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

Dear Deputy McGuinness,

I write on behalf of Transparency International (TI) Ireland to offer its submission on the General Scheme of the Protected Disclosures (Amendment) Bill 2021.

In drafting this submission, we have considered the following:

- The policy rationale for the Bill
- The technical, legal and drafting aspects of the Bill
- Possible areas where the Bill might be improved, and
- Possible implications/consequences arising from the Bill

The submission is presented under three key headings:

- Introduction and Rationale
- How the 2014 Act is working
- Possible areas for improvement

The technical aspects of the Bill and possible implications are addressed in each section where possible.

The submission largely draws from both TI Ireland's and the Transparency Legal Advice Centre's (TLAC) analysis and experience of working with whistleblowers and other disclosers of wrongdoing since 2010. It also reflects TI Ireland's submission in response to the July 2020 public consultation on the transposition of the EU Whistleblowing Directive, which accompanies this submission.

I should use this opportunity to thank you for your recent invitation to share our experiences in working with whistleblowers with the Committee on 27 May, and for considering this submission. Please let us know if you should like any further information or clarification on any of the 18 recommendations that follow.

Yours sincerely,

Chief Executive
Transparency International Ireland

Introduction and Rationale

The General Scheme of the Protected Disclosures Amendment Bill 2021 has been published to meet Ireland's obligations as a Member State of the European Union to transpose Directive (EU) 2019/1937 of the European Parliament and the Council on the protection of persons who report breaches of Union law (the EU Whistleblowing Directive or Directive). The deadline for transposition of the Directive is 17 December 2021.

The Directive contains 29 Articles and 110 recitals which prescribe and describe the measures that all Member States must directly transpose or consider when transposing the Directive into national law.

Some Articles are mandatory, others are voluntary. They provide for broad categories of wrongdoing including breaches of public procurement, financial services, products and markets, and prevention of money-laundering and terrorist financing, product safety and compliance as well as transport safety.

The Directive requires Member States to introduce a 'stepped disclosure regime' such as is already provided for in Ireland. This encourages workers to report internally before reporting externally and thereafter to the media and other public channels.

It will also place an obligation on all employers across the EU with 50 or more staff and all employers in the financial services sector, to introduce internal procedures to receive, communicate and act on disclosures.

EU Member States will be obliged to empower and resource competent State authorities to receive and act on relevant disclosures. Protections against reprisal will also be extended to other categories of reporting person, including volunteers and shareholders.

In addition, Member States will have to ensure that whistleblowers have access to free comprehensive and independent information on their rights, as well as advice on procedures and remedies available on protection against retaliation, while they will also be encouraged to provide free legal aid and psychological support to whistleblowers in difficulty.

The Directive encourages Member States to go beyond the voluntary and mandatory provisions in the text and introduce measures that will offer assurance to whistleblowers that they will not be penalised as a result of speaking up. Although the Directive relates to breaches falling within the scope of Union acts, this is intended only as a common minimum standard, and Recital 5 of the Directive suggests that Member States can decide to extend whistleblowing provisions beyond this at national level.

Most importantly, Article 25.2 of the Directive makes it clear that Member States will not be allowed to weaken existing provisions in their whistleblowing laws while transposing the Directive.

TI Ireland and others made submissions on the working of the Protected Disclosures Act 2014 (the Act) as part of a statutory review of the legislation in 2017. However, this review did not lead to any amendment of the Act and the transposition process of the Directive is likely to be the only opportunity to strengthen existing legal safeguards for whistleblowers for the foreseeable future.

The submissions are available on our website at www.transparency.ie and the recommendations made therein.

How the 2014 Act is working

Transparency International defines whistleblowing 'as the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action'.

In spite of the many benefits of whistleblowing, we know whistleblowers often pay an enormous price for speaking up. Too many examples illustrate the financial, psychological toll and the risks that whistleblowers bear to their livelihoods and sometimes their lives for speaking up.

The purpose of any whistleblowing law is therefore to help protect whistleblowers from reprisal and see that any information shared in the course of blowing the whistle is acted upon without undue delay.

To this end, the Oireachtas enacted a whistleblower protection law in 2014 that is considered to be very strong by international standards. It was drafted with the support of TI Ireland and others and drew from TI's International Principles for Whistleblowing Legislation as well as guidance and legislation from comparable jurisdictions such as the UK and New Zealand.

The body of case law developing since 2014 is still relatively small. TI Ireland and TLAC have analysed those cases, summarised and made recommendations which are available in TI Ireland's Speak Up Reports for 2017 and 2020. However, and notwithstanding the comprehensive protections provided for in the Act, it is difficult to conclusively evaluate the effectiveness of the legislation.

Firstly, there are numerous extraneous factors that will determine whether someone suffers penalisation as a result of blowing the whistle. These include working environment and culture, the compliance risk appetite of an employer, industry risk profiles, an employer's reputational exposure, organisation size, remote working practices, existing HR systems, internal whistleblowing procedures, the quality of whistleblowing policies, as well as the availability of training and education for disclosure recipients and employers.

Another determinant will be the response of the recipient to the disclosure and the alacrity with which they act on the concern. Anecdotal evidence points to a direct link between the failure of the employer or external regulator to act on the concern raised and negative outcomes for whistleblowers. Data from surveys conducted in Ireland, the US and UK points to the deterrent effect a fear of futility will have on prospective whistleblowers.

In other words, it is more likely that a worker will suffer reprisal where their disclosures are not treated seriously.

Furthermore, there is no data available on the total number of protected disclosures made each year and the outcomes for both employers and employees.

Where evidence of the Act's effectiveness exists, it points to varying degrees of compliance, poor outcomes for workers bringing claims under the Act before the Workplace Relations Commission (WRC), and gaps in measures that should be addressed through the Act's amendment later this year.

The rate of compliance with section 22 of the Act, which requires public bodies to publish an annual report detailing the number of protected disclosures and action taken in response to them, has been mixed. For example, TI Ireland found that only 54% of local authorities were compliant with section

22 of the Act by publishing their reports on time in 2018.[1] This figure worsened in 2019, when only 45% of local authorities were assessed to have published their section 22 reports in compliance with the Act.[2]

It is also worth noting that although it has been a requirement for all public bodies to have procedures in place since 2014, the same obligations have not applied to private-sector employers. This is reflected in TI Ireland's finding in 2016 that only 34% of private sector employers reported having procedures in place, while only 10% reported that they had policies.[3]

These figures will inevitably improve with the requirement for all employers with 50 or more employees to establish whistleblowing channels and procedures. However, affordable guidance, training and support will be necessary if those channels and procedures are to be fit for purpose.

In addition, free or low-cost guidance and legal advice is essential to avoid negative outcomes for workers. Likewise, low-cost advice and support is essential for employers in adopting or adapting their policies and procedures to comply with the new legislation, and TI Ireland hopes to see more employers from all sectors engage in the Integrity at Work programme and sign its eponymous pledge.

Thanks to grant support from the Department of Public Expenditure and Reform, the European Commission, and the Joseph Rowntree Charitable Trust, access to free guidance (from the Speak Up Helpline) and legal advice (from TLAC) valued at almost €1 million has been made available to over 1,850 general clients and 90 protected disclosure clients respectively since 2011.

However, current funding levels are not sustainable and with enactment of this Bill, we expect to see another sharp increase in calls and requests for support from the Helpline and TLAC. If Ireland is to deliver on its obligations under Article 20 of the Directive to provide for adequate measures of support to Irish whistleblowers, additional and appropriate funding for the provision of free guidance and legal advice will be needed.

Outcomes for workers bringing claims for penalisation or dismissal arising from a protected disclosure before the Workplace Relations Commission (WRC) have also been poor. According to our research, workers lose more than 90% of protected disclosure claims brought before the WRC.[4] Research published by Professor Kate Kenny and others, shows how whistleblowers in certain sectors such as banking can find it impossible to find work in their given profession again.[5]

It is not clear why so few cases result in a positive outcome for the worker. It has been speculated that this might be partly a result of the evidential hurdle to be overcome by claimants in showing penalisation. This will largely be addressed with the reversal of the burden of proof in respect of penalisation claims. However, it is likely that there are many other factors that will determine the success of any subsequent claim such as the financial resources available to the whistleblower, as

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[1] See National Integrity Index – Local Authorities, 2018, Transparency International Ireland https://www.transparency.ie/sites/default/files/18.07.03_nii_report_vf.4.pdf
[2] See National Integrity Index – Local Authorities, 2019, Transparency International Ireland https://www.transparency.ie/sites/default/files/19.12.09_nii_report_2019.pdf
[3] See Speak Up Report 2017, Transparency International Ireland https://transparency.ie/sites/default/files/17.12.13_speak_up_report_ie_final.pdf, p.42.
[4] See Speak Up Report 2020, Transparency International Ireland https://transparency.ie/sites/default/files/20.12_speakup2020.pdf, p.25.
[5] See Whistleblowing – Towards a New Theory, Kate Kenny https://www.hup.harvard.edu/catalog.php?isbn=9780674975798

well as the level of legal and judicial expertise or experience currently available in this developing area of law.

This is a highly complex area of law. However, we are not aware of any judicial education on the legislation to date and would be an important area of law for the Judicial Council Studies Committee to consider as part of any forthcoming judicial education programme. It is worth noting, for example, that it is a legal requirement for members of the Serbian judiciary to undergo judicial training on their Whistleblower Protection Act.[6] In addition, it should be a legal requirement for all WRC adjudicators to have received training on the law in addition to other employment legislation. Education and training on the provisions of the amended Act will be essential if it is to achieve its intended purpose.

Finally, it is essential that those provisions that make the 2014 Act strong are not weakened and that this window of opportunity be used, not just to meet minimum EU standards, but to strengthen the legislation further. In doing so, it will lend greater assurance to potential whistleblowers that they can expose wrongdoing without reprisal and ensure that employers and the State can act promptly on the information whistleblowers disclose.

Possible Areas for Improvement

TI Ireland has welcomed the publication of the General Scheme and the Government's announcement in May that it would enact the new Bill by the transposition deadline.

Although specific provisions such as the reversal of the burden of proof appear to be missing from the General Scheme, Minister McGrath announced that the new Bill would provide for the reversal of the burden of proof in circumstances where the discloser is penalised.

The creation of a Protected Disclosures Office with responsibility for advising public bodies on the operation of the Act and overseeing the assessment and investigation of protected disclosures in the public and civil service is also to be welcomed. Likewise, the extension of interim relief in cases of penalisation might help avoid escalation of related workplace disputes and further litigation.

Nevertheless, there do appear to be areas for possible improvement and some provisions give rise to concerns that Ireland might fall short of its obligations not to weaken existing provisions in the 2014 Act.

Head 5(2) - Interpersonal Grievances

Head 5(2) of the General Scheme provides that:

'Section 5 of the Principal Act is amended by the insertion of the following after subparagraph 8:

(9) A matter is not a relevant wrongdoing if it is a matter concerning interpersonal grievances exclusively affecting the reporting person, namely grievances about interpersonal conflicts between

[6] See Whistleblowers in Serbia: a model law, Council of Europe, 2017 https://www.coe.int/en/web/corruption/completed-projects/enpi/newsroom-enpi/-/asset_publisher/F0LygN4lv4rX/content/whistleblowers-in-serbia-a-model-law?inheritRedirect=false

the reporting person and another worker and the matter can be channelled to other procedures designed to address such matters.''

While Recital 22 of the Directive provides that:

'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.'

Recital 22 has been provided as guidance and is not in any way a mandatory provision. It is therefore not a requirement to provide for a distinction to be drawn in legislation between interpersonal grievances and protected disclosures. Indeed, TI Ireland's experience and that of its international counterparts suggests that a substantial volume of protected disclosures contain one or more overlapping grievances that either pre-date or follow from the disclosure of wrongdoing.

Grievances can often give rise to circumstances that would justify the making of a protected disclosure – such as where allegations of bullying, unfair and discriminatory treatment or unhealthy or unsafe working conditions have gone unaddressed and amount to a breach of a legal duty on the part of the employer.

It should also be borne in mind, that many employer policies also deal with workplace bullying under their respective grievance procedures.[7] In the absence of a fail-safe definition of 'interpersonal grievance', the provision for such a section would likely encourage employers to channel legitimate concerns of bullying and other health and safety risks through their grievance procedures without adequately assessing any elements of the disclosure that contain information tending to show a relevant wrongdoing.

Grievances can encompass protected disclosures related to wrongdoings other than health and safety risks. For example, TI Ireland has encountered numerous cases and supported clients raising concerns about the loss of bonuses or expense claims that pointed to fraud and other criminal offences. The concerns were dismissed by their respective employers as 'personal grievances'. In those cases, the workers suffered formal penalisation through disciplinary action and dismissal for then seeking to make external disclosures.

Moreover, the High Court in its judgement in Baranya v Rosderra Irish Meats Group acknowledged that there can be an overlap between grievances and protected disclosures and determined that a protected disclosure can be made without invoking the Act or using the language of 'protected disclosure'.[8]

Recommendation 1

Section 5 of the Act should therefore remain unaffected by Recital 22. Instead, additional statutory guidance should be issued to help address any confusion amongst employers about how interpersonal grievances and protected disclosures are assessed and investigated.

[7] See for example Grievance Procedure Guide, Peninsula, https://www.peninsulagrouplimited.com/ie/guides/grievance-procedure/

[8] See https://transparency.ie/sites/default/files/20.12_speakup2020.pdf, p.29

Head 8 (5A(2)) - Anonymous disclosures

Head 8 (5A(2)) of the General Scheme provides that:

'Without prejudice to any other enactments that provide for anonymous reporting of wrongdoing, nothing in this Act shall impose an obligation on any of the legal entities within the scope of this Act to accept and follow up on anonymous disclosures.'

Recital 34 of the Directive provides that:

'Without prejudice to existing obligations to provide for anonymous reporting by virtue of Union law, it should be possible for Member States to decide whether legal entities in the private and public sector and competent authorities are required to accept and follow up on anonymous reports of breaches which fall within the scope of this Directive. However, persons who anonymously reported or who made anonymous public disclosures falling within the scope of this Directive and meet its conditions should enjoy protection under this Directive if they are subsequently identified and suffer retaliation.'

There is no provision in the Directive that requires Member States to forgo the requirement on competent authorities to follow up on an anonymous disclosure. Instead, the General Scheme proposes to explicitly exclude a requirement to act on those disclosures.

This is despite the fact that anonymity was cited by respondents to TI Ireland's Integrity at Work Survey in 2016 as the most important factor in assuring them that they could safely raise workplace concerns.[9]

The second most commonly cited factor in deciding to speak up was whether the worker 'worked for someone or an organisation that would act on [their] report'.[10] The link between these two factors should not be overlooked. The importance of providing for a variety of confidential and anonymous disclosure channels, combined with a requirement to act on useful and verifiable information shared through these channels, has been recognised as essential features of any functioning whistleblowing management system.

For example, the provision of anonymous disclosure channels has been a requirement for many Irish or Irish-based firms and professionals operating in the international financial services sector with the passage of the Sarbanes Oxley Act in 2002.[11] The US Securities and Exchange Commission actively encourages tips of regulatory breaches and fraud, irrespective of whether they are made confidentially or anonymously.[12] It reports that enforcement actions arising from such tips have led to more than US$3.5 billion in financial remedies since 2011.[13]

Indeed, Article 9.1(e) of the Directive provides for:

'diligent follow-up, where provided for in national law, as regards anonymous reporting;'

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[9] See https://www.transparency.ie/sites/default/files/18.01_speak_up_2017_final.pdf, p.39
[10] See p.39
[11] See Whistleblower Provisions of the Sarbanes-Oxley Act - Some Practical Considerations, Perkins Coie, 2003 https://www.perkinscoie.com/en/news-insights/whistleblower-provisions-of-the-sarbanes-oxley-act-some.html
[12] See Office of the Whistleblower, U.S. Securities and Exchange Commission https://www.sec.gov/whistleblower/submit-a-tip
[13] See U.S. Securities and Exchange Commission https://www.sec.gov/page/whistleblower-100million

The 2014 Act is silent on the management of both confidential and anonymous disclosures and allows for recipients to exercise sound judgement in deciding on how or whether to respond. There will be circumstances where a recipient ought to acknowledge and act on the disclosure of such information where there is adequate documentary or material evidence shared with a recipient to determine the likelihood of a relevant wrongdoing.

It is also worth considering DPER statutory guidance on Protected Disclosures which states:

'12.1 A public body's Procedures should draw attention to the distinction between an anonymous disclosure (where identity is withheld by the discloser) and confidential disclosures (where identity is protected by the recipient). Anonymous disclosures made by workers are not excluded from the protection of the 2014 Act. Public bodies should give a commitment that they will be acted upon to the extent that this is possible, while recognising that they may be restricted in their ability to investigate the manner in the absence of the knowledge of the identity of the discloser.'

The circumstances of each case will be different and where the recipient of a disclosure can determine that the person making a disclosure is likely to be a reporting person as defined in the Act, the information contained in the disclosure is a relevant wrongdoing, and the information is actionable, then the same requirements placed on the recipient to follow up on the report should apply in cases where the identity of the discloser is unknown. Likewise, where the anonymous discloser has provided contact details (such as an anonymised email address or mobile phone number) there is no reason why the recipient of a disclosure cannot acknowledge the receipt of a disclosure and follow up within a given timeframe of no more than three months on whether or what action is being taken in response to the disclosure.

There will still be a requirement to take action in response to anonymous disclosures where the information points to a serious economic crime, a threat to public safety or the wellbeing and safety of children.

Most protected disclosures that have been assessed through the Speak Up Helpline since 2014, contain multiple pieces of information with potential consequences arising under different laws. An explicit blanket provision excluding competent authorities or employers from any requirement to act on anonymous disclosures in the Bill will create confusion where it is not clear what part of a disclosure is actionable or contains a mandatory reporting element, and which part does not require action solely because the disclosure was made anonymously. What is more, it will serve as a disincentive to speaking up by increasing the likelihood that no action will be taken in response to a disclosure unless the whistleblower identifies themselves to the recipient.

Recommendation 2

Unless Head 8 (5A(2)) of the General Scheme is revised to reflect those circumstances as set out above, the Bill should remain silent on the matter of follow up in respect of anonymous disclosures and require the follow up of disclosures where the information shared tends to show a relevant wrongdoing and can be actioned by the employer or relevant competent authority.

Head 9 - Internal Reporting Channels

Head 9 of the General Scheme proposes to require only employers with 50 or more employees, all public bodies, and those in financial services or obligations under EU directives related to the prevention of money laundering and terrorist financing to establish and maintain internal channels and procedures for the making of protected disclosures by their employees and for follow-up.

It will exclude all entities, including charities and companies with fewer than 50 staff or those sectors described above, from the requirement to establish or make their workers aware of reporting channels or procedures. This is despite the well-established risk of wrongdoing in the charity and micro-enterprise sector.[14]

Nothing in the Directive prevents a requirement that all employers establish reporting procedures or that they inform their workers of their rights and obligations.

In the absence of such a requirement, the Act might be amended to provide that all employers adopt and disseminate a policy or procedure without any prescribed timeline for follow up or to establish dedicated channels. Template policies are already available, with recommendations on the establishment of channels and appropriate follow up, that could be easily adapted for use by most employers in micro enterprises and small charities.

Head 9 also provides that Section 6 of the Principal Act be amended at subsection (6) as follows:

'The provisions of subsection (3) shall not come into effect for employers, other than public bodies, with between 50 and 249 employees until 17 December 2023.'

The deadline for the transposition of Article 8 which creates an obligation on Member States to provide for internal report channels was extended to 17 December 2023. This was to allow for Member States with no whistleblowing related law time to develop and adopt appropriate measures. However, Ireland has had legislation, guidance and sample procedures in place since 2014. A two-year delay in the adoption of whistleblowing procedures by Small and Medium Sized Enterprises is excessive and will place their workers at unnecessary risk.

Recommendation 3

The requirement to establish procedures for employers with between 50 and 250 employees should come into effect from 17 December 2022.

Recommendation 4

Consider amending the Act to require that all employers adopt and disseminate a policy or procedure without any prescribed timeline for follow up or requirement to establish dedicated channels.

[14] See for example, 'Former Bóthar chief admits taking hundreds of thousands from charity', The Irish Times, 27 April 2021, https://www.irishtimes.com/news/crime-and-law/courts/high-court/former-b%C3%B3thar-chief-admits-taking-hundreds-of-thousands-from-charity-1.4548969 and 'Hospital procurement fraud inquiry began in September', The Irish Times, 17 July 2015, https://www.irishtimes.com/news/health/hospital-procurement-fraud-inquiry-began-in-september-1.2288324

Head 10 (5) The reporting person shall cooperate, as required, with any investigation or other follow up procedure initiated in accordance with section 4(c).

There is no requirement under the Directive that Member States introduce an obligation on whistleblowers to cooperate with investigations. Indeed, there will be circumstances where the whistleblower's identity should be withheld and there is sufficient evidence to progress an investigation without the whistleblower also becoming a witness.

Mandatory reporting provisions are already in place such as under section 19 of the Criminal Justice (Theft and Fraud Offences) Act 2011, the Children First Act 2015, as well as the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 which compels a witness to cooperate with a Garda investigation into the abuse of children or vulnerable persons.

Provisions around witness compellability should be provided for where necessary under the relevant statute, as is currently the case. However, the sweeping provision contained in Head 10(5) is disproportionate and is likely to be counterproductive in efforts to build confidence in the amended Act.

Recommendation 5

Remove the requirement on reporting person to cooperate, as required, with any investigation or other follow up procedure unless already required to by law.

Head 11 - Ministerial reporting channels

Head 11 implies the removal of the right of public sector workers under section 8 of the Principal Act to make a protected disclosure to the responsible Government Minister. It will also remove any corresponding protections for such workers in reporting directly to a Minister. This amendment would be regressive and likely be in breach of Article 25.2 of the Directive.

Firstly, Head 11 implies that the reporting person will report to a prescribed person as set out in section 7 of the Act. However, in some instances, as can be the case with workers raising concerns within Primary and Secondary level institutions in the Education sector, the number of prescribed persons is limited and specific. If a worker in the education sector wishes to disclose to a Minister under the new regime, they may not have an option of reporting under section 7. In such cases, where reporting to the employer and a prescribed person is not an option, the only avenue will be to make an external report. This will require the reporting person to meet a higher test than would be the case if they were entitled to report to a Minister and the prescribed person.

TI Ireland is also aware of the difficulties faced by Government departments in following up on disclosures made under Section 8 and has provided training and guidance to civil servants operating the system. These difficulties lie in part with the legal powers of Government departments to investigate concerns, as well as the operation and resourcing of the reporting system rather than the wording of the Act itself.

Most Government departments do not appear to be adequately resourced to assess and/or investigate protected disclosures, with departments designating recipients within their respective audit and/or corporate service functions.

However, beyond receiving, recording and corresponding with disclosers there is often little that these recipients can do other than to commission an assessment and/or investigation under the Office of Government Procurement (OGP) Framework or to redirect the disclosure back to the public body in which the discloser is employed.

In particular, the appointment of solicitors and/or barristers exclusively, as investigators under the OGP Framework has been highlighted as a potential issue. In the view of some clients and officials, this had led to unnecessary escalation and threat of litigation by respondents who perceive the engagement of a solicitor or barrister as an investigator as a prelude to legal action.

This perception could be remedied in part by publishing statutory guidelines on assessments and investigations and updating them where necessary. It would also be advisable to ensure that public bodies are able to avail of the services of investigators with specialist knowledge and expertise in the subject matter directly relevant to the disclosure.

The proposed Protected Disclosures Office (PDO) should help relieve some of the pressure Government departments currently find themselves under, but it is also important to equip and resource departments to assess and investigate concerns where appropriate under the guidance of the PDO.

Only where the department is unable, or it is deemed inappropriate for the department's internal compliance function to investigate should the disclosure be referred to the PDO. Departments should also be resourced with trained personnel to undertake assessments or investigations to avoid creating an over-reliance on services commissioned under the OGP Framework.

Recommendation 6

TI Ireland therefore recommends amending Head 11 from:

(*1) A disclosure is made in the manner specified in this section if:*

(a) the worker is or was employed in a public body; and

(b) the disclosure is made to a Minister of the Government or a Minister of State with responsibility for the public body concerned; and

(c) one or more of the following conditions are met:

(i) the worker has previously made a disclosure of substantially the same information in the manner specified in section 6 or section 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; or

(ii) the worker reasonably believes the Head of the public body concerned is personally complicit in the relevant wrongdoing reported; or

(iii) 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.

(2) Each Minister of the Government shall provide clear and easily accessible information regarding the procedures for making disclosures in the manner specified in this section.

(3) Upon receipt of a disclosure made in accordance with this section, the relevant Minister shall within 7 days:

(a) refer it to the Protected Disclosures Office; and

(b) acknowledge receipt of the disclosure informing the reporting person it has been referred to the Protected Disclosures Office in accordance with subsection 3(a).

(4) Head 18 shall apply to all disclosures referred to the Protected Disclosures Office under subsection (3)(a).

to read:

'(1) A disclosure is made in the manner specified in this section if:

(a) the worker is or was employed in a public body; and

(b) the disclosure is made to a Minister of the Government or a Minister of State with responsibility for the public body concerned.

(2) The relevant Minister shall within 7 days:

(a) acknowledge receipt of the disclosure informing the reporting person;

(b) commission an assessment or investigation into the relevant wrongdoing;

or

(3) Within 7 days of receipt of a disclosure:

(a) refer it to the Protected Disclosures Office for guidance, referral, assessment or investigation; and

(b) acknowledge receipt of the disclosure informing the reporting person as to the reason/s it has been referred to the Protected Disclosures Office.

(c) where, upon seeking guidance from the Protected Disclosures Office, it has been determined that the Minister is the most appropriate person to commission an assessment or investigation, communicate with the reporting person on the progress and outcome of the assessment or investigation in accordance with the Act.

(4) Each Minister of the Government shall provide clear and easily accessible information regarding the procedures for making disclosures in the manner specified in this section.'

In this way, the Minister would retain the right to refer a disclosure to the Protected Disclosures Office where appropriate, while continuing to afford a worker employed by a public body their right to make a disclosure to the relevant Minister as currently provided for under section 8 of the Principal Act.

Head 16 - Establishment of a Protected Disclosures Office

The success of the Protected Disclosures Office will depend on the clarity of its role, and it being adequately resourced to perform its stated functions. In addition, the office could perform a useful public service in reporting to the Oireachtas each year on the compliance with the Act of public bodies under its remit.

As has been noted on page 3, the rate of compliance with section 22 of the Act requires attention. For example, TI Ireland found that only 54% of local authorities were compliant with section 22 of

the Act by publishing their reports on time in 2018.[15] This figure worsened in 2019, when only 45% of local authorities were assessed to have published their section 22 reports in compliance with the Act.[16] As a statutory body with responsibility for providing guidance and support on the operation of the Act to public bodies, the Protected Disclosures Office would be well placed to report on and improve compliance with the Act by those same organisations.

Recommendation 7

The Protected Disclosures Office should therefore be delegated with responsibility, *inter alia*, for receiving and reporting on the publication of reports prepared under section 22 of the Principal Act and making recommendations to public bodies on the preparation of their procedures and the drafting of preparation of their section 22 reports.

Head 21 – Protection from retaliation

New protections including provision for interim relief for penalisation are welcome and reflect recommendations made by TI Ireland and others.

In addition to these protections, TI Ireland has recommended that the cap on awards arising from actions taken under sections 11 and 12 should be removed. As noted in our submission on the Act in 2017, the provision to compensate workers that have been dismissed for having made protected disclosures with a sum equivalent to 260 weeks' salary for whistleblowers is likely to be inadequate for certain categories of worker. This is particularly so for those workers in financial or professional services. Numerous 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.

In the absence of financial rewards for disclosures, workers in the banking sector in particular are unlikely to incentivised to make protected disclosures if they stand to recover the equivalent of five years' salary or less. The Safety, Health, and Welfare at Work Act 2005, section 28 (3) c provides that the WRC 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.

TI Ireland is aware that the Supreme Court judgement in the case of Zalewski v An Adjudication Officer, the Workplace Relations Commission & others [2021] IESC 24, delivered on 6 April 2021, will require amending legislation to clarify the procedures and remit of the Workplace Relations Commission. This notwithstanding, the overwhelming majority of workers do not have the financial resources to pursue a High Court action arising from detriment under the Act. As has been observed by Judge Peter Kelly, the only people who can litigate in the High Court are 'paupers and millionaires' and it is not unusual for costs for claims before the High Court to exceed €250,000.[17] The potential costs associated with taking a claim through the higher courts serves as a deterrent from availing of remedies under section 13 of the Act.

[15] See https://www.transparency.ie/sites/default/files/18.07.03_nii_report_vf.4.pdf
[16] See https://www.transparency.ie/sites/default/files/19.12.09_nii_report_2019.pdf
[17] See 'Legal costs in dispute over €228,000 'may exceed €500,000', The Irish Times, 1 March 2021, https://www.irishtimes.com/news/crime-and-law/courts/high-court/legal-costs-in-dispute-over-228-000-may-exceed-500-000-1.4498487

In the absence of any legislation aimed at reducing legal costs for litigants, the WRC will continue to be the primary route through which claimants will seek redress for penalisation or dismissal.

Recommendation 8

Consideration should be given to extending the same provisions for awards under section 12 (1) of the Protected Disclosures Act as are provided for under section 28 (3) c the Safety, Health, and Welfare at Work Act 2005 that requires the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances.

Recommendation 9

Consideration should be given to amending section 11 of the Act that provides for protection of employees who are dismissed for having made a protected disclosure. This section directs the redress provisions for such a dismissal away from the Protected Disclosures Act 2014 to the Unfair Dismissals Acts 1977 – 2015. Under the Unfair Dismissals Acts redress is only awarded for financial loss, to a limit of 260 weeks remuneration. In contrast, redress for penalisation under section 12(1) can require the employer to pay to the employee compensation of such amount (if any) as the adjudication officer considers just and equitable having regard to all the circumstances, but not exceeding 260 weeks' remuneration. As with Recommendation 7, consideration should be given to extending the same provisions for awards under section 7(1A) of the Unfair Dismissals Act 1977 (as amended by section 11(d) of the Protected Disclosures Act 2014) as are provided for under section 28 (3) c the Safety, Health, and Welfare at Work Act 2005.

Head 22 - Measures of support

As was noted in our submission on the transposition of the Directive in July 2020, Ireland meets most of its obligations under Article 20.1 (a) and (c) by providing:

- easy and free access to comprehensive and independent information and advice on procedures and remedies available, on protection against retaliation, and on the rights of the person concerned (via the TI Ireland Helpline/Website, TLAC and Integrity at Work programme) and
- access to free legal advice, counselling and legal assistance in the making of protected disclosures (via TLAC, upon assessment by the TI Ireland Helpline)
- TI Ireland intends to provide access to free psychological support to disclosers through a counselling support network in 2021.

It is likely that further demands will be placed on the TI Ireland Helpline, TLAC and Integrity at Work programme arising from the transposition of the Directive. Meeting this demand will require additional investment of resources.

In the absence of a financial reward system, TI Ireland also suggested that financial assistance could be provided by using fines imposed and/or revenues generated arising from investigations into protected disclosures to fund free legal aid for workers who have made protected disclosures and/or assist them to recover their legal costs.

Article 20 1 (b) suggests that competent authorities provide 'effective assistance' before any relevant authority involved in their protection against retaliation, including 'certification of the fact that they qualify for protection under this Directive'. In cases where there is any doubt about

whether a protected disclosure had been made, the competent authority, could provide evidence to a court, tribunal and/or employer to this effect.

Recommendation 10

Prescribed persons should be required to provide material assistance to persons that have been considered to have made a disclosure in a manner consistent with the Act, by:

(a) confirming to any person, unless already required to do so by law and in response to a written request by a reporting person, that the same reporting person is believed to have made a protected disclosure in a manner consistent with the Act; and/or

(b) by providing reporting persons access to a fund established for the purpose of meeting the costs of litigation arising from a protected disclosure made by the reporting person to the same prescribed person.

Head 24 - Penalties

Head 24 of the General Scheme provides '*for appropriate penalties for any person who:*

(a) Hinders or attempts to hinder a worker in making a protected disclosure;

(b) Penalises or threatens penalisation against a worker or a facilitator or causes or permits any other person to penalise or threaten penalisation against a worker or a facilitator for having made a protected disclosure;

(c) Brings vexatious proceedings against a worker for having made a protected disclosure or a facilitator for assisting a worker in making a protected disclosure; or

(d) Breaches the duty of confidentiality in section 16 or Head 13.'

Article 23 states that penalties should apply to all categories of persons referred to in Article 4 who are retaliated against. However, Head 24 only refers to workers and facilitators. There is currently no reference to other categories of reporting persons under Article 4 of the Directive including, but not limited to, volunteers, shareholders and non-executive directors.

Recommendation 11

Provide for appropriate penalties for any person who:

'(a) Hinders or attempts to hinder a reporting person in making a protected disclosure;

(b) Penalises or threatens penalisation against a reporting person or a facilitator or causes or permits any other person to penalise or threaten penalisation against a reporting person or a facilitator for having made a protected disclosure;

(c) Brings vexatious proceedings against a reporting person for having made a protected disclosure or a facilitator for assisting a worker in making a protected disclosure; or

(d) Breaches the duty of confidentiality in section 16 or Head 13.'

Miscellaneous Provisions

Trade Secrets

In transposing the Trade Secrets Directive (EU) 2016/943 in 2018, Ireland amended the Protected Disclosures Act to make a disclosure of wrongdoing punishable with up to three years in prison and a €50,000 fine for making a protected disclosure using trade secrets where they cannot prove they were motivated by the public interest.[18]

Recommendation 12

Section 5.7(a) of the Act should be repealed and S.I. No. 188 of 2018 amended to allow for the transposition of Article 21.7 of the Directive. This provides that the only test a reporting person must meet in availing of legal protections is that they had reasonable grounds to believe that the reporting or public disclosure [or a trade secret] was necessary for revealing a breach [as defined in the Directive].

Continuous Penalisation

The Act contains a six-month time limit for issuing a claim for penalisation, which can be extended in exceptional circumstances. Workers who have suffered penalisation as a result of having made protected disclosures often do so on an ongoing basis and often for longer than six months prior to their complaint to the Workplace Relations Commission (WRC). Where there is penalisation over a period of time which can be viewed as a series of similar acts, the time-limit runs from the last incident of penalisation. As long as the claim is taken within six months of the last incident, it does not matter that the period of penalisation began more than six months before the claim was initiated. This reflects the approach taken in cases such as Mr John Arthur v London Eastern Railway Limited.[19]

Recommendation 13

It is recommended therefore that Head 21 should be amended to make it clear that, where there is a period of such continuous or ongoing penalisation, the time-limit runs from the date of the last incident, which would include the date of dismissal.

In connection with employment

TI Ireland has previously recommended the revision of Section 5(2)(b) of the Act which provides that 'relevant information' must come to the 'attention of the worker in connection with the worker's employment'. This is an issue that has been brought to the attention of TLAC since 2016 and has posed a needless evidential burden for workers.

Recommendation 14

To avoid any risk of the wording being interpreted unduly narrowly, it should be removed altogether.[20] Alternatively, and to comply with Articles 4.1, 5.9 and 5.11 of the Directive, it should or

[18] See https://www.transparency.ie/news_events/irish-whistleblowers-could-face-criminal-prosecution-reporting-white-collar-crimes-and

[19] See [2006] EWCA Civ 1358 https://www.bailii.org/ew/cases/EWCA/Civ/2006/1358.html

[20] It is worth noting that no such language is used in the United Kingdom's Public Interest Disclosure Act 1998.

amended to read that relevant information must come to the 'attention of the reporting person in a work-related context'.

Duty to detect wrongdoing

Section 5(5) of the Act excludes from the definition of 'relevant wrongdoing' any matter 'which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer'. Section 5(5) can make it difficult for workers such as senior executives, board members, compliance officers or auditors to avail of protections under the Act, particularly where it is not clear what constitutes an 'act' or 'omission' on the part of the employer.

Recommendation 15

It is recommended that section 5(5) should be amended so that all reporting persons as defined in the Directive can avail of the protections of the Act where they face adverse treatment from their own employer for reporting or disclosing a relevant wrongdoing notwithstanding their duty to do so.

Definition of Protected Disclosure

It is not unusual for workers to ask for advice from co-workers or managers in the course of considering or preparing to make a protected disclosure, or to share a concern about a relevant wrongdoing without sharing relevant information as defined in Section 5(3).[21] Likewise, it is common for workers to indicate that they intend to make protected disclosures or ask questions that divulge knowledge or a reason to believe that wrongdoing may be taking place.

Recommendation 16

Consideration should therefore be given to broadening the definition of protected disclosure in Section 5(1). This would afford the appropriate protections to those that can show they intended or were believed or suspected by their employer or the person causing detriment to have made a protected disclosure. This scenario appears to have been anticipated and partly addressed in section 7 (24B.-1) of the Communications Regulation (Amendment) Act 2007 and in section 20 of the Criminal Justice Act 2011:

20.— (1) An employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee—

(a) for making a disclosure or for giving evidence in relation to such disclosure in any proceedings relating to a relevant offence, or

(b) for giving notice of his or her intention to do so.

[21] For instance in a Concierge V a Hotel (ADJ-00023901) of 5 February 2020, the WRC only recognised a written protected disclosure made in May 2019, after the complainant had resigned, and doubted whether complaints or concerns related to the same wrongdoing made in January that year amounted to protected disclosures because they did not provide 'detailed particulars' of the alleged wrongdoing.

Defamation

Although the Act contains a wide civil immunity provision to protect whistleblowers from being sued, they remain subject to defamation proceedings. It is open to a worker to seek to rely on a defence of 'qualified privilege' in such cases but instructing a solicitor to put forward the defence can be expensive and there is no guarantee that the worker will ultimately be protected.

Recommendation 17

Consideration should be given to amending the Act to repeal the exclusion for defamation and which would transpose Article 21.7 by protecting reporting persons against incurring 'liability of any kind as a result of reports or public disclosures under this Directive'.

Soft law

The list of relevant wrongdoings in section 5(3) of the Act may not always cover soft law mechanisms such as professional codes or ethical guidelines, upon which the public, customers and employers often rely to protect themselves from risks and harmful practices. These practices include:

- The mismanagement of or failure to disclose conflicts of interest by providers of professional services;
- improper staff recruitment (including, for example, the appointment of family and friends who are not properly qualified for the role);
- the cover up of such activities and/or repeated misconduct.

Recommendation 18

TI Ireland recommends that the list of relevant wrongdoings in the Act should be expanded to explicitly include the above. Alternatively, the list of relevant wrongdoings could be expanded to include a breach of a professional code of conduct or any code of conduct to which the worker is contractually bound and where it is in the public interest to disclose it. As with the position with volunteers, some employers have attempted to deal with the gap in the legislation by extending their policies to cover such wrongdoing. This can lead to confusion and pose additional legal risks to workers in circumstances where the worker may only have the protection of their employer's policy and not the full cover of the Act.