

IHRC Observations on the Scheme of the Protected Disclosures in the Public Interest Bill 2012

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IHRC

AN COIMISIÚN UM CHEARTA AN DUINE
IRISH HUMAN RIGHTS COMMISSION

I INTRODUCTION

1. The Irish Human Rights Commission (IHRC) is Ireland's National Human Rights Institution, set up by the Irish Government under the Human Rights Commission Acts 2000 and 2001 and functioning in accordance with the United Nations Paris Principles. The IHRC has a statutory remit to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in the law and practice of the State. One of the functions of the IHRC is to examine legislative proposals and to report its views on the implications of such proposals for human rights, having regard to the Constitution and international human rights treaties to which Ireland is a party.¹ The IHRC is mandated to make recommendations to the Government as it deems appropriate in relation to the measures which the IHRC considers should be taken to strengthen, protect and promote human rights in the State.²

2. The IHRC is pleased to present its observations on the Protected Disclosures in the Public Interest Bill 2012 ("Protected Disclosures Bill") to the Minister for Public Expenditure and Reform. The IHRC welcomes the introduction of the present legislation and that the Government has recognised the need for whistleblower legislation in the Programme for Government 2011.

3. The importance of providing legal protections for 'whistleblowers' and ensuring that people in possession of information about malpractice or irregularities are able to come forward without risk of sanction, is fundamental to ensuring good governance through promoting transparency and accountability. The importance of individuals coming forward has been well documented in Ireland, resulting as it has in the uncovering of a range of abuses and malpractice. In the absence of comprehensive legislation protecting those who disclose vital information, the fear of bullying, losing one's job or even potential legal sanctions can deter potential whistleblowers from coming forward. Safeguards need to be put in place so that both public and private sector employees may disclose, in good faith, information about a suspected wrongdoing.

4. There is a need for a single, comprehensive, overarching piece of legislation covering both the public and private sectors in Ireland. Whistleblower protection legislation has been introduced on a 'sectoral' basis in Ireland to date, thereby only protecting employees in certain sectors and professions. There is no overarching whistleblower protection law in place. This can be seen in contrast to the situation in the United Kingdom, where the Public Interest Disclosure Act (PIDA) has been in force since 1998. As set out in the Schedules to the Heads of Bill, existing Irish legal whistleblower safeguards cover for example persons reporting suspicions of child abuse or neglect; breaches of the Ethics Acts; Gardaí and Garda civilian employees reporting corruption or malpractice; matters relating to workplace health & safety; health care employees who report threats to the welfare of patients; offences relating to employment permits; consumer protection and breaches of charities law.

¹ Section 8(b) of the Human Rights Commission Act 2000.

² Section 8(d) of the Human Rights Commission Act 2000.

The IHRC notes that the Standards In Public Office Commission, when considering the low level of complaints it received under the Ethics Act stated:

it is also the case that a major factor in the low level of complaints is fear on the part of potential whistleblowers of the consequences of reporting wrongdoing. It may also be that the piecemeal approach to introducing protection for whistleblowers has created confusion as to whether protection is available or indeed whether there is a real commitment to encouraging whistleblowers to come forward. There is a strong public interest in ensuring that persons who are aware of wrongdoing are encouraged to report it to the appropriate authorities.³

I. INTERNATIONAL STANDARDS

5. 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.

United Nations

6. The most significant international instrument on anti-corruption and whistleblowing is the United Nations (UN) Convention Against Corruption (UNCAC).⁴ 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.

7. Article 33 on “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

8. 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. The Criminal Law Convention was ratified by Ireland in 2003. Article 22 of that Convention on the ‘Protection of collaborators of justice and witnesses’ provides that:

³ Standards in Public Office Commission Annual Report 2009, Chapter 2 – Ethics.

⁴ United Nations Convention against Corruption, Available online at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

- a those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;
- b witnesses who give testimony concerning these offences.

In April 2010, the Parliamentary Assembly of the Council of Europe adopted a Resolution on the protection of whistleblowers. The Resolution considered that whistleblowing legislation must ensure protection of whistleblowers:

Whistle-blowing has always required courage and determination and whistle-blowers 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 provide a safe alternative to silence and not offer potential whistle-blowers a “cardboard shield” that would entrap them by giving them a false sense of security.⁵

In a report on the protection of whistleblowers, the Parliamentary Assembly set out some guiding principles for such legislation:

- this legislation should protect anyone who, in good faith, makes use of existing internal “whistle-blowing” channels from any form of retaliation (unfair dismissal, harassment, or any other punitive or discriminatory treatment);
- where internal channels either do not exist, or have not functioned properly, or could reasonably not be expected to function properly given the nature of the problem raised by the “whistle-blower”, external “whistle-blowing”, including through the media, should likewise be protected;
- any “whistle-blower” shall be considered as acting in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives, and
- relevant legislation should afford *bona fide* “whistle-blowers” reliable protection against any form of retaliation by an enforcement mechanism investigating the “whistle-blowers” complaint and seeking corrective action from the employer.⁶

⁵ Parliamentary Assembly of the Council of Europe, Resolution 1729 (2010).

⁶ The protection of “whistle-blowers”, Report Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 14 September 2009.

European Convention on Human Rights

9. Article 10 of the European Convention on Human Rights is of relevance in the area of whistleblowing. The European Court of Human Rights (ECtHR) Grand Chamber case of *Guja v. Moldova* is of particular relevance to the present discussion, as the Court set out some of the principles relevant to the disclosure of information in the public interest.⁷ The case concerned a civil servant working in the Prosecutor General's Office who was dismissed from his job for leaking to a newspaper two letters from a Deputy Minister and the Deputy Speaker of the Parliament, which suggested possible interference in an ongoing investigation. The applicant claimed that the dismissal breached his right to Freedom of Expression under Article 10 of the European Convention on Human Rights.

10. The Court examined whether the interference 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". The Court considered that there was a legitimate aim in preventing the disclosure of information received in confidence. It therefore examined the issue of whether the action was necessary in a democratic society as central to the case. The Court noted that:

... a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a strong public interest. The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.

...

In the light of the duty of discretion referred to above, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public.⁸

11. The Court set out a number of principles relevant to the issue of determining the proportionality of an interference with a Civil Servant's freedom of expression. Firstly, the public interest involved in the disclosed information. The Court considered that there is "little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest". It continued:

⁷ *Guja v. Moldova* (Application No. 14277/04) Grand Chamber Judgment 12 February 2008.

⁸ *Ibid.*, para. 72 – 73.

In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence.⁹

12. Secondly, the authenticity of the information disclosed. The Court noted that “freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable”.¹⁰ 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.

13. Thirdly, the motive of the person revealing the information is relevant to determining whether the disclosure is protected. The Court considered that:

It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet means of remedying the wrongdoing was available to him or her.¹¹

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.

14. In that case, the Court found that there had been a breach of the applicant’s rights under Article 10, particularly as there was no available authority other than his superiors to whom he could have disclosed the information, and that the effectiveness of disclosure to his superiors was not demonstrated. The Court also considered that there was an issue of serious public interest involved given that the matter related to “issues such as the separation of powers, improper conduct by a high-ranking politician and the Government’s attitude towards police brutality”.¹² The Court found the public interest in maintaining confidence in the Public Prosecutor’s Office was outweighed by the importance of the information disclosed, which suggested undue pressure and wrongdoing in the Office. The Court also accepted that the actions of the applicant were in good faith and aimed at exposing corruption and undue influence.

⁹ *Ibid.*, para. 74.

¹⁰ *Ibid.*, para. 75.

¹¹ *Ibid.*, para. 77.

¹² *Ibid.*, para. 88.

Other international and regional instruments

15. 2003 OECD *Guidelines for Managing Conflict of Interest in the Public Service* highlighted the need for effective complaint-handling mechanisms and protections of whistleblowers against possible reprisals:

Complaint-handling – Develop complaint mechanisms to deal with allegations of non-compliance, and devise effective measures to encourage their use. Provide clear rules and procedures for whistle blowing, and take steps to ensure that those who report violations in compliance with stated rules are protected against reprisal, and that the complaint mechanisms themselves are not abused.¹³

The OECD Guidelines for Multinational Enterprises require that Enterprises should:

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.¹⁴

16. The OECD Working Group on Bribery in International Business Transactions has included questions on whistleblowing as part of the process of monitoring the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.¹⁵ In its Phase II reports on implementation, the Working Group has recommended that many countries adopt whistleblower protection laws.¹⁶

17. Relevant provisions exist in many other regional agreements and conventions as well as other domestic jurisdictions. For example, the Inter-American Convention Against Corruption (article 3); the African Union Convention on Preventing and Combating Corruption (article 5); the US Sarbanes-Oxley Act (2002) and Whistleblower Protection Act (1989); the South Africa Protected Disclosure Act (2000) and New Zealand Protected Disclosures Act (2000).¹⁷

¹³ OECD Guidelines for Managing Conflict of Interest in the Public Service C(2003)107, 28 May 2003, 2.3.2.(b).

<http://www.oecd.org/horizontal/oecdacts.nsf/Display/BF81CE725CF6D47FC125708800581411?OpenDocument>

¹⁴ OECD, Commentary on the OECD Guidelines for Multinational Enterprises, II.9.

<http://www.oecd.org/dataoecd/56/36/1922428.pdf>

¹⁵ See questions 2.4 and 2.5 of Procedure for Self- And Mutual Evaluation of Implementation of the Convention and the Revised Recommendation - Phase 2. Questionnaire.

<http://www.oecd.org/dataoecd/9/35/2090000.pdf>

¹⁶ See OECD Country Reports on the Implementation of the OECD Anti-Bribery Convention and the 1997 Revised Recommendation.

http://www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1,00.html

¹⁷ See *generally* Compendium of International Legal Instruments on Corruption, 2nd Edition, United Nations Office on Drugs and Crime, 2005.

II. COMMENTS ON THE PRESENT LEGISLATIVE PROPOSALS

18. The Protected Disclosures Bill was drafted in furtherance to the Government's commitments under the Programme for Government to introduce whistleblower legislation. The Explanatory Note sets out the purposes of the Bill as the following:

- the promotion in the public interest of the disclosure of information relating to unlawful or other misconduct by an employer;
- the provision of specific procedures for such disclosures (i.e disclosure channels);
- the protection of workers who make such disclosures from reprisals by their employer; and
- provide redress for workers in such circumstances.

19. The Bill proposes a "stepped" disclosure regime in which a number of distinct disclosure channels are available – internal, "regulatory" and external –through which the worker can, subject to different evidential thresholds, make a protected disclosure. The Bill also seeks to safeguard a worker who has made a 'protected disclosure' by providing immunity against civil liability and criminal liability in certain circumstances and confer 'protected disclosure' status on disclosures made under existing sectoral whistleblowing legislation to try to ensure a uniform standard of protection. In addition, the legislative proposals highlight the responsibility of employers to put effective internal mechanisms in place to investigate whistleblowing complaints and to develop an organisational culture that supports such disclosures as a key element of corporate risk management, in order to identify potential wrongdoing and take appropriate corrective action at the earliest possible stage.

A. Overarching Principles

20. The IHRC would welcome the inclusion in the legislation of the broad public policy principles underlying it, which should include:

- the need to maintain public confidence in the institutions of the State through transparency and accountability;
- the primacy of the public interest over loyalty to an employer;
- the need to prevent corruption and promote sound corporate governance;
- the positive duty on workers – particularly Civil and Public Servants - to report impropriety and in the first place (where possible) to their

employer but to a relevant body or Minister when necessary, or even externally as a last resort.

B. The Burden on the Whistleblower

21. The IHRC is concerned that the present draft legislation may place an unreasonable evidential burden on the whistleblower as regards protected disclosures, which may result in a restriction in practice on potential whistleblowers. As noted above, the European Court of Human Rights considered that:

freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable.¹⁸

22. The IHRC recalls the Parliamentary Assembly of the Council of Europe recommendation that:

Any whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives.¹⁹

Disclosure to an employer or 'relevant body'

23. Under 'Head 5 – Disclosure to an Employer' and 'Head 6 – Disclosure to a relevant body' of the Bill, there is a varying evidential burden, or level of belief that has to be held by the worker in order for a disclosure to be considered a protected disclosure for the purposes of the Bill. According to the Explanatory Note to Head 5 of the Bill, the worker must make the disclosure in good faith and must have a reasonable belief that the allegation is "true".²⁰ Whereas, according to Head 6, the disclosure will only be considered an eligible disclosure for the purposes of the Bill if it is made in good faith by a worker and if that worker reasonably believes the disclosure to be "substantially true".²¹

¹⁸ *Guja v. Moldova* (Application No. 14277/04) Grand Chamber Judgment 12 February 2008, para. 75.

¹⁹ Parliamentary Assembly of the Council of Europe, Resolution 1729 (2010).

²⁰ "Head 5 – Disclosure to an Employer

Provide that -

(1) A disclosure made in good faith by a worker in relation to any of the matters set out in Head 4

(a) to his or her employer,

or

(b) where the worker reasonably believes that the impropriety relates solely or mainly to-

(i) the conduct of a person other than his or her employer, or

(ii) any other matter for which a person other than his or her employer has legal responsibility, to that other person

is a protected disclosure for the purposes of this Act." The Explanatory Note provides that "the worker must have a reasonable belief that allegation is true"

²¹ Head 6 – Disclosure to a relevant body Provides that – 'A disclosure made in good faith by a worker, which the worker reasonably believes is substantially true, to a relevant body where the impropriety

24. It appears that the worker may have to meet a different evidential burden under Head 6 as this covers an external disclosure to a relevant body, as opposed to an internal disclosure being made to an employer as provided for under Head 5. However, the Bill does not set forth how ‘reasonable’ is to be defined and there is also no definition laid down for the meaning of ‘substantially true’ - in particular, in relation to the use of ‘true’ in the Explanatory Note to Head 5 and whether this is a higher or lower evidential burden. Head 4 is also of note in this regard as it refers to the worker having a “reasonable belief” that the information shows or “tends to show” one of the listed acts in that Head.

25. The IHRC **recommends** that the terms ‘reasonable belief’ and ‘substantially true’ be defined within the context of this Bill so that a worker understands what constitutes a protected disclosure for the purposes of the Act. The IHRC further **recommends** that more generally, consideration be given to ensuring that the evidential burden set by this legislation is not overly onerous on the potential whistleblower. The IHRC recalls the European Court of Human Rights’ statement of principles in *Guja v. Moldova*, detailed above, that the motive of the person revealing the information should act in good faith, with a belief that the information was true and authentic.

Disclosure to a Minister

26. Under ‘Head 7 – Disclosure to a Minister’, the evidential burden on the worker when making a disclosure in this instance is not defined in the text outside of its being made in good faith. The provision should explicitly state that a disclosure to a Government Department under this section is to be understood as a disclosure to a Minister of Government, as referred to in the explanatory note on this head, and it should be clear to potential whistleblowers how this can be undertaken – for example, directly to the Minister, to the Secretary of the Department or to their immediate superior.

Disclosure in other cases

27. ‘Head 8 – Disclosure in other cases’ again highlights the potential variance in the evidential burden on the whistleblower in the present legislation. Under this Head, in order for a disclosure to be protected, s/he must meet a considerable number of tests.

- Firstly, the whistleblower must meet the evidence burden in having a reasonable belief that the information and any allegation is, ‘substantially’ true;
- Secondly, the disclosure must meet the motive requirements of being disclosed for the purposes of the information being investigated and not for personal gain;
- Thirdly, the information is subject to additional conditions that:

falls within any description of matters prescribed by the Minister in respect of that body is a protected disclosure for the purposes of this Act.

- He/she reasonably believes that he/she will be subject to penalisation or detriment if the disclosure is made to his/her employer;
- There is no relevant body and the worker has a reasonable belief that it is likely evidence related to the impropriety will be concealed or destroyed if he/she makes a disclosure to his/her employer;
- That the worker has previously made a disclosure of substantially the same information to (a) his/her employer or (b) to an employer, relevant body or Minister under Heads 5-7, and no action was taken in a reasonable time;
- Fourthly, that making the disclosure “is in all the circumstances of the case reasonable.”

Only upon meeting all of the above criteria will a disclosure be protected for the purposes of the legislation. This Head includes consideration of the factors that will determine reasonableness. It is unclear who would make such a determination. However, when read with Head 12, it would appear that a Labour Court Rights Commissioner may be tasked with making a determination of reasonableness in the event of penalisation of a whistleblower.

28. The IHRC considers that this is a significant number of steps and range of requirements on a potential whistleblower may be unfeasibly burdensome and act to restrict potential whistleblowers. There appear to be limited incentives in the proposals for a person to make a disclosure but rather a focus in the legislation, possibly inadvertent, on the threat of sanction for so doing.

29. The IHRC **recommends** that simplification of this section be considered, and that the key criteria in this legislation that would allow a whistleblower to disclose information outside of his employer, a relevant body or a Minister, be clearly set out. These appear to be:

- that the issue has previously raised with his employer or a relevant body or the Minister, and
- a reasonable amount of time has passed since that disclosure with no action, and
- that he/she is acting in good faith and in the public interest.

The IHRC notes that Head 8 is particularly important given that many disclosures of impropriety ultimately only come to light through the media and public scrutiny. The ability of a person to put information into the public arena should not be unduly restricted. The IHRC recalls the European Court of Human Rights’ criteria in *Guja v. Moldova*, detailed above. The IHRC further notes that the person who has made a disclosure will need to be informed by the relevant body or Minister of what action has/will be taken in respect of their disclosure in order for section 2(c)(ii) in order to avoid a situation where a person mistakenly comes to the conclusion that no action has been taken.

Exceptionally Serious Impropriety

30. Head 9 covers disclosures of ‘exceptionally serious impropriety’. The does not set out who decides whether an impropriety is of an ‘exceptionally serious nature’ or to indicate how a worker is to know this. This Head references Head 4, and perhaps greater clarity between these two provisions would be of assistance in identifying impropriety that is ‘exceptionally serious’, particularly given the already serious nature of the issues identified in Head 4.

Conclusion and Recommendations – Burden on Whistleblower

31. Openness, transparency and accountability are the cornerstones of a truly democratic society. Whistleblower protection legislation should thus promote a culture of openness and transparency as a positive example for society by encouraging disclosures, as well as providing specific protections to individuals once a disclosure has been made. The focus of the Heads of Bill is on accountability and providing protection for bona fide, non self-serving, disclosures that are in the public interest. While the IHRC welcomes the intention of the Bill in this respect, it is concerned that, rather than encouraging a whistleblower to come forward, the legislation may have the unintended effect of deterring potential bona fide whistleblowers. The primary reason for this is the apparent overweighting of burden on the whistleblower under this legislation. The IHRC **recommends** that the potential of the legislation to place an undue burden on the whistleblower be examined.

C. Anonymity and Confidentiality

32. Head 11 provides that “a disclosure made anonymously shall not be a protected disclosure”. The focus of whistleblower legislation should be to encourage good faith disclosures which improve transparency and accountability. The rationale for not permitting any anonymous submissions in any circumstances is in question where such a disclosure may identify a serious issue in exceptional circumstances. For example, a facility could be put in place in Government Departments and Services (including care homes in receipt of State funding) to allow for the investigation of anonymous tips, which could result in an investigation being commenced. The IHRC notes that there is a right to fair procedures for anyone accused of impropriety, which must always be respected however, some system to allow for anonymous ‘tip offs’ that could prompt an investigation, in certain circumstances, should be considered.

33. In this regard, the IHRC further **recommends** that consideration be given to providing an independent mechanism; perhaps expanding the existing remit of the Standards in Public Office Commission (SIPO), such that each incident of whistleblowing made to a public employer or independent body such as the Health Information and Quality Authority by an individual is reported to SIPO. This would allow SIPO to follow up selected individual cases to see first, whether structural problems addressed in the whistleblowing complaint are being addressed by the public body (where merited), and second, to ensure that the whistleblower is not victimised.

34. The whistleblower should also be able to contact SIPO to give independent information or be directed to the appropriate body. Further, SIPO and other public bodies should be in a position to advise the individual on the protections available to whistleblowers.

35. The Council of Europe Parliamentary Assembly Recommendation on the protection of whistleblowers recommended that “the identity of the whistle-blower is only disclosed with his or her consent, or in order to avert serious and imminent threats to the public interest”.²² The United States of America’s (US) Whistleblower Protection Act stipulates that the identity of the whistleblower may not be disclosed without the individual’s consent unless the Office of Special Counsel ‘determines that disclosure is necessary to avoid imminent danger to health and safety or an imminent criminal violation’.²³ While Head 16 of the present legislation does provide for some safeguards against the disclosure of the worker’s identity, in the view of the IHRC it does not offer sufficient protection. Rather than making disclosure of a worker’s identity an offence, the legislation states that any person to whom a disclosure is made must merely use his or her ‘best endeavours not to disclose information that might identify the worker who made the protected disclosure’.²⁴

36. The IHRC **recommends** that the legislation be strengthened in this regard and that it should stipulate that the identity of the whistleblower may not be disclosed without the worker’s consent and that anyone disclosing the identity of a whistleblower may be subject to sanction.

D. Protection of Workers

37. The Council of Europe Parliamentary Assembly report on the protection of whistleblowers, notes the legislative position in the US where a more whistleblower friendly approach has been taken. It is sufficient under the US legislation that the employee demonstrates that a disclosure was a ‘contributing factor’ in the personnel action taken against him for corrective action to be ordered. ‘After the worker establishes a *prima facie* case of retaliation, the employer must now prove by “clear and convincing evidence” - rather than by a mere “preponderance of evidence” as required by previous case law – that the same action against the employee would have been taken anyway for reasons independent of the whistleblowing.’²⁵ The Resolution of the Parliamentary Assembly of the Council of Europe on the protection of whistleblowers provides:

As regards the burden of proof, it shall be up to the employer to establish beyond reasonable doubt that any measures taken to the detriment of a

²² Parliamentary Assembly of the Council of Europe, Resolution 1729 (2010).

²³ WPA 5 U.S.C Para. 1213 (h).

²⁴ Head 16 (1), General Scheme of the Protected Disclosures in the Public Interest Bill, 2012.

²⁵ Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights report, ‘Protection of “Whistleblowers”’, July 2009.

whistle-blower were motivated by reasons other than the action of whistle-blowing.²⁶

38. Head 12 provides that an employer shall not ‘penalise or threaten penalisation’ against a worker who may make a disclosure. The IHRC **recommends** that this be broadened to include discrimination or harassment. The definition of ‘detriment’ included in Head 14 could be replicated in Head 12 in this regard.

39. Furthermore, read in conjunction with point (2), the provision in Head 12 (1) may provide the possibility for an unscrupulous employer to discriminate against a whistleblower under a guise of ‘organisational reasons’. It must be particularly recalled that a means of penalising a whistleblower could include redeployment or demotion. The IHRC considers that once Head 12 is combined with a robust procedure before the Labour Court that this should provide sufficient protection for whistleblowers that are subsequently targeted by their employer because they have made a protected disclosure.

E. Disclosures relating to Security, Intelligence, Defence or International Relations

40. The IHRC queries the limitations in Head 22. While recognising the importance of maintaining confidentiality and security in relation to certain aspects of the functioning of the State, it must be ensured that in these critical areas there is a provision in place that would allow disclosures to be made. The introduction of a complaints referee is welcome and any such person must be independent in their function. The IHRC recalls the statement of the European Court of Human Rights, noted above, that “The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence.”

F. Definition of a “Relevant Body”

41. The IHRC notes the list of organisations included as ‘relevant bodies’ for the purposes of the legislation. The IHRC considers that the future Irish Human Rights and Equality Commission should be listed as a relevant body for the purposes of this legislation.

G. Publication of a Disclosure under the Legislation by the Media

42. The IHRC considers that in light of the public interest in ensuring that information on misconduct or wrongdoing be in the public domain, that there should not be a chilling effect on the reporting of disclosures made under this legislation by the media. Disclosures that meet the criteria of this legislation – that is, the discloser has acted in good faith, on the belief the information was true and in the public

²⁶ Parliamentary Assembly of the Council of Europe, Resolution 1729 (2010).

interest and there was no other effective avenue available – should be considered as publication in the public interest for the purposes of the Defamation Act 2009.

The IHRC recalls the recommendation of the OECD Working Group on Bribery in International Business Transactions in 2007 in relation to Ireland that:

Given the important role that investigative journalism can play in reporting allegations of bribery of foreign public officials, the lead examiners recommend that Ireland adopt legislation strengthening freedom of expression for the media and allowing protection of their sources.²⁷

While the IHRC notes that the Defamation Act was introduced subsequent to this recommendation, it considers that this statement underlines the importance of the media in combating corruption and highlighting misconduct.

H. Other General Comments

43. The IHRC **recommends** that undue influence by a public official, particularly in relation to the administration of justice and the proper functioning of State organs, should be included in the list of protected disclosures in Head 4.

44. The IHRC **recommends** that a definition be included for “public official”, and that this should include members of the Oireachtas, and all Civil and Public Servants including members of Boards and other State appointees.

45. The IHRC would query the use of the term “improperly discriminatory” in Head 4 (1) (h) and **recommend** that it be reconsidered.

46. The IHRC understands that the term “or elsewhere” in Head 4(2) refers to improprieties that have occurred outside of the State, as noted in the Explanatory Note. The IHRC would **recommend** that this be made expressly clear in the legislation.

47. The IHRC would suggest that the language in Head 10 and Head 18 be aligned to clarify issues relating to legal professional privilege.

48. Head 15 is stated as providing for immunity from criminal proceedings. However, the note in the present Heads of Bill states that “the provision will have to ensure that a whistleblower report can be made while at the same time not facilitating reports which would be harmful to the public interest”. The IHRC questions the concept of this sentence, particularly given that the Bill is aimed at promoting transparency. An overly restrictive approach to this Head could deter potential whistleblowers. The IHRC again recalls the statements of the European

²⁷ Ireland: phase 2: Report on the application of the convention on Combating bribery of foreign public officials in International business transactions and the 1997 Revised recommendation on combating bribery in International business transactions 2007.

Court of Human Rights in this regard that some information can be so strong as to override even a legal duty of confidence.

49. The legislation should also be reviewed to ensure its application to disclosures by those working in the private sector.

I. Awareness of Legislation and Guidelines

50. It is crucial that on enactment of any whistleblowers legislation, the Government also produces a plain language guide to be distributed widely, including to all Civil and Public Servants and made widely available. In order to encourage persons in possession of relevant information to come forward, and for potential whistleblowers to be aware of the impact of the legislation, clear, readily accessible guidelines must be made available. The IHRC **recommends** that following the enactment of any legislation, clear, accessible guidelines on the legislation are produced and widely publicised.

51. In relation to the Guidelines to be established under Head 26, the IHRC **recommends** that the Government provide general guidelines and that the quality of the guidelines within each public sector organisation is given independent scrutiny, for example, by a relevant body or independent organisation such as the IHRC. The principles set out by the European Court of Human Rights may be instructive in this regard.

52. Guidelines should be required to ensure that there is a designated person within any Department or Service who is responsible for implementing and overseeing an internal policy that promotes transparency and accountability.