections for reporting of corruption by any person.

It states:

> "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."

Council of Europe

The Council of Europe Civil Law Convention on Corruption and the Criminal Law Convention on Corruption also include protections for those who assist in combating corruption.[12] Article 22 of the Criminal Law Convention requires Member States to adopt measures for the protection of collaborators of justice and witnesses.

A Parliamentary Assembly of the Council of Europe ('PACE') [13] Resolution recognises the importance of whistle-blowers[14] and recommends that protected disclosure

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[10] Article 10 ECHR and Article 11 EU Charter on Fundamental Rights.

[11] United Nations Convention against Corruption. Available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

[12] Council of Europe, Civil Law Convention on Corruption, available at https://rm.coe.int/168007f3f6 and the Criminal Law Convention on Corruption available at https://rm.coe.int/168007f3f5. The Criminal Law Convention was ratified by Ireland in 2003.

[13] Parliamentary Assembly of the Council of Europe, Resolution 1729 (2010), available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851

[14] The resolution states at para 5 that "[w]histleblowing has always required courage and determination and whistleblowers should at least be given a fighting chance to ensure that their warnings are heard without risking their livelihoods and those of their families. Relevant legislation must first and foremost

legislation should be comprehensive and cover both public and private sector employees.[15]

A PACE Recommendation on the protection of whistle-blowers[16] stresses the importance of whistle-blowing as a tool to increase accountability and to strengthen the fight against corruption and mismanagement, and urges the Committee of Ministers to draft guidelines for the protection of whistle-blowers, and to invite Member States to examine their existing legislation and its implementation to assess whether it conforms to these guidelines.

A Committee of Ministers of the Council of Europe Recommendation notes whistleblowing as a 'safe alternative to silence' and as something that could:

> "reinforce the value of facilitating channels to report risk of wrongdoing."[17]

It recommends that Member States have in place a 'normative, institutional and judicial' protected disclosures framework[18] and that protected disclosures should be extended to all persons in both the public and private sectors.

In 2019, the PACE adopted a Resolution welcoming the EU Whistleblowing Directive and inviting all Council of Europe Member States to adopt its provisions.[19]

European Convention on Human Rights

provide a safe alternative to silence and not offer potential whistleblowers a "cardboard shield" that would entrap them by giving them a false sense of security".

[15] Parliamentary Assembly of the Council of Europe, Resolution 1729 (2010), at para 6, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851

[16] Parliamentary Assembly of the Council of Europe, Recommendation 1916 (2010), available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17852&lang=en

[17] Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2014)7, at p 14, available at https://rm.coe.int/16807096c7

[18] Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2014)7, at p 6, available at https://rm.coe.int/16807096c7

[19] Parliamentary Assembly of the Council of Europe, Resolution 2300 (2019) - Improving the protection of whistle-blowers all over Europe, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=28150. The Resolution invites Council of Europe Member States who are also members of the EU to transpose the Directive as soon as possible into their national legislation in line with the spirit of the directive, which, the Resolution notes, aims to set minimum common standards so as to ensure a high level of protection for whistle-blowers, including for those who "blow the whistle" on breaches of national law or threats to the public interest at national level (at para 13.1).

The jurisprudence of the European Court of Human Rights ('the ECtHR') has been consistent in affirming the rights of whistle-blowers to freedom of expression and to protection against retaliation,[20] as well as the duties of employers in this respect.[21]
The General Scheme engages the right to freedom of expression under Article 10 of the European Convention on Human Rights. The ECtHR Grand Chamber case of *Guja v Moldova* is of particular relevance. The ECtHR found a breach of Article 10 after the applicant, a civil servant in the Prosecutor General's Office, was dismissed for leaking two letters from a Deputy Minister and the Deputy Speaker of Parliament, which suggested possible interference in an ongoing investigation. [22]
Central to the case was whether the interference with the applicant's right to freedom of expression, in the form of dismissal, was in pursuit of a legitimate aim, necessary in a democratic society, and:

> "in particular whether there was a proportionate relationship between the interference and the aim thereby pursued".[23]

This case is important as the ECtHR sets out a number of principles relevant to the disclosure of information in the public interest and the issue of determining the proportionality of an interference with a Civil Servant's right to freedom of expression. These principles were recently affirmed by the ECtHR in the case of *Gawlik v Liechtenstein*.[24]
Firstly, particular attention must be paid to the public interest involved in the disclosed information.[25]Secondly, any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and

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[20] Article 10 ECHR. See also Article 11 EU Charter on Fundamental Rights.
[21] Heinisch v. Germany (App No **28274/08**, 21 July 2011); Guja v. Moldova, (App No **14277/04**, 12 February 2008, GC); Zakharov v. Russia (App No 14881/03, 18 December 2008); Kudeshkina v Russia (App No. 29492/05, 26 February 2009); Aurelian Oprea v. Romania (App No 12138/08, 19 January 2016).
[22] Guja v. Moldova (App No 14277/04, 12 February 2008, Grand Chamber).
[23] Guja v. Moldova (App No 14277/04, 12 February 2008, Grand Chamber) at para 59. The fundamental principles as to whether the interference was "necessary in a democratic society" are well established in the case law. See Jersild v. Denmark (23 September 1994, Series A no. 298); Hertel v. Switzerland (25 August 1998, Reports 1998-VI); and Steel and Morris v. the United Kingdom (no. 68416/01, ECHR 2005-II).
[24] Gawlik v Liechtenstein (App no 23922/19, 31 May 2021).
[25] The Strasbourg Court reiterates that there is "little scope under Article 10(2) of the Convention for the restrictions on debate on questions of public interest". See Guja v. Moldova (App No 14277/04, 12 February 2008, Grand Chamber) at para 74. See Sürek v. Turkey (no. 1) (App no 26682/95 at para 61, ECHR 1999-IV, Grand Chamber).

reliable.[26] This must be weighed against the damage, if any, suffered by the public authority as a result of the disclosure, and whether any damage outweighed the public interest in having the information revealed. The subject-matter and State authority concerned are relevant to this consideration.

The motive of the person revealing the information is also relevant to determining whether the disclosure is protected.[27] Finally, in determining any breach of Article 10 in such circumstances, consideration must be given to the penalty imposed on the person disclosing the information and its consequences.[28]

European Union Law

The most relevant EU law is set out below in respect of the Commission's submission.

European Charter of Fundamental Rights:

Article 11 (freedom of expression and information) provides that:

1. "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected."

EU Directive 2019/1937

The *EU Whistleblowing Directive*[29] harmonising protections for whistle-blowers who report breaches of EU law was adopted by Ireland on 23 October 2019. The Directive must be transposed into Irish law by 17 December 2021.[30] The Directive recognises that whistle-blowers play a key role in exposing and preventing breaches of EU law that are harmful to the public interest, and in safeguarding the welfare of society. However, potential whistle-blowers are often discouraged from reporting any breaches for fear of retaliation. Thus, the importance of providing balanced and effective whistle-blower protection is increasingly acknowledged at both EU and international level.[31] In order to enhance enforcement it is necessary to introduce effective, confidential and secure

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[26] Guja v. Moldova (App No 14277/04, 12 February 2008, Grand Chamber) at para 75.
[27] Guja v. Moldova (App No 14277/04, 12 February 2008, Grand Chamber) at para 77.
[28] Guja v. Moldova (App No 14277/04, 12 February 2008, Grand Chamber) at para 78.
[29] EU Whistleblowing Directive, Directive (EU) 2019/1937.
[30] EU Whistleblowing Directive, Directive (EU) 2019/1937, Article 26. It also provides an extension to this timeline for legal entities in the private sector with 50-249 workers until 17 December 2023.
[31] EU Whistleblowing Directive, Directive (EU) 2019/1937, Recital 1.

reporting channels to ensure that whistle-blowers are protected effectively from retaliation.[32]

General Observations on the General Scheme

Whilst the PDA is recognised as being very strong by international standards, it is difficult to conduct a meaningful assessment of its effectiveness as the case law that has developed since 2014 is relatively small[33] and there are no data available on the total number of protected disclosures made each year and the outcome of such disclosures.[34] It is of note that the Workplace Relations Commission received 75 complaints under the PDA between October 2015 and the end of 2017. 53 of these cases were received in 2017. Of these cases, 23% were withdrawn before or during a hearing, and a further 12% were rejected following adjudication.[35]

Under the proposed General Scheme the PDA will be amended to give effect to the EU Whistleblowing Directive and to further enhance and strengthen the protections it provides.[36] It is important that the transposition of the Directive into Irish law is used as an opportunity to further strengthen the legal safeguards in the PDA and that no existing protections are weakened or removed in the process.

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[32] EU Whistleblowing Directive, Directive (EU) 2019/1937, Recital 3.

[33] See DPER, Statutory Review of the Protected Disclosures Act 2014 (2018) at p 21. See also TII, 2021 Submission to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach on the General Scheme of the Protected Disclosures Amendment Bill 2021, at p 3. For further information on the case law and analysis see TII's Speak Up Report 2020 and 2017, available at https://transparency.ie/sites/default/files/20.12_speakup2020.pdf and https://transparency.ie/sites/default/files/17.12.13_speak_up_report_ie_final.pdf, respectively.

[34] See TII, 2021 Submission to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach on the General Scheme of the Protected Disclosures Amendment Bill 2021, at p 3. According to TII, 90% of protected disclosure claims brought before the Workplace Relations Commission have been unsuccessful. See TII's Speak Up Report 2020, available at https://transparency.ie/sites/default/files/20.12_speakup2020.pdf.

[35] See DPER, Statutory Review of the Protected Disclosures Act 2014 (2018) at p 20.

[36] See Press Release, available at https://www.gov.ie/en/press-release/d263a-minister-mcgrath-publishes-general-scheme-of-protected-disclosures-amendment-bill/. The General Scheme was published on 12 May 2021 by the Minister for Public Expenditure and Reform, Mr. Michael McGrath TD. The General Scheme has been referred to the Joint Committee on Finance, Public Expenditure and Reform and Taoiseach for pre-legislative scrutiny and also to the Attorney General to commence formal drafting of the Bill for presentation to the Oireachtas later in 2021.

Internal Reporting Channels, Obligations and Threshold

Under Head 9 of the General Scheme, all employers[37] with 50 or more employees will have to establish and maintain internal reporting channels and procedures for both receiving and following up protected disclosures.[38] Whilst the Directive must be transposed into Irish law by 17 December 2021, it provides an extension to this timeline for legal entities in the private sector with 50 - 249 workers until 17 December 2023.[39] The 50 employee limit does not apply to public bodies and they must have internal procedures for receiving and handling protected disclosures, regardless of the size of the organisation.

There will be an obligation to have information regarding the following up of protected disclosures available, which the PDA is currently silent on. This is to be welcomed and will further help to strengthen the protection afforded to disclosers. This means that organisations must assess the accuracy of the information received and if necessary decide whether to carry out an internal inquiry of investigation or decide to close the procedure.[40]

Experts in the field have recommended that the PDA should provide that smaller entities (including the private sector)[41] with fewer than 50 employees should establish internal reporting channels and procedures, and this should apply to all sectors. They have also recommended that employees of smaller entities should be made aware of their rights, responsibilities, existing reporting channels, and sources of advice and support in making protected disclosures. The significance of the presence and

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[37] Currently under section 21 of the PDA only public bodies are required to have reporting channels and procedures.

[38] This is in accordance with Articles 8 and 9 of the Directive.

[39] Article 26(2).

[40] Head 9 also provides for specific requirements that will have to be included in those procedures, both for the public and private sector. Organisations must acknowledge receipt of protected disclosures within seven days, they must follow up diligently on the information contained in the disclosure, maintain communication with the reporting person and provide feedback within three months of receipt of the protected disclosure. Or if there was no acknowledgement of receipt within seven days from the expiry after the report was made. It should be noted that there is no timeframe in which a protected disclosure should be made, only a timeframe in respect of follow up procedures once the protected disclosure has been made. This applies to both internal and external reporting.

[41] This would also include charities, social enterprises and not-for-profit organisations. See Transparency International Ireland, 2020: Submission on Transposing the EU Whistleblowing Directive, at p 2.

implementation of policies and procedures in the workplace cannot be under estimated.[42]

Currently, Transparency International Ireland (TII) observes that there are lower adoption rates of policies and procedures in the Irish private sector compared with the public sector.[43] This could suggest that this is due to the absence of any such requirement under the PDA for organisations other than public bodies to establish procedures.

There is concern that compliance with legislation becomes even more difficult or less likely if the number of employees fluctuates within small firms, and leaves the employee vulnerable to greater legal risk.[44] However, currently, all employers, regardless of size, are obliged to have undertaken health and safety risk assessments and to have procedures in place to prevent bullying under the Safety, Health and Welfare at Work Act 2005. There would be no reason why these standard policies from the Health and Safety Authority could not be adapted for procedures on making protected disclosures. Of note is that the code of practice on the PDA includes a model protected disclosures policy which can be adapted by employers, at minimal expense.[45] The cost of adapting such policies for all employers should not be any higher than those associated with implementing mandatory health and safety procedures.[46]

Statistics published by the Central Statistics Office show that small enterprises, i.e. those with less than 10 persons engaged, accounted for 92.2% of enterprises in the economy and 25.6% of persons engaged; enterprises with 10-49 persons engaged accounted for 6.2% of enterprises and 20.5% of persons engaged.[47] Therefore, excluding private companies with fewer than 50 employees from the reporting

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[42] For more information see Code of Practice Protected Disclosures Act 2014 (Declaration) Order 2015 available at https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/cop12/

[43] For instance, only 10% of private sector employers said that they had whistleblowing policy in place as of November 2016, compared to 68% of the local authorities that had published policies and procedures as of December 2019. See TII, Speak Up Report 2017 available at https://transparency.ie/sites/default/files/17.12.13_speak_up_report_ie_final.pdf and TII's 2020: Submission on Transposing the EU Whistleblowing Directive, at p 2.

[44] See TII, 2020: Submission on Transposing the EU Whistleblowing Directive, at p 2.

[45] S.I. No. 464/2015 - Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015. See WRC, Codes of Practice on Protected Disclosures Act 2014.

[46] Existing not-for-profit supports such as the TI Ireland Speak Up Helpline and Transparency Legal Advice Centre (TLAC) also provide free advice to workers from organisations of all sizes and from all sectors, while the Integrity at Work initiative keeps the cost of supports to employers to a minimum through tiered membership fees and government grant support.

[47] See https://www.cso.ie/en/releasesandpublications/er/bd/businessdemography2019/

requirements under the General Scheme would mean that close to one in two private sector employees would not be covered and the vast majority of employers in the Irish private business economy will have no obligations in relation to reporting procedures for protected disclosures.

According to a 2017 European Commission funded study on the economic costs and benefits of implementing such procedures, the ratio of potential economic benefits to the costs of implementing such procedures (including the passage of legislation) in Ireland's public procurement system range between 1.4 to 1 and 2.3 to 1.[48]

Obliging all employers to establish procedures would provide for a greater degree of legal and procedural certainty for workers and help mitigate legal, financial and reputational risks for all employers.

It is important to note that whilst the Directive permits the limitation of these provisions to employers with over 50 employees, the Directive introduces minimum standards and it should be possible for Member States to introduce or maintain provisions which are more favourable to the reporting person, provided that such provisions do not interfere with the measures for the protection of persons concerned.[49] Thus the State could have chosen to not apply the 50 employee limit.

The Commission recommends that the requirement to establish internal reporting channels and procedures should apply to all private employers, regardless of the size of the organisation.

External Reporting Channels and obligations

Head 10 of the General Scheme seeks to amend section 7 of the PDA. Under the General Scheme, external reporting channels are subject to the same requirements as internal reporting channels. Receipt of a protected disclosure must be acknowledged within a maximum of seven days, unless a reporting person explicitly requests otherwise or the prescribed person reasonably believes that such an acknowledgement would jeopardise the protection of identity of the reporting person. Prescribed persons

[48] European Commission, Estimating the Economic Benefit of Whistleblower Protection in Public Procurement (2017) at pp.67-69.

[49] Recital 104. In addition, the transposition of the Directive should, under no circumstances, provide grounds for reducing the level of protection already granted to reporting persons under national law in the areas to which it applies.

must diligently follow up on reports unless they deem that the report is clearly minor or if it is a repetitive report.[50] Head 10 also provides that feedback must be provided within three months, or six months in 'duly justified cases'. However, it is not yet clear as to what will amount to a duly justified case.[51]

Another welcome proposal under Head 10 is that prescribed persons must publish information in a separate, easily identifiable and accessible section of their website regarding the procedure for making a protected disclosure, the nature of follow-up to be given to the protected disclosure and the remedies that are available against retaliation, as well as contact details for support services. This provision under Head 10 is key in terms of strengthening the protections afforded to reporting persons making protected disclosures.[52]

Reporting to Ministers

Currently under the PDA, workers employed in a public body can report directly to a Minister.[53]

Head 11 of the General Scheme creates new conditions to be met by workers before such a report can be made. One of the conditions that may need to be met is that the worker must have previously made a disclosure of substantially the same information in the manner required under sections 6 or 7, or both, but no appropriate action was taken in response to the disclosure within the timeframes for follow-up specified in section 6 or section 7.[54] It is suggested from this condition that it will require the worker to report to their own employer or to a prescribed person before reporting to a Minister which may not always be possible.

Currently public sector workers have a right to report to the relevant Minister and removing that right or adding in additional tests may result in non-compliance with

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[50] If the report contains no new meaningful information they may close the procedure or if they are not the appropriate prescribed persons they must transmit it to a competent prescribed person without delay.

[51] The prescribed person must also communicate the final outcome to the reporting person and they must have trained members of staff who are designated to handle protected disclosures.

[52] Research conducted by Dr Lauren Kieran, of Maynooth University, in March 2021, found that of the current 110 prescribed persons, 68 of these had no information publicly available as regards their role. See TII Webinar on the Protected Disclosures (Amendment) Bill 2021, 27 May 2021, at 30:17.

[53] Section 8, Protected Disclosures Act 2014.

[54] Under the General Scheme, a worker employed in a public body may also report to the relevant Minister if they reasonably believe the Head of the public body concerned is personally complicit in the relevant wrongdoing reported; or the disclosure contains information about a relevant wrongdoing that may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage.

Article 25(2) of the Directive, which provides that there can be no reduction in the level of protection already afforded by Member States.[55]

The General Scheme also creates a new Protected Disclosures Office which should offer additional support to government departments in assessing and investigating protected disclosures. Whilst the Commission welcomes the fact that there are multiple ways in which a reporting person can make a protected disclosure, including to an employer, a prescribed person or to a Minister, there should be no reduction or removal of the right to report to a Minister.

The Commission recommends that there should be no dilution/removal of the right to report to a Minister in accordance with Art. 25(2) of the Directive, which states there should be no reduction in existing rights.

Relevant Wrongdoing and Interpersonal Grievances

Head 5 of the General Scheme provides for the expansion of the definition of a 'relevant wrongdoing' to include all matters falling within the scope of the Directive, including areas such as public health, consumer protection and product safety. However, Head 5(2) purports to insert a provision to the effect that interpersonal grievances between workers will not be considered a relevant wrongdoing where the grievance can be addressed through other means by the employer. This is concerning as grievances and protected disclosures can often be intertwined. Guidance is already provided under the current framework as to the distinction between grievances/personal complaints and protected disclosures and how these can be dealt with. [56] Therefore, it is unclear why a provision specifically excluding interpersonal grievances is required, particularly where there is no explicit definition of 'interpersonal grievances'. Furthermore, the explanatory notes of the General Scheme indicate that this provision is made in accordance with Recital 22 of the Directive. However, whilst Recital 22 permits the

[55] Article 25(2) of the Directive provides that "the implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection already afforded by Member States in the areas covered by this Directive."

[56] See Section 53(b) of the PDA 2014, Codes of Practice on Protected Disclosures Act 2014, at Sections 30 and 31 and the Guidance under Section 21(1) of the Protected Disclosures Act 2014, at Section 13.

inclusion of this provision, the Directive does not require a distinction to be made in the legislation between interpersonal grievances and protected disclosures. [57]

The Commission calls for the removal of the provision under Head 5(2) that provides that interpersonal grievances are not relevant wrongdoings and notes that this is not required by the Directive.

Types of Communications that Qualify as Protected Disclosures

The Commission notes the recent *Baranya v Rosderra Irish Meats Group Limited* [58] case, of which leave to appeal to the Supreme Court has been granted. The Supreme Court determined that the case involves a matter of general public importance regarding the application and interpretation of the PDA with regard to what type of communication could qualify as a protected disclosure under the Act (as opposed to a grievance that could be dealt with under a grievance procedure).
Depending on the outcome of *Baranya*, the Court's decision might be taken into consideration when drafting legislation, as it could provide clarity as to what type of communication qualifies as a protected disclosure.

As a matter of general public importance, the Commission recommends that further clarity is provided as to what types of communication qualifies as a protected disclosure under the PDA.

Requirement to Cooperate with Investigations

Head 9(11) and Head 10(5) of the General Scheme provide for new obligations on reporting persons to cooperate with internal and external investigations. Both Heads provide that the reporting person:

> "shall cooperate, where required, with any investigation or any other follow-up procedure initiated..."

The strong language in these two sections stands in contrast with Recital 57 of the Directive which provides that:

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[57] Recital 22 provides: "*Member States could decide to provide that reports concerning interpersonal grievances exclusively affecting the reporting person, namely grievances about interpersonal conflicts between the reporting person and another worker, can be channelled to other procedures.*"
[58] [2020] IEHC 56

> "it should be possible to ask the reporting person to provide further information, during the course of the investigation, albeit without there being an obligation to provide such information".

The use of the wording 'shall cooperate' does not accord with there being no obligation to provide such information under the Directive. This is concerning as the balance of power in these matters is not usually with the discloser. Further, often when a disclosure is made in the workplace, multiple investigations are instigated against the person concerned. This new element in the framework could distort the balance of power even further in favour of the employer to the detriment of the reporting person and the obligation placed on the reporting person to cooperate and the failure to do so is not clear.[59] The concern is that as an unintended consequence this provision could act as a deterrent and discourage workers from making a protected disclosure.

The Commission recommends that the language in Head 9 and Head 10(5), providing that a reporting person "shall cooperate….with an investigation" should be reconsidered so as not to deter the reporting person from making a protected disclosure.

Protections and References to the Rights of Persons Concerned

A disclosure does not only involve the disclosure itself but it also involves those who are implicated in the wrongdoing. Head 2 defines persons concerned as meaning:

> "a natural or legal person who is referred to in a protected disclosure as a person to whom the relevant wrongdoing is attributed or with whom that person is associated."

Under the current regime, such a person relies on their natural justice and fair procedure rights and not directly on the provisions of the PDA for protection. In this regard, the express reference to the rights of persons concerned in the General Scheme is to be welcomed and will provide certainty and reassurance to such persons that their rights will be protected. The General Scheme makes a number of references

[59] See The Bar of Ireland, Submission of the Council of the Bar of Ireland: Protected Disclosures (Amendment) Bill 2021, at p 11.

to the duty of confidentiality and the requirement to protect the identity of the person concerned.[60]

Head 23 of the General Scheme provides for the insertion of a new provision that states that none of the provisions in the Act shall impact the rights of persons concerned under the EU Charter of Fundamental Rights. The Explanatory Notes to the General Scheme state that:

> "this Head transposes Article 22(1) of the Directive, which provides that the Directive shall not prevent persons concerned from being fully able to enjoy the right to an effective remedy and a fair trial as well as the presumption of innocence and the rights of defence, including the right to be heard and the right to access their file."

However, Article 22(1), in fact, provides that:

> "Member States shall ensure, in accordance with the Charter, that persons concerned fully enjoy the right to an effective remedy and to a fair trial, as well as the presumption of innocence and the rights of defence, including the right to be heard and the right to access their file." [Emphasis added]

The wording of the Directive places more of a positive obligation on Member States than the wording of Head 23 suggests. Given the importance of these rights, the wording of the proposed legislation should more accurately reflect the provision of the Directive which it seeks to transpose.

Given the importance of the rights protected under the EU Charter of Fundamental Rights, and referred to in Article 22(1) of the Directive, the Commission recommends that the General Scheme should more accurately reflect the wording of Article 22(1).

Reversal of the Burden of Proof

The press release published by the Department of Public Expenditure and Reform indicated that the burden of proof would be reversed and it will be assumed that the alleged act of penalisation occurred because the worker made a protected disclosure

[60] See Heads 13, 17(3) (b) and 18(2) (b).

unless their employer can prove otherwise. Regrettably this was not provided for in the General Scheme, and it is important that this will be reflected in the final version of the Bill.

Currently, whistle-blowers taking legal action over penalisation must demonstrate that they would not have been penalised 'but for' the fact that they had made a protected disclosure. Where adverse measures have been taken which appear to be penalisation for having made a protected disclosure, the burden of proof should rest with the employer to prove otherwise. This would bring Ireland into compliance with Article 21(5) of the Directive and be consistent with the approach adopted in discrimination and sexual harassment cases (see section 85A of the *Employment Equality Acts 1998 - 2015* and section 38A of the *Equal Status Acts 2000 - 2018*).

The Commission recommends that the proposed legislation makes provision for the reversal of the burden of proof to further enhance the protection afforded to a worker after having made a protected disclosure.

Remuneration and Penalisation

Whilst it is welcome that Head 21(3) makes provision for compensation for penalisation for those not in receipt of remuneration, the cap of €13,000 on this compensation is questionable as there is no provision for a cap on compensation in the Directive which states that a remedy must be effective, proportionate and dissuasive.[61] The cap on awards arising for those in receipt of remuneration should also be removed. Currently, under section 12 of the PDA, compensation for workers that have been dismissed for having made a protected disclosure can amount to no more than 260 weeks' salary. The consequences of making a protected disclosure could be extensive and have long-term negative impact on a person's career.[62]

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[61] Recital 95.

[62] See TII's Speak up Report 2017 - it includes findings from the Integrity at Work Survey 2016 which reveals that 21% of individuals who made a protected disclosure suffered as a result. The survey measures the attitudes and experiences of Irish private sector employees and employers to whistleblowing. Available at https://transparency.ie/sites/default/files/17.12.13_speak_up_report_ie_final.pdf. See also TII, 2021 Submission to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach on the General Scheme of the Protected Disclosures Amendment Bill 2021, at p 13. See TII, 2020: Submission on Transposing the EU Whistleblowing Directive, at p 9. Documented cases have emerged in Ireland and overseas where workers in the banking/financial sector or professions such as audit and compliance have lost employment and have never been able to secure employment of equivalent status. The Safety,

In addition to financial support, Head 21(4) provides for the application to the Circuit Court for interim relief, 21 days immediately following the date of the last instance of penalisation. This allows for complainants to seek interim relief in respect of all forms of penalisation, in accordance with Article 21(6) of the Directive. This is to be welcomed as currently, interim relief only applies in the context of alleged dismissal for having made a protected disclosure. The General Scheme should specify that this would not only apply to penalisation but also to detriment suffered which would include, for example, financial relief for a worker whose working hours have been reduced, pending final determination of his or her claim.[63]

The Commission recommends that the cap on compensation for penalisation complaints for those not in receipt of remuneration to €13,000 be reviewed.

The Commission recommends that the cap on compensation for all workers be removed and that compensation awarded is just and equitable having regard to all the circumstances.[64]

The Commission recommends that the General Scheme specifies that interim relief can be sought in respect of any detriment suffered in addition to all forms of penalisation.

Anonymous Disclosures

Head 8 purports to transpose Article 6(2) of the Directive and states that legal entities are not obliged to accept or follow up on anonymous disclosures. However, Article 6(2*)* provides that:

> "Without prejudice to existing obligations to provide for anonymous reporting by virtue of Union law, this Directive does not affect the power of Member

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Health, and Welfare at Work Act 2005, Section 28(3)(c) provides that the Rights Commissioner may require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances. This should be regarded as the model provision for an amendment to Section 12(1) (3).

[63] Dr Lauren Kieran – Assistant Professor of Law (Maynooth University), TII Webinar on the General Scheme of the Protected Disclosures (Amendment) Bill, 27 May 2021, available at https://www.youtube.com/watch?v=sFDwAfGaEu8 at 1:25:40.

[64] As is provided for under the Safety, Health, and Welfare at Work Act 2005, Section 28(3) (c). See also Recital 94 and 95.

States to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches." (Emphasis added).

Thus, Member States are not obliged to make such a provision in respect of anonymous disclosures. It is anticipated that the inability to make an anonymous disclosure could have a deterrent effect on individuals considering whether to make a protected disclosure.[65] The establishment of confidential and anonymous disclosure channels is essential for the effective functioning of a whistleblowing system.[66]

The Commission recommends that legal entities should be obliged to accept or follow up on anonymous disclosures.

Cultural Reality of Reporting a Disclosure

Whilst Ireland purports to have an advanced position in the EU in terms of its legislation on protected disclosures, the cultural reality is different and consideration should be given to how individuals who make disclosures are treated. The Integrity at Work Survey revealed that 21% of respondents who reported wrongdoing said that they had suffered because they had blown the whistle.[67] The labelling of someone as a 'whistle-blower' and the negative connotations it has gained in media reports and society is a real concern for those who simply wish to report a wrongdoing.[68] Research has found the approach taken by the media is often exploitative in nature and in order to get a story published, a whistle-blower would have to reveal personal and intimate details about themselves and their family life.[69]

The experience and fear of the potential negative impact that making a disclosure will have on an individual's career and personal life, can be a barrier to reporting a concern. This is reflected in the relatively high number of people who said that the fear of losing

[65] Anonymity was cited by respondents to TII's Integrity at Work Survey in 2016 as the most important factor in assuring them that they could safely raise workplace concerns. See Transparency International Ireland, Submission to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach on the General Scheme of the Protected Disclosures Amendment Bill 2021, 16 July 2021 at page 7.
[66] Transparency International Ireland, Submission to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach on the General Scheme of the Protected Disclosures Amendment Bill 2021, 16 July 2021 at p 7.
[67] Interestingly, 28% of respondents said that reporting a wrongdoing had a positive impact on them. See Integrity at Work Survey in TII Speak Up Report 2017 at p 36.
[68] Kate Kenny, Whistleblowing: Towards a New Theory (Harvard University Press, 2019) at p 6.
[69] Kate Kenny, Whistleblowing: Towards a New Theory (Harvard University Press, 2019) at p 149.

their job (31%), the fear of harm to their career (13%), or of isolation by their colleagues (13%) would deter them from speaking up.[70] Notably, despite 80% of employers stating that a report of wrongdoing would be investigated and their staff would not suffer as a result, only 24% of all employees said that they felt safe reporting a concern or believed that their report would be acted on by their employer.[71]

The Commission recommends that the fear of negative consequences on career and personal life around making a protected disclosure should be taken into consideration during the drafting process to ensure that there is adequate resources and support in place for those who choose to make a protected disclosure.

[70] Only 7% of respondents said that they would not speak up out of loyalty to their employer, organisation or cause. See Integrity at Work Survey in TII Speak Up Report 2017 at p 36.
[71] See Integrity at Work Survey in TII Speak Up Report 2017 at p 37.



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