

c/o Transparency International Ireland
69 Middle Abbey St
Dublin 1

Minister Heather Humphreys TD
Minister for Business, Enterprise and Innovation
23 Kildare Street
Dublin 2
D02 TD30

3 July 2018

Dear Minister,

The undersigned whistleblowing support organisations, legal advisors and practitioners write to urge you to amend the EU Protection of Trade Secrets Regulation (SI 188) so that Irish whistleblowers can continue reporting corruption, fraud and many other forms of wrongdoing without fear of criminal prosecution or incurring legal costs and damages.

Until recently, Ireland has been considered to have the strongest whistleblower protection law in the European Union: the Protected Disclosures Act 2014 (PDA).

One of the reasons behind the PDA's effectiveness was the absence of any motivation test which would have focussed attention on the character, state-of-mind or work-history of whistleblowers. Instead, s.5 of the PDA made it clear that the motivation of a worker was irrelevant for making a protected disclosure and only required workers to demonstrate a reasonable belief in sharing information on a relevant wrongdoing.

In other words, it focussed attention on the message, not the messenger.

As you are aware, the EU Trade Secrets Directive was passed in June 2016 and provides the legal basis for strong legal safeguards for intellectual property holders. It also balances penalties for the unlawful use or acquisition of trade secrets with broad protections for whistleblowers.

Article 5 of the Directive allows for anyone to acquire, use or share a trade secret for the following four purposes:

- (a) for exercising the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media;*
- (b) for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest;*
- (c) disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise;*
- (d) for the purpose of protecting a legitimate interest recognised by Union or national law.*

Although SI 188, which transposed the EU Trade Secrets Directive allows for reporting in such circumstances, s.7 of SI 188 amends the PDA to create a new test for whistleblowers that will require them to show that they made their disclosure in the general public interest even where the disclosure is true, related to a criminal offence, or they reported to their employer or the appropriate authorities.

There was no requirement in the EU Directive for Ireland to create this test. Other EU Member States, including France and Denmark have transposed the Directive to the satisfaction of the European Commission but have not introduced a similar requirement.

Nonetheless, if an amendment to the PDA was needed – and we would argue it was not – then the new motivation test should have allowed whistleblowers to share trade secrets for all four purposes set out in Article 5 of the Directive.

The implications for whistleblowers and the general public of the amendment to the PDA cannot be understated. It will make it more difficult for whistleblowers in banks, private healthcare, pharmaceuticals and IT to speak up. Given that the majority of wrongdoing is exposed by whistleblowers, this means that the wellbeing of consumers, patients and the general public are placed at much greater risk of corporate fraud, malpractice and cover-ups.

Whistleblowers reporting company-law offences to the Office of the Director of Corporate Enforcement or the Gardaí will not only be required to show that they believed a crime was or might be committed but that they were motivated to protect the general public interest in reporting the crime.

Likewise, a whistleblower in a private medical laboratory or responsible for pharmaceutical safety will face legal action by their employer where they share information that the employer considers to be commercially-valuable, even though the information shows a risk to patient health and safety.

The whistleblower's employer or the 'trade-secret-holder' will be allowed to take legal action for damages, seek a court injunction or even press criminal charges against the whistleblower by alleging that evidence that they consider commercially valuable was 'stolen' and that the whistleblower was motivated by something other than the general public interest.

'Trade secrets' could be interpreted to mean emails, phone records or financial data – any information with a commercial value - and whistleblowers using such information will face three years in prison and a €50,000 fine unless they can demonstrate their good faith in disclosing it.

The amendment to the PDA creates a Kafkaesque legal absurdity whereby it may be a criminal offence for a whistleblower to report a criminal offence using evidence the perpetrator alleges is a trade secret unless the whistleblower can show that he or she was motivated to protect the general public interest in reporting the criminal offence.

Whistleblowers will bear the cost of defending a prosecution or challenging a High Court action or injunction. It is safe to say that most workers in Ireland's banking and finance, semi-state, pharmaceutical and private health-care sectors will not be able to afford or be inclined to take the risk of defending their freedom, livelihoods and reputations in court.

What is more, the amendment has been passed with little consultation and before a statutory review into the implementation of the PDA has been published or shared with the Oireachtas. It also comes at a time when a Tribunal of Inquiry is investigating whether there was a smear campaign to damage the reputation and character of Garda Sergeant Maurice McCabe and as investigations begin into INM, IBRC and NAMA based on protected disclosures.

This change means employers will be free to question the motivation, and therefore the personal character of countless whistleblowers and stymie attempts by the State to pursue investigations into the future. The amendment to the PDA will deter workers from speaking up and put Ireland's financial stability and the health and wellbeing of our citizens at undue risk.

It is for this reason, that we ask you to remove s.7 of SI 188 as a matter of urgency. In the meantime, we would ask you to publish the legal advice received by your Department on this matter as well as any submissions received on the transposition of the Directive.

Yours sincerely,

John Devitt, Chief Executive, Transparency International Ireland
David Banisar, Senior Legal Counsel, Article 19, London
Professor AJ Brown, Griffith Business School, Griffith University, Australia
Tom Devine, Legal Director, Government Accountability Project, Washington DC
Gavin Elliott BL, Chair, Transparency Legal Advice Centre, Dublin
David Hutton, Centre for Freedom of Expression, Toronto
Lauren Kierans BL, School of Law, Maynooth University
Professor David Lewis, School of Law and Whistleblowing Research Unit, Middlesex University
Anna Myers, Director, Whistleblowing International Network, Glasgow
Venkatesh Nayak, Steering Group Member, Whistleblowing International Network, New Delhi
Judy O'Loan, Managing Solicitor, Transparency Legal Advice Centre, Dublin
Vladimir Radomirović, Editor in Chief, Pitaljka, Belgrade
Professor Wim Vandekerckhove, School of Business, Greenwich University, London
Francesca West, Chief Executive Officer, Public Concern at Work, London

Cc:

Minister Paschal Donohue TD, Department of Public Expenditure and Reform
Minister of State Patrick O'Donovan TD, Department of Public Expenditure and Reform
Minister Charlie Flanagan TD, Minister for Justice and Equality
Ms Georgia Georgiadou, European Commission Directorate-General for Justice and Consumers
Professor David Kaye, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression
Mr Drago Kos, Chair of the OECD Working Group on Bribery
Dr Oliver Landwehr, Legal Officer, United Nations Office on Drugs and Crime Secretariat/UNCAC Implementation Review Group