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An Comhchoiste um Airgeadas, Caiteachas Poiblí agus Athchóiriú, agus an Taoiseach

Tuarascáil ón gComhchoiste maidir leis an nGrinnscrúdú Réamhreachtach ar Scéim Ghinearálta an Bhille um Nochtadh Cosanta (Leasú), 2021

Nollaig 2021

Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

Report of the Joint Committee on the Pre-Legislative Scrutiny of the General Scheme of the Protected Disclosures (Amendment) Bill 2021

December 2021

33/JF/4

MEMBERS OF THE JOINT COMMITTEE

Deputies

		
Mick Barry (SOL-PBP) **Cork North-Central**	**Pearse Doherty (SF)** **Donegal**	**Bernard Durkan (FG)** **Kildare North**
		
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Senators

		
Maria Byrne (FG)	**Pat Casey (FF)**	**Aidan Davitt (FF)**

		
Alice-Mary Higgins (IND)	**Marie Sherlock (LAB)**	

CATHAOIRLEACH'S FOREWORD

The Protected Disclosures (Amendment) Act 2021 aims to transpose the EU Directive on the protection of persons who report breaches of Union law (commonly referred to as the "EU Whistleblowing Directive"). The issue of protected disclosures is one of vital importance and interest to the Committee, and as such the Committee scheduled an engagement with stakeholders prior to commencing formal scrutiny.

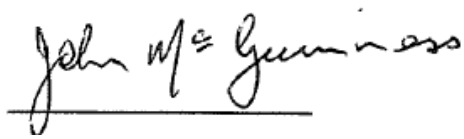
The Committee heard initially through this preliminary engagement, and throughout its examination of the issue, that although Ireland's protected disclosure regime is well regarded internationally, there are significant failings in the level of protection and facilitation of whistleblowers in dealing with their claims. These failings include lack of information about the progress of an individual's case, prolonged delays, a lack of transparency about the process, lack of accountability, and obstructions of one kind or another that could be seen as penalisation.

The negative impact on these individuals and their lives, careers, families, and people associated with them was clear, and was a recurring theme in the public engagements held and submissions received by the Committee during the scrutiny of the General Scheme of the Bill. When it is considered that these detriments have resulted from whistleblowers having stepped forward in the public interest, it is plain that amendments need to be made to how protected disclosures are dealt with in Ireland for the sake of disclosers, and for the benefit of society in general, which only stands to gain by the exposition and elimination of wrongdoing.

The Committee greatly welcomed the opportunity to investigate this issue and sees the forthcoming legislation as a good opportunity to make significant improvements to the operation of the protected disclosure regime, both in terms of improved legislation and through developments in practice. The Committee is of the view that the proposed Protected Disclosures Office working in tandem with, but maintaining clear independence, from the Department of Public Expenditure and Reform will provide the vehicle through which practice can be continually improved and modified. To achieve this successfully, the office must be fully staffed and funded from its inception, and any lack of willingness to proceed at pace must be addressed forcefully.

The Committee believes that these opportunities must be taken if they are to bring about the necessary improvements sought. It notes and is encouraged by the views expressed by the representatives of the Department of Public Expenditure and Reform during their engagement with the Committee, which demonstrated that the Department is taking a rounded view of the issues and is determined to fully understand the issues and challenges that must be overcome in this area.

I would like to I thank all those who provided submissions and attended meetings of the Committee for their input to the examination of this topic, particularly those who had personal experience of making a protected disclosure. I also thank the staff of the Library & Research Service and the Secretariat for their assistance in the production of this report.



John McGuinness T.D.
Cathaoirleach
9 December 2021

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COMMITTEE RECOMMENDATIONS

Recommendation 1:

The Committee recommends that the amendments to the original Protected Disclosures Act 2014 should be retrospective in nature to ensure protected disclosures made prior to the enactment of the amended legislation receive the full benefit of the legislation

Recommendation 2:

The Committee recommends that consideration be given to the removal of the requirement as it may be incompatible with the Directive

Recommendation 3:

The Committee recommends that consideration be given to amending Head 22 of the Bill as recommended in the Transparency Ireland International (TII) submission to accommodate this point

Recommendation 4:

The Committee is of the opinion that adequate resources will be fundamental to the implementation and operation of the Bill and recommends that publication of the final Bill should be accompanied by a clear commitment to the provision of such resources

Recommendation 5:

The Committee recommends that the practicality and benefits of publishing such information and whether it should be published on a statutory basis should be considered in the drafting and subsequent consideration of the Bill

Recommendation 6:

The Committee is of the opinion that section 5(7)(a) of the 2014 Act should be repealed and S.I. No. 188 of 2018 amended to allow for the appropriate transposition of Article 21.7 of the Directive

Recommendation 7:

The Committee recommends that the Department would, shortly after the enactment of the legislation, commence a public information campaign with the respect to the role of whistleblowing in the advancement of the public good

Recommendation 8:

The Committee recommends that consideration be given to amending section 14 of the Principal 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"

Recommendation 9:

The Committee recommends that the following additional definitions of "penalisation" be included:

(s) Vexatious proceedings brought against a discloser

(t) Attempts to hinder further reporting

Recommendation 10:

The Committee recommends that consideration be given to defining "detriment" in section 13 of the 2014 Act in a similar non-exhaustive, comprehensive manner to that applied to "penalisation" in order to avoid inadvertent limitation of the protections for individuals

Recommendation 11:

The Committee further recommends that the definition of "reporting person" be clarified to ensure that it explicitly includes all those who "make a disclosure in a work related context"

Recommendation 12:

The Committee recommends that in order to avoid any tension between conflicting legal obligations, the phrase "psychiatric or medical referrals." within the definition of "penalisation" should be replaced with "unfounded or inappropriate psychiatric or medical referrals"

Recommendation 13:

The Committee recommends that the proposed new section 5(9) on the exclusions in relation to "interpersonal grievance" would not be included as it could create uncertainty or discourage disclosure

Recommendation 14:

The Committee recommends that, in the drafting of the Bill, careful consideration is given to defining when a breach of the proposed legislation has occurred and that clarity be provided as to what the term "likely to occur" means

Recommendation 15:

As a first step, the Committee recommends that a statement setting out the sector-specific legislation currently in force and how the Bill proposes to amend provisions of such legislation should be published by the Department of Public Expenditure and Reform, either as part of the Explanatory Memorandum to the Bill or separately, at the same time as the Bill is published

Recommendation 16:

The Committee recommends that the HSE publishes its views in relation to whether provisions in the Health Act should be repealed by laying them before the Houses of the Oireachtas in advance of the debate on the motion for the Second Reading of the Bill

Recommendation 17:

The Committee recommends that in the drafting of the Bill, in order to avoid inadvertent narrowing of application, the term worker might where appropriate be replaced with "reporting person", with a definition of "reporting person" which explicitly includes all those who make a report in a "work related context"

The Committee is of the opinion that an extension of the scope of the Bill as recommended by ICCL could be introduced with the following amendment to section 5 of the Principal Act:

"Section 5 of the Principal Act is amended-

(a) in subsection (2)(i) by the substitution of the following for paragraph (b):

"(b) it came to the attention of the person in a work-related context",

Recommendation 18:

The Committee recommends, in finalising the drafting of the Bill, the Department should clearly set out these limits

Recommendation 19:

The Committee therefore recommends that section 5A(2) be removed and a decision whether or not to follow up be made based on the criteria set out in Head 10

Recommendation 20:

The Committee recommends that there should be legal requirement to accept anonymous reports of breaches and determine follow up on the same basis as other disclosures

Recommendation 21:

If removal of the requirement is considered unnecessary, the Committee recommends that it should also be provided for in the Bill that failure on the part of a reporting person to co-operate will not of itself be sufficient grounds for not commencing or for discontinuing an investigation in order to address the concerns expressed that failure to co-operate would offer a reason for a wrongdoing organisation not to follow up on a genuine disclosure

Recommendation 22:

The Committee recommends that further consideration be given to the date by which private sector entities with 50 or more employees must establish internal channels and procedures for making protected disclosures and follow-up; and that amendments should be brought forward at Committee Stage if this is considered necessary or appropriate

Recommendation 23:

The Committee believes that allowing such entities to share reporting and investigative resources would provide benefits for both the entities and disclosures. Therefore, it recommends that sharing of these resources by grouped entities with 250 employees should be allowed

Recommendation 24:

The Committee recommends that careful consideration be given during the drafting of the Bill to reducing the time limits prescribed for feedback to disclosers to they are made aware that their disclosure is being dealt with in an appropriate and timely fashion

Recommendation 25:

The Committee recommends that the desirability and practicality of reducing the timeframes for feedback should be considered in the drafting and subsequent consideration of the Bill

Recommendation 26:

The Committee recommends that the Bill should be amended to provide that in addition to an entitlement to initial feedback at three to six months, a reporting person should be entitled to request further interim feedback from the prescribed person on their protected disclosure at least once every 12 months thereafter until a final outcome is reached. The Committee further recommends that the Bill should include a requirement for final outcomes on all cases to be delivered after a maximum of three years

Recommendation 27:

The Committee believes that where persons have made a protected disclosure in the past but are still awaiting information as to the final outcome of that disclosure, they should, following the enactment of this Bill, be entitled to seek and receive feedback from a prescribed person in the manner outlined in this legislation or, where the issue has been resolved, they should be entitled to seek and receive information as to the final outcomes from that prescribed person and the Committee recommends that the Bill be amended to accommodate this aspect

Recommendation 28:

The Committee accordingly recommends that, in finalising the drafting of the Bill, the Department considers the arguments made by Dr. Kierans against the amendment of section 7(1)(b)(ii) of the Principal Act

Recommendation 29:

The Committee reiterates its recommendation that consideration be given to whether the requirement should be removed to ensure compliance with the Directive

Recommendation 30:

The Committee recommends that consideration be given to publishing the report; and that the treatment of HSE-funded agencies should be explicitly considered by it during Committee Stage of the Bill

Recommendation 31:

The Committee notes that the adequate resourcing of provisions mandated by the Directive will be essential in allowing the successful operation of the envisaged protected disclosures regime. It recommends that the Department issues clear guidelines to signal this, and to facilitate obligated entities in implementing the necessary provisions

Recommendation 32:

The Committee recommends that, in finalising the drafting of the Bill, the Department seek to ensure compatibility with the non-regression clauses under Article 25 of the Directive, and that new and additional conditionalities around disclosure to a Minister are not inserted under Head 11

Recommendation 33:

The Committee recommends that during the drafting of the Bill the term 'appropriate action' be defined

Recommendation 34:

The Committee recommends that consideration be given to whether, having regard to the Directive, all and any tests provided for by or under existing legislation or the current Heads for disclosers in cases involving trade secrets is appropriate and proportionate

Recommendation 35:

The Committee recommends that care should be taken, in drafting regulations as envisaged by Head 14, to ensure to the extent possible that they cannot be used solely, principally, or incidentally for the purpose of establishing the identity of protected disclosers

Recommendation 36:

The Committee recommends that the Bill is drafted to ensure the independence of the Protected Disclosures Office, particularly in relation to its functions in respect of disclosures made to Ministers (Head 11)

Recommendation 37:

The Committee also recommends that alternative mechanisms be provided to deal with disclosures by Protected Disclosures Office staff

Recommendation 38:

The Committee further recommends that careful consideration is given in the drafting of the Bill to the relationship between the PDO and the Department and where responsibility for the issuing of any guidance should reside as between the Minister, the Department, or the Protected Disclosures Office

Recommendation 39:

The Committee is of the opinion that the drafting of the PDO's functions needs to be carefully scrutinised in general but specially to ensure that it remains independent, particularly in relation to its functions in respect of ministerial disclosures. The Committee also recommends that there should be a mechanism to ensure that whistleblowing disclosures by PDO staff are not investigated by the PDO itself

Recommendation 40:

The Committee accordingly recommends that there should be detailed engagement between those in the Office of the Ombudsman and in the nascent office charged with its establishment and the Department of Public Expenditure and Reform regarding its set-up and operation and the resources required in this regard

Recommendation 41:

The Committee further recommends that in resourcing the Protected Disclosures Office there should be some capacity for the appropriate collection of data for the purposes of identifying particular patterns of relevant wrongdoing within a public body or a sector and that appropriate aggregate information in relation to such patterns should be published by the Protected Disclosures Office

Recommendation 42:

The Committee also recommends that resourcing of the Protected Disclosures Office should be explicitly addressed in its annual reports and that consideration should be given to including this as a statutory requirement

Recommendation 43:

The Committee recommends that, where bodies consider that a disclosure relates to a matter not within their remit, there should be an onus on them to redirect the disclosure to the appropriate body or to the Protected Disclosures Office; and that the Protected Disclosures Office should have statutory authority to make determinations regarding remit in relation to matters referred to it

Recommendation 44:

The Committee recommends that that during the drafting of the Bill a requirement be inserted that disclosures be securely transmitted

Recommendation 45:

The Committee recommends that clarity be provided as to what exactly is required when communicating the outcome of an investigation under subsection (d) to avoid any infringement with respect to the provisions of Heads 14 and 15

Recommendation 46:

The Committee recommends that consideration be given during the drafting of the Bill to including a provision that employers be given notice by appropriate means as soon as possible of any alleged retaliation by them against a discloser, with a view to protecting the discloser from intimidation

Recommendation 47:

The Committee recommends that where a person previously made a protected disclosure and continues to suffer the effects of penalisation, they should be entitled to make a new request for compensation under this Act

Recommendation 48:

The Committee recommends that provision is made in the legislation creating an obligation to provide interim feedback to persons who have made a protected disclosure

Recommendation 49:

On this basis, the Committee recommends that thought be given to amending section 12 (1) of the Protected Disclosures Act to provide the same awards as are provided for under section 28 (3) (c) of the Safety, Health, and Welfare at Work Act 2005

Recommendation 50:

The Committee also recommends that consideration be given to amending section 11 of the Act that provides for protection of employees who are dismissed for having made a protected disclosure as are provided for under section 28 (3)(c) of the Safety, Health, and Welfare at Work Act 2005

Recommendation 51:

The Committee recommends that, in drafting the Bill or amendments to the Bill at Third Stage, consideration be given to how this shifting of the burden of proof should be clearly reflected and provided. The Committee do not support the proposals made by IBEC in relation to reduced compensation

Recommendation 52:

The Committee is of the opinion that clarity should be provided in respect of the proposed time-limit for presenting a complaint and recommend that where there is a period of continuous or ongoing penalisation, the time-period for presentation of a complaint shall run from the date of the last incident

Recommendation 53:

The Committee recommends that an amendment should be included that would provide clarity in respect of the proposed time limit for presenting a complaint

Recommendation 54:

The Committee is of the opinion that during the drafting of the Bill it will be necessary to provide clarity in relation to the definition of 'penalisation'. It further recommends that greater clarity should be provided as to how employers will make reparations to non-traditional workers including volunteers, unpaid trainees, board members and job applicants, and the extent to which these groups should have access to the WRC

Recommendation 55:

The Committee notes that Article 21(7) unequivocally provides that persons comprehended by Article 4 of the Directive "shall not incur liability of any kind as a result of reports or public disclosures under this Directive" and recommends that the text of the Bill include clear provision to this effect

Recommendation 56:

The Committee recommends that specific provision for access to legal aid for whistleblowers be made in the legislation, along with a reference to other appropriate supports, which should include counselling

Recommendation 57:

The Committee recommends that, in deciding on the penalties to be provided for in the Bill, the Minister take account of the views expressed to the Committee

Recommendation 58:

The Committee further recommends that the phrase “reporting person” should be used instead of “worker” in relation to this section on penalties

Recommendation 59:

The Committee recommends that consideration be given to how reporting requirements may interact with other legislation, particularly the obligation to provide financial information following the conclusion of investigations and proceedings

Recommendation 60:

The Committee is of the opinion that these steps would enhance accessibility to protected disclosures annual reports and facilitate those seeking to make protected disclosure within the bodies concerned. Therefore, the Committee recommends the inclusion of such a provision in the Bill

CHAPTER 1 – Introduction

The General Scheme of the Protected Disclosures (Amendment) Bill ("the General Scheme") was published on 12 May 2021 by the Minister for Public Expenditure and Reform, Mr. Michael McGrath, T.D.

The purpose of the proposed Bill is to provide for the transposition of Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law ("the Whistleblowing Directive") into Irish law. The Directive's transposition date is 17 December 2021.

The Directive aims to set a common minimum standard across EU Member States for the protection of persons who report information about threats or harm to the public interest obtained in the context of their work-related activities. It is open to Member States to extend the scope of the directive beyond breaches of EU law to include breaches of national law.

The general scheme follows on from the Programme for Government, which contained a commitment to "use the opportunity of the EU consideration of reforms to European-wide whistleblowing provisions to review, update and reform our whistleblowing legislation and ensure that it remains as effective as possible".

The general scheme was referred to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach ("the Committee") on 11 May 2021. The Committee agreed on 26 May to undertake pre-legislative scrutiny (PLS) of the general scheme.

In advance of the formal pre-legislative scrutiny process commencing, the Committee met with several whistleblowers to hear of their lived experience of the existing legislation and their suggestions as to how it could be improved.2

[2] JCFPERT Meeting 27 May 2021

The Committee sought 26 written submissions that were received over the summer recess and held three public hearings:

JCFPERT Meeting 22 September 2021

JCFPERT Meeting 29 September 2021

JCFPERT Meeting 6 October 2021

The Committee's conclusions and recommendations arising from submissions received and evidence heard by the Committee in public session are set out in this report.

CHAPTER 2 – Background to the General Scheme

Details of and background to the Directive

The purpose of the Bill is to transpose Directive (EU) 2019/1937 of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union law (commonly referred to as the "EU Whistleblowing Directive").

The Directive, which must be transposed by 17 December 2021, aims to set a common minimum standard across EU Member States for the protection of persons who report information about threats or harm to the public interest obtained in the context of their work-related activities. The Directive provides for designated internal and external workplace channels to report wrongdoing, protections to be applied during and after investigations, reporting and feedback requirements, penalties for non-compliance, and remedies for those who are penalised for making protected disclosures.

Protected Disclosure Act 2014

Ireland is one of ten EU countries that has previously enacted comprehensive statutory protections for whistleblowers under the Protected Disclosures Act 2014 (PDA). The PDA provides reporting channels, protections for persons who report wrongdoing and remedies for those who are penalised. Further, the Act also addresses several special cases and miscellaneous matters such as disclosures concerning law enforcement, national security, defence, and international relations, as well as having provision for annual reporting by public bodies.

A statutory review of the Act was published in July 2018. This found the impact of the Act has been broadly positive to date, although it raised some implementation and procedural issues in the public sector. [4] Civil society groups, expert bodies and whistleblowers themselves also highlighted concerns in relation to the 2014 legislation and its implementation.

[4] Statutory Review of the Protected Disclosures Act 20214 (July 2018)

Interaction of the EU Whistleblowing Directive with Protected Disclosures Act

The Directive is similar in many regards to the Protected Disclosures Act, and successful implementation of the Directive would strengthen the protections in place for whistleblowers in Ireland, while also providing greater clarity regarding duties and obligations for recipients of disclosures from whistleblowers. There are several key areas of difference between the Act and the Directive which must be addressed during the transposition process:[5]

Material Scope

The broad definition of "wrongdoing" under the Act aligns with most categories within the material scope of the Directive, but some aspects, such as breaches concerning the Internal Market, must be included.

Personal Scope

The Directive provides protections for persons extending beyond the scope of the PDA, which focuses on workers as traditional employees. The Directive extends protections to a broad range of reporting persons, including shareholders and volunteers.

Internal and External Reporting Channels

The channels for internal reporting envisaged by the Directive are similar to the PDA in that they allow for internal reporting to an employer, external reporting to a prescribed person, and public disclosure. The conditions for external reporting and public disclosure are slightly different and notably there is no equivalent provision in the Directive for reporting to Government Ministers as provided for in the Act.

Operation of Reporting Channels

The Directive imposes specific obligations on employers and prescribed persons who receive reports of wrongdoing. These relate primarily to having formal channels for receipt of reports, obligations to act upon reports and requirements for providing feedback to

[5] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (europa.eu)

whistleblowers. These obligations are not included in the PDA, while the obligation to have formal procedures to deal with protected disclosures only applies to public bodies.

Protections

The Directive provides that Member States must provide protection from retributive actions by the employer, and any civil or criminal liability arising from reporting wrongdoing. Although these protections are not defined, Article 23 of the Directive states that "effective, proportionate and dissuasive penalties" should apply for persons who breach or frustrate the provisions and purpose of the Directive.

Key elements of the General Scheme:[6]

The General Scheme comprises 6 Parts, which, in turn, include 26 Heads.

Part 1 - Preliminary and general.
Part 2 - The application of the Bill, including personal and material scope
Part 3 - Internal and external reporting channels
Part 4 - Establishment of a Protected Disclosures Office
Part 5 - Protections for whistleblowers and penalties for breaches of the Directive
Part 6 - Miscellaneous and supplementary.

The key areas to be addressed during the transposition process include the scope of persons who are protected, the creation of new internal and external reporting channels, the establishment of a new Protected Disclosures Office, and the strengthening of protections for whistleblowers.

Policy Objectives

The Department of Public Expenditure and Reform stated that its policy objectives are:

- In the short term, to align Ireland with the minimum standards of the Directive by transposing it into Irish law by 17 December 2021

[6] General Scheme of the Protected Disclosures (Amendment) Bill 2021

- In the long term, to review, update, and reform national whistleblower protection laws to ensure they remain as effective as possible

Flexibility to Include Additional Provisions

In some key areas, the option to provide enhanced protections beyond those in the Directive have been left at the discretion of Member States, including:

- Extension of the Directive to cover additional breaches, for example, disclosures in the public interest
- Whether anonymous disclosures must be accepted and followed up on, and
- Penalties for those who retaliate against individuals making protected disclosures

Retrospective application of the legislation

The Committee notes that a noteworthy and lauded feature of the Protected Disclosure Act 2014 was that it is retrospective in effect, that is, that a disclosure made before the date of the Act (15 July 2014) may be a protected disclosure.

The Minister for Public Expenditure and Reform, Mr. Michael McGrath, T.D., has been tasked with transposing the European Directive into Irish law and has taken this opportunity to amend elements of the original 2014 Act which have been found to be deficient in purpose and weak in delivery.

The Committee notes that, unfortunately, the drafting of the general scheme has failed to embrace the valued retrospective nature of the 2014 Act and needs to provide the benefit of these amendments to those who made protected disclosures prior to the amendments being passed.

This means that those who made protected disclosures prior to 2022 will be left at a disadvantage as they seek justice and an effective remedy through a deficient and weak Act, although the aim of the general scheme is to improve the protections available.

Restricting access to these improvements will be a breach of the public sector equality and human rights duty. There is a legal obligation contained in section 42 of the Irish Human Rights and Equality Act 2014 that public sector bodies must assess and identify the human rights and equality issues that are relevant to their functions. Restricting the benefit of the amendments to protected disclosures submitted after 2022 will deny the right of an effective remedy to those who submit their protected disclosure prior to 2022. It is imperative that the amendments which repair the deficient sections of the original Act are made available to all equally. The proposed amendments must be retrospective, in keeping with the celebrated spirit of the original Act and the promotion of fairness and equality.

Recommendation 1:

The Committee recommends that the amendments to the original Protected Disclosures Act 2014 should be retrospective in nature to ensure protected disclosures made prior to the enactment of the amended legislation receive the full benefit of the legislation

Compatibility of the General Scheme with the Directive

1. The Committee referred the general scheme to the Office of the Parliamentary Legal Advisor (OPLA) for an independent assessment of whether the legislation would lower existing national standards in respect of protected disclosures and to confirm that it was compliant with the EU Directive that the proposed legislation is intended to transpose. The Committee understands that the proposed alteration, under Head 10 of the Bill, of the requirement that a reporting person believes that wrongdoing is "substantially true" to the belief that it is "true" may create a higher threshold for reporting of the wrongdoing externally. This would appear not to be compatible Article 6 of the Directive.

2. The Committee notes that there is no obligation contained in the Directive that a reporting person "co-operate, as required" with the investigation of the reported wrongdoing; and also that the consequences of failure to comply with this obligation have not been set out. The Committee further notes that there may be valid reasons for a reporting person not to co-operate with an investigation.

Recommendation 2:

The Committee, therefore, recommends that consideration be given to the removal of the requirement as it may be incompatible with the Directive

3. The Committee notes that several of the submissions received argue that the additional requirements that a reporting person must satisfy themselves that a matter is "true" rather than "substantially true" prior to making a disclosure to a relevant Minister are in breach of the non-regression clause contained in Article 25 of the Directive. It is clear that this argument can be made, but the Committee notes that such arguments are unlikely to be upheld by the Court of Justice where a State can justify the amendment under objective policy grounds. It is, therefore, unlikely that the requirements will be found to have infringed the Directive. The Committee also notes that section 8 of the 2014 Act is potentially outside the scope of the Directive's non-regression clause as direct reporting to a government official is not a provision of the Directive.

4. The Committee notes that the Directive clearly states (both in its Recitals and in Article 21) that the burden of proof in cases taken seeking relief from retaliation falls on the employer; and further notes that several submissions correctly pointed out that such a provision is absent from the Bill. However, the Committee notes that the intention to include the provision was expressly mentioned in the Department's official press release regarding the Bill. The Committee, therefore, expects that the provision will be included during the drafting of the Bill.

5. The Committee notes that, as acknowledged in several submissions to the Committee, Ireland already satisfies the requirements that Member States provide measures of support to reporting persons, apart from those under Article 20.1(b), relating to the potential certification of a protected disclosure having been made by a prescribed person.

Recommendation 3:

The Committee recommends that consideration be given to amending Head 22 of the Bill as recommended in the Transparency Ireland International (TII) submission to accommodate this point

Chapter 3 - Overview and assessment of the General Scheme

General comments on the Heads of the Bill

A number of organisations expressed the view that implementation and operation of the Bill as envisaged by the Heads would have staffing implications for them and that additional resources would be required to allow them to meet the additional responsibilities arising.

Recommendation 4:

The Committee is of the opinion that adequate resources will be fundamental to the implementation and operation of the Bill and recommends that publication of the final Bill should be accompanied by a clear commitment to the provision of such resources

The Mental Health Commission pointed out that there does not appear to be a time limit for the disclosure of a wrongdoing from the time it is witnessed or identified, only in relation to an employers' acknowledgement and response and asked whether this should be addressed.

The Committee is of the opinion that it would not be appropriate to introduce time limits for the reporting of wrongdoings.

Publication of information in relation to the operation of legislation dealing with protected disclosures

NUIG observed that metadata around whistleblowing can be communicated to the public in a way that does not breach confidentiality and expressed the view that this should be encouraged as research indicates it is important in promoting a speak up culture.

Recommendation 5:

The Committee recommends that the practicality and benefits of publishing such information and whether it should be published on a statutory basis should be considered in the drafting and subsequent consideration of the Bill

Disclosures in the public interest

The Irish Council for Civil Liberties expressed the view that whistleblowing may not always involve specific individual or institutional malfeasance but rather can relate to the uncovering or other discovery of information which it is in the public's interest to know. The council suggested that it would be desirable to see a general protection being legislated for which would encapsulate disclosures in the public interest.

Resourcing and data sharing

The Garda Síochána Ombudsman Commission (GSOC) highlighted two predominant concerns, the proper provision of resources and training on the new provisions, along with clarity on data sharing which protects the discloser but allows for efficient investigation and efficient processing of a protected disclosure.

GSOC noted that the decision of a discloser to publicly identify themselves does not release the organisation(s) dealing with the protected disclosure of the obligations under section 16 of the 2014 Act. This, GSOC stated, has led to difficulties for all involved and the recommendations of the Disclosures Tribunal should be considered in that regard.[7]

Non-regression clause

Dr. Lauren Kierans, NUIM, stated that the approach to transposition must be underpinned by reference to Article 25 of the Directive, which provides that:

[7] Fourth Interim Report of the Tribunal Inquiry Terms of Reference [p] ("the Disclosures Tribunal") at Vol. 2 P.767.

> 1. Member States may introduce or retain provisions more favourable to the rights of reporting persons than those set out in this Directive, without prejudice to Article 22 and Article 23(2).
>
> 2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection already afforded by Member States in the areas covered by this Directive.

Dr. Kierans observed that section 5(7A) of the 2014 Act conflicts with Article 21(7) of the Directive and noted that all that was required was that a worker made a protected disclosure to attract immunity without having to establish that, in making of the disclosure, the worker was acting for the purpose of protecting the public interest. She concluded that section 5(7A) of the 2014 Act must be deleted.

Dr. Kierans referred to Article 21.5 of the directive which states:

> In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds.

She noted that section 5(8) of the 2014 Act provides that in proceedings involving an issue as to whether a disclosure is a protected disclosure, it is presumed that it is until the contrary is proved by the respondent. She concluded, therefore, that section 5(8) needs to be retained and the provisions regarding penalisation claims under section 12, detriment claims under section 13, and breach of confidentiality claims under section 16 should be amended so that it is presumed that the penalisation/detriment was in retaliation for the protected disclosure.

Trade Secrets

Transparency International Ireland (TII) suggested that section 5(7)(a) of the 2014 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].

Recommendation 6:

The Committee is of the opinion that Section 5(7)(a) of the 2014 Act should be repealed and S.I. No. 188 of 2018 amended to allow for the appropriate transposition of Article 21.7 of the Directive

Public Information

Recommendation 7:

The Committee recommends that the Department would, shortly after the enactment of the legislation, commence a public information campaign with the respect to the role of whistleblowing in the advancement of the public good

Duty to Detect Wrongdoing

It is recommended Transparency International Ireland 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.[8]

Definition of Protected Disclosure

Consideration should be given to broadening the definition of protected disclosure in section 5(1). This would afford the appropriate protections to those who can show they

[8] Transparency Ireland International Submission

intended or were believed or suspected by their employer or the person causing detriment to have made a protected disclosure.

Defamation

Recommendation 8:

The Committee recommends that consideration be given to amending section 14 of the Principal 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". [9]

Soft Law

TI Ireland recommends that the list of relevant wrongdoings in the Act should be expanded to explicitly include 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.

Part I – Preliminary and General (Heads 1-4)

This Part deals with preliminary and general matters and sets out a number of key definitions used in the Bill.

Head 1: Short Title, collective citation, and commencement

Head 1 contains standard provisions relating to the Short Title, collective citation, and commencement of the Bill, including a provision that the Bill shall come into operation on such day or days as the Minister may by order or orders appoint either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or different provisions.

[9] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (europa.eu)

Head 2: Interpretation

Head 2 proposes the amendment of section 3 (interpretation) of the Protected Disclosures Act 2014 by:

(a) the insertion of a number of definitions relating to terms used in the general scheme[10], and

(b) the amendment of the existing definition of "penalisation", extending the definition by the insertion of the following after paragraph (i):

"(j) withholding of training;

(k) a negative performance assessment or employment reference;

(l) failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he or she would be offered permanent employment;

(m) failure to renew or early termination of a temporary employment contract;

(n) harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;

(o) blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry;

(p) early termination or cancellation of a contract for goods and services;

(q) cancellation of a licence or permit; and

(r) psychiatric or medical referrals."

[10] Viz.: "Principal Act" (Protected Disclosures Act 2014), "Breaches", "Data protection law", "Directive 2016/680", "Facilitator", "Follow-up", "Feedback", "General Data Protection Regulation", "Ombudsman", "Person concerned", "Reporting person", "Union" (the European Union), "Whistleblowing Directive" and "Work-related context",

Recommendation 9:

The Committee recommends that the following additional definitions of "penalisation" be included:

(s) Vexatious proceedings brought against a discloser

(t) Attempts to hinder further reporting

The term "detriment"

Dr. Lauren Kierans, NUIM, suggested defining "detriment" in section 13 of the 2014 Act in the same terms as the non-exhaustive, comprehensive definition of "penalisation" in Head 2(2). This would avoid including a limitation on protection for individuals due to the restrictive definition of "detriment".

Recommendation 10:

The Committee recommends that consideration be given to defining "detriment" in section 13 of the 2014 Act in a similar non-exhaustive, comprehensive manner to that applied to "penalisation" in order to avoid inadvertent limitation of the protections for individuals

Recommendation 11:

The Committee further recommends that the definition of "reporting person" be clarified to ensure that it explicitly includes all those who "make a disclosure in a work related context"

Medical Referrals

The Law Society expressed the view that the inclusion of medical referrals as paragraph (r) in the definition of "penalisation" should not include referrals an employer is required to discharge under its legal obligations to the relevant employee.

Recommendation 12:

The Committee recommends that in order to avoid any tension between conflicting legal obligations, the phrase "psychiatric or medical referrals." within the definition of "penalisation" should be replaced with "unfounded or inappropriate psychiatric or medical referrals"

Head 3: Expenses

Head 3 proposes a standard provision to the effect that expenses incurred by the Minister shall be paid out of moneys provided by the Oireachtas.

Head 4: Regulations

Head 4 proposes what is referenced as "a standard provision relating to any regulation making powers granted to the Minister under the Bill".

Part II – Application of the Bill (Heads 5-8)

Part II concerns the application of the Bill with the aim of aligning the scope of the Protected Disclosures Act with the material and personal scope of the Directive as well as setting out the legal position on the receipt of anonymous disclosures.

Head 5: Material scope

As per the explanatory note to the Head –

- Head 5 proposes amending the definition of a "relevant wrongdoing" in the Protected Disclosures Act to include all matters within the material scope of the EU Whistleblowing Directive.

- Head 5 also proposes the insertion of a provision that matters concerning interpersonal grievances are not relevant wrongdoings, in accordance with Recital 22 of the Directive.

NUIG suggested that there was no need to exclude interpersonal grievances from the definition of "relevant wrongdoings" as, if "interpersonal grievances exclusively affecting the reporting person" do not represent relevant wrongdoings, this will become clear in the normal process of triage when organisations receive and deal with disclosures, as recommended by the EU Directive. NUIG also suggested that excluding personal grievances may encourage authorities to dismiss mixed disclosures or not accord them appropriate weight.[11]

Transparency International Ireland expressed the view that section 5 of the Act should remain unaffected by Recital 22 but that additional statutory guidance would be needed to address confusion among employers about how interpersonal grievances and protected disclosures are assessed and investigated.[12] It also noted the importance of proper training for those dealing disclosures and that without it, a person may mistake a protected disclosure containing an element of personal grievance as simply a personal grievance.[13]

Transparency International Ireland also suggested that consideration should be given to 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]

The Council of the Bar of Ireland favoured the exclusionary provision concerning interpersonal grievances but advised that the term "interpersonal grievance" should be defined in the Bill.[15]

During its scrutiny, the Committee expressed concern about the proposed exclusions in respect of interpersonal grievance. Members sought clarity and confirmation that the fact

[11] NUIG Submission
[12] TII Submission
[13] JCFPERT Meeting 27 May 2021, P.20.
[14] TII Submission
[15] Council of the Bar of Ireland Submission

that an individual is in a process relating to an interpersonal grievance should in no way preclude them from also, and possibly simultaneously, making a protected disclosure and noted that this would need to be clear in the legislation not just in interpretation as the phrase "can be channelled to other procedures" which is currently proposed seems to imply a protected disclosure would be a last resort rather than an action to be supported. Witnesses noted the lack of definition around interpersonal grievance and the further ambiguity created by the use of variable terms such as 'grievance' and 'interpersonal conflict'.

The Committee recommends that the proposed new section 5(9) on the exclusions in relation to "interpersonal grievance" would not be included as it could create uncertainty or discourage disclosure. The Committee is of the view that the exclusionary grounds for "interpersonal grievance" creates unnecessary risks that a legitimate protected disclosure of wrongdoing, could be deliberately mischaracterised and miscategorised as relating to another matter (for example: grievance, or respect and dignity in the workplace) or that reference to a grievance or interpersonal process could be used to delay or redirect action in relation to a protected disclosure. This could prevent the wrongdoing from being revealed and afford the discloser less protection and may even create a perverse incentive for the personal targeting of a potential whistleblower.

Recommendation 13:

The Committee recommends that the proposed new section 5(9) on the exclusions in relation to "interpersonal grievance" would not be included as it could create uncertainty or discourage disclosure

The Law Society suggested that greater clarity was needed in relation to the proposal to exclude interpersonal grievances where the facts giving rise to the grievance overlap with the definition of a protected disclosure. It observed that greater clarity and certainty is

needed in relation to what the terms "grievances" and "interpersonal conflicts" will mean when they will not be considered to constitute a relevant wrongdoing.[16]

The Committee notes the testimony of The Council of the Bar of Ireland which stated that providing in national law for the exclusion on the basis of an 'interpersonal grievance' is not necessary to the transposition of the EU Directive and such a provision is solely at the discretion of the Oireachtas.

Raiseaconcern agreed that interpersonal grievances should not have the protection of the Act unless the interpersonal grievance is something that already comes within the provisions of section 5(3) by reason of being a "relevant wrongdoing". It observed that bullying, harassment, and sexual harassment can also be breaches of health and safety, employment and equality legislation.

It proposed, therefore, that section 5 of the Principal Act should be 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 the reporting person and another worker and the matter can be channelled to other procedures designed to address such matters.[17]

The HSE expressed the view that Head 5 will require legal clarification relating to interpersonal grievances, noting that Recital 22 of the Directive states that these could be channelled to other procedures now that they are not protected disclosures. The HSE also observed that a recent High Court case stated that a grievance can qualify as a protected disclosure. [18]

The HSE also expressed the view that clarity is required around when a breach, as defined in Article 5 (1) of the Whistleblowing Directive, has occurred, is occurring or is likely to occur. It suggested that the term "likely to occur" without specific guidance lacks clarity.[19]

[16] Law Society Submission
[17] Raiseaconcern Submission
[18] HSE Submission
[19] HSE Submission

The Department noted in their testimony that it is common for protected disclosures to be mixed with personal grievances and that it is incumbent on the recipient of the protected disclosures to break down what they receive and categorise such materials into protected disclosures and that further guidance on this issue may be required.

Recommendation 14:

The Committee recommends that, in the drafting of the Bill, careful consideration is given to defining when a breach of the proposed legislation has occurred and that clarity be provided as to what the term "likely to occur" means.

Head 6: Interaction with other enactments

As per the explanatory note to the Head –

- Head 6 sets out the relationship between this Bill and existing EU legislation that already provides protections for whistleblowers in certain sectors (e.g., financial services) by proposing that, where specific rules on the reporting of relevant wrongdoings are provided for in the sector-specific Union acts set out in the Annex to the Whistleblowing Directive, those rules shall apply. The provisions of this proposed Bill shall be applicable to the extent that a matter is not mandatorily regulated in those sector-specific Union Acts.
- Work is ongoing as regards the interaction of this proposed Bill and the Directive with other sector-specific national legislation concerning the protection of whistleblowers, such as the Acts listed at Schedule 4 of the Protected Disclosures Act. Accordingly, this Head will be completed during the drafting process.

General

IBEC noted that it should be clearly stated that if a sector-specific whistleblowing procedure is already in place, it is the sector-specific piece of legislation that would be applicable to any protected disclosures rather than the Principal Act (as amended), to avoid confusion as to which reporting procedures and response timeframes apply.[20]

[20] IBEC Submission

In contrast, NUIG suggested that, to avoid confusion which could potentially create uncertainty about whether a person is protected, which may lead people to remain silent, clarification should be given to workers in specific sectors, if both a sectoral act and the PDA appear to apply, which of them takes precedence.[21]

The Committee is of the opinion that the new protected disclosures legislation must provide clarity in relation to the law that is to apply in various sectors of the economy.

Recommendation 15:

As a first step, the Committee recommends that a statement setting out the sector-specific legislation currently in force and how the Bill proposes to amend provisions of such legislation should be published by the Department of Public Expenditure and Reform, either as part of the Explanatory Memorandum to the Bill or separately, at the same time as the Bill is published

The Health Sector

The Health Service Executive (HSE) referred to the fact that the Health Act 2004 and provisions in the Health Act related to protected disclosures remain in force, and stated that the dual legislative arrangements for protected disclosures continued to cause confusion, adding that this matter had been raised on several occasions with the Department of Health and with the Department of Public Expenditure and Reform. The HSE has further advised that the Department had requested the views of the HSE in relation to the abolition of the relevant provisions in the Health Act.[22]

Recommendation 16:

The Committee recommends that the HSE publishes its views in relation to whether provisions in the Health Act should be repealed by laying them before the Houses of the Oireachtas in advance of the debate on the motion for the Second Reading of the Bill

[21] IBEC Submission
[22] HSE Submission

Head 7: Personal scope

As per the explanatory note, Head 7 proposes to extend the scope of persons who are protected if they report a relevant wrongdoing to include those listed in Article 4 of the Directive by the addition of the following to the definition of "worker" in section 3 (Interpretation) of the Protected Disclosures Act 2014:

> (e) is a shareholder;
>
> (f) is a member of the administrative, management or supervisory body of an undertaking, including non-executive members;
>
> (g) is a volunteer or an unpaid trainee;
>
> (h) acquires information on a relevant wrongdoing during a recruitment process or other pre-contractual process.

IBEC was of the view that, given the Principal Act will amend the definition of reporting person to include individuals outside the employment relationship, combining the broader definition of reporting person with the reversal of the burden of proof referred to in Recitals 28 and 93 of the Directive would be completely unacceptable and unworkable for employers who, it stated, "would likely face a plethora of claims, many of which are likely to be unsubstantiated or even vexatious due to the complexity of the whistleblowing framework and the likelihood of the legislation either being misunderstood or indeed abused".[23]

The Bar told the Committee that the Bill could be improved by a "more comprehensive and inclusive definition for the persons entitled to whistle-blowing protection" and recommended that the term "worker" be replaced by "reporting/disclosing person". It also recommended that the term "reporting/disclosing person" be enumerated with the various categories of persons who ought to be caught by the protections. It stated:

> … jurisprudence and other statutory definitions of "worker" general relate to relationships narrower than what is envisaged in the proposed Bill. The expansion of the understanding of "worker" to include a shareholder or applicant for a role is of

[23] IBEC Submission

some concern on the basis that to stretch the meaning of "worker" beyond its traditionally understood meaning could result in persons who would otherwise be protected not believing they classify as a worker and therefore not making a protected disclosure.[24]

The Mental Health Commission welcomed any legislative provisions which would support staff and other parties in raising concerns about the safety and quality of care for patients and other vulnerable service users. The MHC agreed with the proposed approach intended to ensure that the legislation is at least as broad as the current 2014 Act in terms of its material scope. The MHC also welcomed the provisions for protections for persons other than direct employees.[25]

The Irish Council for Civil Liberties (ICCL) noted that the expanded definition of "worker" would nevertheless still be limited to those who have an existing work or employment relationship with an organisation and recommended that consideration be given to an explicit recognition of the value of whistleblowing outside the context of employment/work as per the United Nations Convention Against Corruption (UNCAC). The council also referred to Head 16, which proposes to establish a Protected Disclosures Office, and stated that this office could have a role in this regard. The council recommended that further consideration be given to how this office could potentially examine protected disclosures that arise outside of a work/employment context and called for an appropriate revision of section 5(2)(b) of the 2014 Act in the amending legislation.[26]

Recommendation 17:

The Committee recommends that in the drafting of the Bill, in order to avoid inadvertent narrowing of application, the term worker might where appropriate be replaced with "reporting person", with a definition of "reporting person" which explicitly includes all those who make a report in a "work related context"

[24] JCFPERT Meeting 29 September 2021, P.3.
[25] MHC Submission
[26] ICCL Submission

The Committee is of the opinion that an extension of the scope of the Bill as recommended by ICCL could be introduced with the following amendment to section 5 of the Principal Act:

"Section 5 of the Principal Act is amended-

(a) in subsection (2)(i) by the substitution of the following for paragraph (b):

"(b) it came to the attention of the person in a work-related context",

Specific Areas Requiring Clarity

The Mental Health Commission suggested that the limits to liability of reporting persons should be expressly addressed in the general scheme.[27]

The Mental Health Commission also suggested that protected disclosures from job applicants (who are not employees) should be limited to a specific recruitment process in which the person has partaken.[28]

The Committee is of the opinion that it should be specifically stated in the Bill that protected disclosures from job applicants (who are not employees) should be limited to a specific recruitment process in which the person has taken part.

Recommendation 18:

The Committee recommends, in finalising the drafting of the Bill, the Department should clearly set out these limits.

[27] MHC Submission
[28] Ibid

Head 8: Anonymous disclosures

As per the explanatory note, Head 8 transposes –

- Article 6(3) of the Directive, which provides that persons who report anonymously are still protected by the Directive if their identity is subsequently revealed and they suffer penalisation, and
- Article 6(2) of the Directive, which provides that recipients of anonymous reports are not obliged to accept and follow up on such reports.

Whether recipients of anonymous disclosures should be required to follow up on them

The Committee notes that Article 6 (2) of the Directive does not, in fact, provide that "recipients of anonymous reports are not obliged to accept and follow up on such reports" as stated in the explanatory note, rather, it provides that the Directive "does not affect the power of Member States to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches". In effect, it remains a matter for individual Member States to decide whether recipients of anonymous reports should be obliged to accept and follow up on such reports.

This was tacitly acknowledged by IBEC which, in referring to "the fair balance to be drawn between the protection of whistleblowers and the ability of employers to properly investigate disclosures of alleged wrongdoing and the need for safeguards against misuse", welcomed the Department's position "not to avail of this option to require anonymous reports to be accepted and followed-up".

NUIG expressed the view that granting a right not to accept anonymous disclosures may allow an employer to justify not acting in cases where serious and dangerous wrongdoing has been reported but the report was anonymous. NUIG asserted that this was not in line with international best practice (UK, US, OECD and Transparency International) and DPER guidelines.[29]

[29] NUIG Submission

Raiseaconcern stated that in its experience the concern about their identity being revealed is the single biggest fear that disclosers have and is one of the most significant deterrents to disclosure.

> This is why Raiseaconcern provides the service of being a confidential recipient… we see no logic or justifiable reason as to why disclosures by named workers must be accepted and followed up by employers, whereas in contrast, the same obligation does not apply to disclosures made by anonymous disclosers.[30]

The ICCL was also of the view that international best practice suggests that anonymous reporting should be facilitated, citing the OECD and a resolution on whistleblowing passed by the European Parliament.[31]

Dr. Lauren Kierans, NUIM, drew attention to the fact that Article 6(2) of the Directive does not provide that organisations themselves can decide whether to accept and follow up on disclosures. She expressed that view that, as currently drafted, the legislation would "undoubtedly be relied upon by organisations to deliberately evade their responsibility to accept and follow up on disclosures merely because they are made anonymously, thus posing a risk to ongoing damage from the relevant wrongdoing". She noted that, while anonymous disclosures were not specifically provided for in the 2014 Act, they were used in practice, as evidenced by both DPER guidance and the WRC code of practice.[32]

Dr. Kierans also drew attention to the fact that section 301 of the US Sarbanes-Oxley Act 2002 already required companies listed in the US and their subsidiaries to establish protocols for anonymous reporting. As there are approximately 700 US-owned firms operating in Ireland that employ about 155,000 people, the current proposal under the Heads of Bill was, in her opinion, likely to create confusion and deny many Irish and migrant workers the same rights as those subject to Sarbanes-Oxley.[33]

[30] JCFPERT Meeting 22 September 2021, P.3.
[31] ICCL Submission to the JCFPERT
[32] Dr Lauren Kierans, NUIM Submission
[33] Dr Lauren Kierans, NUIM Submission

Raiseaconcern expressed the view that, if the Act presented recipients of anonymous disclosures with the right not to accept them and to ignore them, this would be likely to act as a deterrent to disclosers; and suggested that "Ireland should avail of the leeway afforded to it to impose a requirement for employers to accept and follow up on disclosures made by anonymous disclosers". Transparency international Ireland also expressed the view that the current proposal would "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".[34]

In contrast, the Office of the Planning Regulator expressed the view that the inclusion of a provision whereby anonymous reports are not obliged to be accepted and followed up on may reduce the risk and number of vexatious disclosures.[35]

Transparency International Ireland expressed concern that "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".[36]

Transparency International Ireland summarised the position as it saw it as follows:

> "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

[34] Raiseaconcern Submission
[35] Office of the Planning Regulator Submission
[36] TII Submission

> given timeframe of no more than three months on whether or what action is being taken in response to the disclosure."

Transparency international Ireland's position was that unless section 5A(2), proposed to be inserted in the Principal Act by Head 8 of the General Scheme, was revised to reflect such circumstances, 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.[37]

The HSE pointed out that while there may be no legal obligation to investigate an anonymous disclosure, if the disclosure is not investigated, there is a risk of facing reputational harm if the matter becomes public.[38]

The Department of Public Expenditure and Reform told the Committee that one of the discretionary elements of the Directive related to anonymous reporting and this had given rise to a great deal of feedback during the public consultation phase with some people thinking it was a great idea and others who did not: "It is difficult to judge which side of the fence to fall on."[39] The Department said that ultimately it felt that one of the major challenges in handling an anonymous disclosure was that it can cause administrative difficulties.

> For example, it is necessary under the directive that reports be made by a person who has a workplace relationship with the organisation. If someone makes a disclosure anonymously, that relationship cannot be verified. Therefore, it becomes a question of whether the rules on how reports must be treated in terms of acknowledgement, follow-up and feedback apply… not knowing the identity of the reporting person can make it much more difficult to follow up on a matter, especially

[37] TII Submission
[38] HSE Submission
[39] JCFPERT Meeting 6 October 2021, P.16.

> if there is no means of making further contact to, for example, get clarification or more information.[40]

The Department said a further point was that a person might believe he or she was safer making an anonymous report, but that protecting someone from harm can sometimes be difficult, for example, if the incidents described were specific enough that the accused person figured out who reported him or her and subjected that person to harassment: "The informer might not be aware of this and the situation could be made much worse. There is also a small risk that allowing anonymous reporting can enable employees to harass colleagues by submitting untrue or defamatory reports. Without knowing the identity of the person making the report, it is difficult to punish false reporting."[41]

The Department added that there were also several legal issues in that Irish legislation in some places specifically prohibits some organisations from following up on anonymous disclosures. This is mainly because disclosures may be related to judicial matters, which require providing the right to a fair hearing where the identity of the discloser must be known. Alternatively, there are also some laws that specifically permit anonymous disclosures, particularly in respect of financial services money laundering.

> We acknowledge that a number of organisations find accepting anonymous reports to be beneficial. Notwithstanding that, we have come to the view that a blanket requirement to follow up on all anonymous disclosures would be problematic for many organisations. It appears to us that the best way to approach this is for anonymous disclosures to be taken on a case-by-case basis. We are providing that it be at the discretion of each organisation to set a policy on anonymous reporting. That is the route we will take with the Bill.[42]

The Committee believes that a blanket exemption from any obligation to accept or follow up on anonymous disclosures as proposed under 5A(2) would curtail the efficacy of this legislation and require greater risk on the part of potentially vulnerable whistleblowers. The

[40] JCFPERT Meeting 6 October 2021, P.16.
[41] Ibid
[42] JCFPERT Meeting 6 October 2021, P.16.

Committee therefore recommends that section 5A(2) be removed and a decision whether or not to follow up be made based on the criteria set out in Head 10.

Recommendation 19:

The Committee therefore recommends that section 5A(2) be removed and a decision whether or not to follow up be made based on the criteria set out in Head 10

The Committee notes the significant evidence in relation to penalisation of whistleblowers and the associated fact that many will prefer to remain anonymous. Penalisation can act as a significant deterrent for potential disclosure of wrongdoing. The public benefit from protected disclosures and the protection of vulnerable parties making such disclosures should receive a greater weighting in this legislation then administrative convenience. The Committee further notes that the removal of any obligation to even "accept" anonymous disclosures under this section seems to contradict other sections of the Bill which require that anonymous reporting mechanisms be established.

Recommendation 20:

The Committee recommends that there should be legal requirement to accept anonymous reports of breaches and determine follow up on the same basis as other disclosures

Part III - Reporting channels (Heads 9-15)

Part III provides for amendments to the sections of the Protected Disclosures Act that provide for channels for protected disclosures to align them with the requirements of the Directive, in particular to introduce obligations on recipients to acknowledge, follow up and provide feedback on disclosures. The Part also contains a number of consequential provisions in respect of confidentiality, data protection and record keeping.

Head 9: Internal reporting channels

As per the explanatory note, Head 9 –

- Transposes Chapter II (Articles 7 – 9) of the Directive concerning internal reporting and follow-up.
- The Protected Disclosures Act already provides for reporting persons to make protected disclosures to their employer under section 6. This Head amends section 6 to provide:
    - that all private sector entities with 50 or more employees must establish internal channels and procedures for making protected disclosures and follow-up (per Article 8 of the Directive); and
    - the minimum requirements for the procedures for internal reporting and follow-up (per Article 9 of the Directive).
- The explanatory note to the Head also details the following specific changes to section 6 of the Protected Disclosures Act:
    - The proposed new subsection (5)(a) provides that the threshold of 50 employees shall not apply to public bodies. This ensures the retention of the existing obligation under the Protected Disclosures Act that all public bodies, regardless of size, must have internal procedures for protected disclosures.
    - The proposed new subsection (5)(b) provides that the threshold of 50 employees shall not apply to companies subject to EU laws in the areas of financial services; prevention of money laundering and terrorist financing; transport safety and protection of the environment. These EU laws already impose obligations on these companies to have internal reporting systems in place.
    - The proposed new subsection (6) provides that the obligation to have internal procedures shall not apply to companies with between 50 and 249 employees until 17 December 2023. This is in accordance with Article 26(2) of the Directive.

- The proposed new subsection (12[43]) repeals section 21 of the Protected Disclosures Act. Section 21(1) of the Act, which obliges public bodies to establish internal channels and procedures, will be superseded by the new subsection (3) proposed to be inserted by this Head. The other subsections of Section 21 of the Principal Act, concerning guidelines for public bodies, will be superseded by Head 25.

Requirement to co-operate with investigations or follow up procedures

Heads 9 and 10 propose the inclusion of additional provisions in the Principal Act - section 6(11) and section 7(5) - providing that reporting persons shall co-operate, as required, with any investigation or follow-up initiated by a prescribed person or recipient of an internal disclosure.

The Council of the Bar of Ireland stated that it agreed with the proposed amendments under Head 9, except for the proposed subsection (11) which provides that:

> The reporting person shall co-operate, where required, with any investigation or any other follow up procedure initiated in accordance with the proposed section 6(9)(d).

The Council argued that this subsection is vague as to what type of co-operation is envisaged. Further, the consequences of a failure to co-operate were, the Council believed, also unclear.[44]

Dr. Lauren Kierans, NUIM, argued that the requirement that reporting persons co-operate, as required, with any investigation or follow-up initiated by a prescribed person or recipient of an internal disclosure is not required by the Directive and expressed the view that it should therefore be deleted. She stated that there should be no onus on a discloser to co-operate with an investigation and that including such a requirement may be used by a recipient to ignore a disclosure of relevant wrongdoing on the ground that the discloser did not co-operate.[45]

[43] Erroneously referred to as subsection (11) in the Heads
[44] Council of the Bar of Ireland Submission
[45] Dr Lauren Kierans, NUIM Submission

NUIG similarly observed that the requirement for the reporting person to co-operate with an investigation offers a reason for a wrongdoing organisation not to follow up a genuine disclosure where the reporting person does not co-operate with the investigation. TII argued for the removal of the requirement on reporting person to cooperate, as required, with any investigation or other follow up procedure unless they already required to by law.

The Committee is of the opinion that it is reasonable to expect that a reporting person would co-operate with any investigation or follow-up arising from their disclosure. However, the Committee is of the opinion that it is at least arguable that making this a statutory requirement would undermine the current standards of protection afforded to workers under the 2014 Act. Accordingly, the Committee recommends that consideration be given to whether a requirement that the reporting person co-operate, as provided for in Heads 9 and 10 of the Bill, should be removed to ensure compliance with the Directive.[46]

Recommendation 21:

If removal of the requirement is considered unnecessary, the Committee recommends that it should also be provided for in the Bill that failure on the part of a reporting person to co-operate will not of itself be sufficient grounds for not commencing or for discontinuing an investigation in order to address the concerns expressed that failure to co-operate would offer a reason for a wrongdoing organisation not to follow up on a genuine disclosure

The Department of Public Expenditure and Reform told the Committee that the legislation would place a requirement on the private sector to have formal, published channels and procedures setting out how people could make reports and what other channels of reporting are available to them if they are dissatisfied with how the internal process has gone. These procedures would "at a minimum" require acknowledgement of the protected disclosure, diligent follow-up of the protected disclosure and feedback to be given to the person: "There is certainly a lot of reassurance there because one of the common

[46] NUIG Submission

complaints we get from whistleblowers is that they make their report and it disappears into a black hole. This cannot happen."[47]

The Department also stated that there would be a stepped disclosure regime whereby if a person made a protected disclosure to their employer who failed to co-operate, he or she would have the option of then going to a prescribed person, who would be subject to the same requirements regarding acknowledgement, follow-up, and feedback. If that failed, the person would then have the more significant option of going public.[48]

Date by which the Directive requires that the obligation to have internal procedures in place must be met

The latest date by which the obligation under the Directive to have internal procedures in place should be met is 17 December 2023, but it is open to individual Members States to provide in law for an earlier date.

IBEC submitted that further guidance and support regarding the designation of impartial persons and persons competent to follow up on protected disclosures are required, particularly for any SMEs who may be implementing such procedures for the first time and may have a very small HR function or indeed no HR function at all. IBEC commented that the requirement to set up either internal reporting channels or to engage a provider to establish the reporting channels externally would present huge challenges for SMEs, both from a financial perspective and also from time and administrative perspectives.

In view of what it described as the onerous requirements to establish such channels for the first time for many smaller employers, IBEC welcomed the decision to derogate, until December 2023, from the requirement to have internal reporting procedures in place for private entities with more than 50 employees.[49]

[47] JCFPERT Meeting 6 October 2021, P.13.
[48] JCFPERT Meeting 6 October 2021, P.13.
[49] IBEC Submission

In contrast, Transparency International Ireland expressed the view that the proposal that employers with between 50 and 250 employees have internal procedures in place from 17 December 2023 (the latest date permitted by Article 26(2) of the Directive) and provided for in Head 9(6)) should instead be 17 December 2022.[50]

Recommendation 22:

The Committee recommends that further consideration be given to the date by which private sector entities with 50 or more employees must establish internal channels and procedures for making protected disclosures and follow-up; and that amendments should be brought forward at Committee Stage if this is considered necessary or appropriate

Shared reporting channels

The Office of the Planning Regulator expressed the view that further consideration of Article 8 of the Directive may be merited. It states:

> Member States may provide that internal reporting channels can be shared between municipalities or operated by joint municipal authorities in accordance with national law, provided that the shared internal reporting channels are distinct from and autonomous in relation to the relevant external reporting channels.

The Office of the Planning Regulator noted that there are 31 local authorities within the local government system, grouped within three regional assembly areas, and that it plays a key role in the oversight of the functioning of the systems and procedures of the local authorities, including the examination of risks relating to maladministration or corruption. Given that issues arising from a protected disclosure may affect multiple local authorities' administrative areas, the office believed that it would be important for appropriate structures to be implemented to avoid the duplication of administrative efforts. The office

[50] TII Submission

added that the proposed Protected Disclosures Office in the Office of the Ombudsman may be the appropriate authority to play a role in the implementation of such structures.[51]

The Mental Health Commission was of the view that the legislation should provide that local authorities and small public bodies share internal reporting channels. The sharing of resources for internal reporting channels may, MHC believed, result in centralised expertise, increased efficiency, ensure consistency, assist with training, and reduce costs..[52]

The Committee notes that Head 9(9) provides that "all employers… with 50 or more employees shall establish and maintain internal channels and procedures for the making of protected disclosure" including, *inter alia*, the "provision of clear and easily accessible information regarding:

(i) the procedures for making a protected disclosure… and

(ii) the procedures for making a protected disclosure to a prescribed person under section 7 of the Principal Act.

The Committee is of the opinion that this provision is likely to provide the necessary clarity in relation to the channels and procedures that will be implemented in practice for employers with 50 or more employees.

Private sector entities with fewer than 50 employees

The ICCL expressed disappointment that the provisions were not intended to apply to private sector entities with fewer than 50 employees and that Article 15 of the 2014 Council of Europe recommendation on whistleblowing does not place a lower threshold regarding the number of employees required for protections to be put in place.

The council pointed out that that the International Whistleblowing Research Network set out [in its submission to DPER's public consultation] that excluding workplaces with fewer than 50 employees from an obligation to establish proper channels for whistleblowers excluded a very large proportion of the working population from protection.

[51] Office of the Planning Regulator Submission
[52] MHC Submission

ICCL also noted that Transparency International Ireland had highlighted that, as of November 2016, only 10% of private sector employers had a whistleblowing policy in place. The council added that the absence of an existing legal compunction to establish such a policy was undoubtedly having an impact on the private sector's willingness to address the issue and that, in its view, to leave such a large percentage of the workforce without protection was unacceptable, particularly in the light of compelling evidence from experts.[53]

The Mental Health Commission recommended that there should be no exemption from the obligation to establish internal reporting channels.[54]

In a similar vein, NUIG suggested that it was undesirable that private sector organisations with a staff of fewer than 50 would not be required to establish internal reporting channels and procedures, noting that speak up procedures are clearly in the best interest of workers, organisations, shareholders, and the public, regardless of the size of the organisations involved.[55]

Raiseaconcern questioned whether there are coherent principled reasons that employers with fewer than 50 employees should not be subjected to the same provisions as those with more than 50, asking whether they are any less prone to wrongdoing, or if the seriousness of any potential work-related wrongdoing they encounter likely to be proportionate to the number of employees they have, or if they are less likely to penalise disclosers?[56] It also suggested that sharing know-how such as templates or standard policies could be used to reduce compliance burdens on organisations:

> The Government is required under Article 20 of the directive to provide support on the design of policies and procedures and on their operation. There is nothing to prevent Government bodies, trade associations, voluntary bodies and others from making template policies, procedures and processes available at low or no cost to

[53] ICCL Submission
[54] MHC Submission
[55] NUIG Submission
[56] Raiseaconcern Submission

micro or small enterprises, thereby eliminating or at least minimising the cost of compliance.[57]

The Committee does not accept the contention that the absence of internal reporting channels results in workers being left without protection. The Committee is of the opinion that external reporting channels can be at least equally effective in affording whistleblowers protection. What is, in the Committee's opinion, most important is that individuals are aware of the channel or channels available to them when they contemplate making what they believe to be a protected disclosure.

However, the Committee is of the view that the establishment of reporting channels and procedures are not particularly onerous for bodies with fewer than 50 employees, they can be easily replicated, and should apply to all entities below 50 employees. This is in line with ethical business practices and best serves workers, shareholders, and the wider community.

The Committee believes that a statutory register, required to be published in a manner that makes it readily accessible to the public, of employers that have established internal reporting channels, and the persons or bodies who provide external reporting channels , and the methods by which disclosures can be made in each case, would go some considerable way to allaying concerns in relation to any lack of protection.

Legal entities with 250 or more workers across related entities

IBEC submitted that the Bill should enable legal entities with 250 or more workers across related entities to share resources regarding the receipt of reports and the conducting of investigations. It stated that the alternative, which would be to require each entity within the group structure to put in place a whistleblowing procedure at each group level, would be unworkable and disproportionate for several reasons including confidentiality concerns in smaller branches of the entity, and reduced ability of the organisation to take corrective action regarding recurring breaches if there is not central oversight.[58]

[57] JCFPERT Meeting 22 September 2021, P.4.
[58] IBEC Submission

Recommendation 23:

The Committee believes that allowing such entities to share reporting and investigative resources would provide benefits for both the entities and disclosures. Therefore, it recommends that sharing of these resources by grouped entities with 250 employees should be allowed

Dr. Kierans also expressed the view that the timeframes "not exceeding three months or six months in duly justified cases" in Head 9 regarding feedback to disclosers were at the outer limits permitted by the Directive. She stated that these timeframes needed to be shortened, as permitted by the Directive, to let disclosers know at the earliest possible time that their disclosure was being dealt with and taken seriously.[59]

Recommendation 24:

The Committee recommends that careful consideration be given during the drafting of the Bill to reducing the time limits prescribed for feedback to disclosers to they are made aware that their disclosure is being dealt with in an appropriate and timely fashion

Head 10: External reporting channels

As per the explanatory note, Head 10 provides for the transposition of Chapter III (Articles 10 – 14) of the Directive. [60]

[59] Dr Lauren Kierans, NUIM Submission

[60] The text of the explanation of Head 10 furnished by the Department also includes the following which appears to include an incorrect reference:

> "Head 9(a) changes the conditions for making a protected disclosure to a prescribed person from requiring that the reporting person must reasonably believe that the information disclosed and any allegation contained in it are substantially true to a reasonable belief that the information and any allegations are true. This is as required under Article 6(1) of the Directive."

The relevant Articles deal with the following:

- Reporting through external reporting channels (Article 10)
- Obligation to establish external reporting channels and to follow up on reports (Article 11)
- Design of external reporting channels (Article 12)
- Information regarding the receipt of reports and their follow-up (Article 13)
- Review of the procedures by competent authorities (Article 14).

The Option to Use External Channels

The Bar of Ireland clarified that if a worker was concerned about the impartiality of their employer, he or she could avail of the option to use external reporting channels as provided for under this Head.

> It is for would-be whistle-blowers to determine whether they believe they will get a fair hearing in their workplace. If they fear they will not, the external reporting channels are available to them and, if not, the protected disclosures office is the default authority. [61]

Making of Protected Disclosures at Physical Meetings

The provisions proposed to be inserted in section 7 of the Principal Act by Head 10 include the following:

> (9) The reporting channels provided for… shall enable the making of protected disclosures in writing and orally. Oral reporting shall be possible by telephone or through other voice messaging system and, upon request by the reporting person, by means of a physical meeting within a reasonable timeframe.

[61] JCFPERT Meeting 29 September 2021, P.13.

The Mental Health Commission expressed the view that bodies should have the discretion to decline holding a physical meeting, where appropriate.[62]

The Committee notes that

(a) Recital 53 of the Directive provides, *inter alia*, that "upon request by the reporting person, such [reporting] channels should also enable reporting by means of physical meetings, within a reasonable timeframe"; and

(b) Article 9(2) of the Directive (Procedures for internal reporting and follow-up) provides that "the channels provided for… shall enable reporting in writing or orally, or both. Oral reporting shall be possible… upon request by the reporting person, by means of a physical meeting within a reasonable timeframe".

However, the Directive is silent on the question of physical meetings in the context of external reporting.

The Committee is of the opinion that the intent of the Directive was that making of disclosures at physical meetings should be possible and, while noting that the Directive does not appear to explicitly require physical meetings in the case of external reporting, sees no grounds for distinguishing between internal and external reporting in this regard.

Times within which receipt of Protected Disclosures must be acknowledged, and feedback must be provided

Subsections (4)(b) and (4)(d), proposed to be inserted in section 7 of the Principal Act by Head 10, include requirements that each prescribed person shall:

> promptly, and in any event within seven days of receipt of the protected disclosure, acknowledge that receipt unless the reporting person explicitly requested otherwise

[62] MHC Submission

> or if the prescribed person reasonably believes that acknowledging receipt of the report would jeopardise the protection of the reporting person's identity
>
> [and]
>
> provide feedback to the reporting person within a reasonable timeframe not exceeding three months or six months in duly justified cases.

GSOC suggested that these time requirements should be moderated to take account of circumstances where the reporting person does not comply with subsection (5) by failing to "co-operate, as required".[63]

The Committee notes that the Directive specifies clear maximum time limits for acknowledgement and the giving of feedback in relation to disclosures received through external reporting channels; and that extension of these time limits, whether because the reporting person has failed to co-operate or for other reasons, is not permitted.

NUIG expressed the view that the proposed timeframes for response to disclosers are excessively long, noting that responses do not need to consist of the results of concluded investigations, nor be substantial. On the other hand, recipients need to stay actively connected with disclosers to put their mind at ease and let them know what is going on.[64] Dr. Kierans similarly expressed the view that the timeframes for feedback need to be shortened for the sake of the discloser.[65]

Recommendation 25:

The Committee recommends that the desirability and practicality of reducing the timeframes for feedback should be considered in the drafting and subsequent consideration of the Bill

[63] GSOC Submission
[64] NUIG Submission
[65] Dr Lauren Kierans, NUIM Submission

Possible conflict between provisions concerning communicating the final outcome of investigations and the safeguarding of legal obligations

GSOC expressed the view that difficulties may arise in fulfilling the obligations under the proposed subsection (4)(e) to communicate to the reporting person the final outcome of investigations triggered by the protected disclosure" without infringing in the provisions of the proposed subsection (7) which provides that "nothing in subsection 4(e) shall be interpreted as overriding any legal obligations as regards confidentiality, professional privilege, privacy and data protection". [66]

The Committee is of the opinion that the provisions strike an appropriate balance between what may from time to time be competing requirements and that they should be of assistance in arriving at decisions where conflict manifests in practice.

The Committee recognises that deliberate attempts can often be made on the part of employers to protract investigations to frustrate attempts to reveal wrongdoing.

The Committee believe that firm timelines and for interim feedback will be central to the effectiveness of this legislation and note there may currently be a very considerable period of time between the initial feedback and the final resolution in respect of a protected disclosure. It is important that these timelags are shortened and that reporting persons are provided with appropriate ongoing information. Therefore, the Committee recommends that the Bill should be amended to provide that in addition to an entitlement to initial feedback at three to six months, a reporting person should be entitled to request further interim feedback from the prescribed person on their protected disclosure at least once every 12 months thereafter until a final outcome is reached. The Committee further recommends that the Bill should include a requirement for final outcomes on all cases to be delivered after a maximum of three years.

[66] GSOC Submission

Recommendation 26:

The Committee recommends that the Bill should be amended to provide that in addition to an entitlement to initial feedback at three to six months, a reporting person should be entitled to request further interim feedback from the prescribed person on their protected disclosure at least once every 12 months thereafter until a final outcome is reached. The Committee further recommends that the Bill should include a requirement for final outcomes on all cases to be delivered after a maximum of three years

Members of the Committee and the Department agreed on the importance of firm timelines and interim feedback on protected disclosures and proposals were made by a number of stakeholders as to how this aspect of the legislation could be strengthened.

Recommendation 27:

The Committee believes that where persons have made a protected disclosure in the past but are still awaiting information as to the final outcome of that disclosure, they should, following the enactment of this Bill, be entitled to seek and receive feedback from a prescribed person in the manner outlined in this legislation or, where the issue has been resolved, they should be entitled to seek and receive information as to the final outcomes from that prescribed person and the Committee recommends that the Bill be amended to accommodate this aspect

Threshold for Disclosures to Prescribed Persons under the Principal Act

Dr. Lauren Kierans, NUIM, expressed the view that the threshold for disclosures to prescribed persons under the 2014 Act must be amended in the transposition of the Directive, which requires the same legal threshold for such disclosures as for an internal disclosure.

Section 7(1)(b)(ii) of the Principal Act provides that a protected disclosure can be made under the section only if, among other matters, the worker "reasonably believes... that the information disclosed, and any allegation contained in it, are substantially true". Dr. Kierans argued that the proposal under Head 10 to amend section 7(1)(b)(ii) of the Principal Act by merely deleting the word "substantially" failed to reflect the lower threshold of disclosures to such recipients under the Directive, and that the provision proposing to amend section 7(1)(b)(ii) should therefore be entirely deleted.[67]

The Committee is of the opinion that Head 10 may introduce inconsistency between the standards required for internal and external reporting, an outcome that would appear to be contrary to the Directive.

Recommendation 28:

The Committee accordingly recommends that, in finalising the drafting of the Bill, the Department considers the arguments made by Dr. Kierans against the amendment of section 7(1)(b)(ii) of the Principal Act

Requirement to co-operate with investigations or follow-up procedures

Subsection (5) proposed to be inserted by Head 10 in section 7 of the Principal Act provides that "the reporting person shall co-operate, as required, with any investigation or other follow up procedure initiated".

Dr. Lauren Kierans, NUIM, argued, for the same reasons as advanced under Head 9, that the requirement that reporting persons co-operate should be deleted.

Recommendation 29:

The Committee reiterates its recommendation that consideration be given to whether the requirement should be removed to ensure compliance with the Directive[68]

[67] Dr Lauren Kierans, NUIM Submission
[68] Dr Lauren Kierans, NUIM Submission

HSE-funded Agencies

The Health Service Executive advised the Committee that, at the request of the Department of Public Expenditure and Reform, a proposal that the HSE would become a prescribed person for HSE-funded agencies was examined by a group comprising representatives of relevant divisions and services as well as from the Department of Health; and that the group furnished a report to senior management in August 2019 which recommended that the HSE would not become the prescribed person for HSE-funded agencies.[69]

Recommendation 30:

The Committee recommends that consideration be given to publishing the report; and that the treatment of HSE-funded agencies should be explicitly considered by it during Committee Stage of the Bill

Resourcing implications

Raiseaconcern noted that significant additional responsibilities will be imposed on "prescribed persons" to establish independent autonomous channels for receiving and handling protected disclosures. It suggested that the success or otherwise of this requirement will depend the availability of adequate levels of trained personnel and an adequate budget to operate and to outsource to competent independent third parties work that cannot be undertaken internally.[70]

Recommendation 31:

The Committee notes that the adequate resourcing of provisions mandated by the Directive will be essential in allowing the successful operation of the envisaged protected disclosures regime. It recommends that the Department issues clear guidelines to signal this, and to facilitate obligated entities in implementing the necessary provisions

[69] HSE Submission
[70] Raiseaconcern Submission

Head 11: Ministerial reporting channels

As per the explanatory note, Head 11 –

- Amends section 8 of the Protected Disclosures Act concerning disclosures made to Ministers.
- Provides that such disclosures shall be referred to a new Protected Disclosures Office in the Office of the Ombudsman, which will provide support and advice to the Minister in respect of handling of protected disclosures.

Whether the proposed conditions for making a disclosure to a Minister are consistent with Article 25 (More favourable treatment and non-regression clause)

The Committee notes that the existing section 8 merely requires that a worker can make a protected disclosure to a Minister "… if –

(a) the worker is or was employed in a public body, and
(b) the disclosure is made to a Minister of the Government on whom any function relating to the public body is conferred or imposed by or under any enactment."

The Committee further notes that subsections (1)(a) and (b) of the proposed new section essentially appear to mirror the existing statutory provisions cited above, but that the proposed new section also provides, at subsection (1)(c), that a protected disclosure may be made to a member of the Government or Minister of State only if one or more of three additional specified conditions are met.

The Committee notes that this new proposed section (1)(c), will through its restrictive conditionality, make it more difficult for those making a protected disclosure in certain cases to go external. The Committee shares the view of Dr. Kierans that this is a "regressive clause" and should be deleted. The Committee is also of the view that the Minister could be

further empowered when receiving a protected disclosure to have the matter referred to another body like the Attorney General, Chief State Solicitors Office or the Director of Public Prosecutions.

Dr. Kierans drew the Committee's attention to the fact that Article 25(2) of the Directive provides, *inter alia*, that "the implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection already afforded by Member States in the areas covered by this Directive". Dr. Kierans argued that the introduction of additional tests for a disclosure to a Minister to be protected, as proposed in Head 11, is a regressive clause and recommend deletion of the proposed section 8(1)(c).[71]

Raiseaconcern was also of the view that Head 11 appeared to narrow the ability of disclosers to use section 8. Raiseaconcern argued that this would be regressive and contrary to Article 25 of the Directive, also observing that the proposed changes would significantly impact the ability of public servants to use section 8.

Transparency International Ireland argued that Head 11 implied the removal of the right of public sector workers to make a protected disclosure to the responsible Government Minister under section 8 of the Principal Act and would also remove any corresponding protections for such workers in reporting directly to a Minister. Transparency International Ireland argued that this would be regressive and likely be in breach of Article 25.2 of the Directive, its submission to the Committee suggesting a wording for the Head to address this and other matters.[72]

The Irish Council for Civil Liberties (ICCL) said that its views stemmed from a stepped support perspective where internal reporting channels should be the first port of call and it was only when these were exhausted or appeared ineffective that matters should be escalated to external channels or the public domain.[73]

The Committee is of the opinion that attaching an additional condition or conditions for the making of a protected disclosure to a Minister may at least have the potential to constitute

[71] Dr Lauren Kierans, NUIM Submission
[72] TII Submission
[73] JCFPERT Meeting 29 September 2021, P.9.

a reduction in the level of protection already afforded in law and may therefore conflict with Article 25 of the Directive. However, the Committee understands that judicial interpretation of non-regression clauses in the context of EU employment law has arguably limited the effectiveness of such clauses in restricting Member States from reducing national standards74 , rendering them "nearly ineffective"75; and that an argument may be made that as the direct reporting to a Minister is not provided for under the Directive, section 8 of the 2014 Act is outside the scope of Article 25. The Committee also understands that, if such a change can be justified by the State on policy grounds, then it is unlikely that any challenge taken for infringement of the Directive would succeed.76

Recommendation 32:

The Committee recommends that, in finalising the drafting of the Bill, the Department seek to ensure compatibility with the non-regression clauses under Article 25 of the Directive, and that new and additional conditionalities around disclosure to a Minister are not inserted under Head 11

What would constitute "appropriate action"?

The proposed new section 8 of the Principal Act proposed in Head 11 provides, *inter alia,* that a protected disclosure may be made to a member of the Government or Minister of State if one or more of three specified conditions are met. One of these conditions is that the worker had first made a disclosure pursuant to sections 6 and 7 "but no appropriate action was taken in response to the disclosure within the timeframes for follow-up specified in section 6 or section 7". The HSE expressed the view that the term "appropriate action" would need to be defined.

[74] Steve Peers, Non-regression clauses: the fig leaf has fallen, Industrial Law Journal, 2010, 39(4), 436-443
[75] Ibid at section 3
[76] See judgments of the Court of Justice in Mangold, Angelidaki (Joined Cases C-378-380/07, [2009] I-3071) and Sorge (Case C-98/09, judgment of 24th June 2010)

Recommendation 33:

The Committee recommends that during the drafting of the Bill the term 'appropriate action' be defined

Head 12: Public disclosures

As per the explanatory note, Head 12 –

- Provides for the transposition of Article 15 of the Directive concerning public disclosures.
- The conditions for making such disclosures are substantially different to those provided for under section 10 of the Protected Disclosures Act. Accordingly, it is proposed that this entire section be replaced with text in line with that required by the Directive.

Public disclosures in the public interest

The Irish Council for Civil Liberties notes that Head 12 seeks to substitute the existing section 10 of the 2014 Act with text which aligns with Article 15 of the Directive. The ICCL states that, in its view, the threshold to qualify for protection for those making public disclosures in the public interest is set too high in both the Directive and the draft Heads and that the Heads should be amended to offer protection to those who seek to disclose wrongdoing or information which is in the public interest regardless of their relationship to the organisation they are reporting.[77]

The Committee notes that Article 15(2) of the Directive provides that "this Article shall not apply to cases where a person directly discloses information to the press pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information".

[77] ICCL Submission

Again (as under head 12), the HSE suggested that the term 'appropriate action' would need to be defined.

The Committee is of the opinion that protection that should or might be afforded to those making public disclosures, to or via the media, for example, without first having sought to avail of other avenues actually or potentially available to them, raises issues that may be quite separate to and distinct from those addressed by the current proposals and, as the current proposals concern themselves with transposition of the Directive, should be dealt with separately.

Head 13 Duty of confidentiality

As per the explanatory note, Head 13 –

- Amends section 16 of the Protected Disclosures Act to align it with the provisions of Article 16 of the Directive regarding the confidentiality of the identity of the reporting person and any other persons named in a protected disclosure.

The Head also proposes the insertion of new sections as follows:

> "**Protection of trade secrets disclosed to prescribed persons**
>
> 16A. Prescribed persons that receive disclosures in the manner specified by section 7 that include trade secrets shall not use or disclose those trade secrets for any purpose beyond what is necessary for proper follow-up of said disclosure.
>
> **Protection of the identity of persons concerned**
>
> 16B. The protections that apply in respect of section 16 shall also apply to persons concerned."

Protection of the identity of "persons concerned"

The HSE noted the fact that the proposals propose imposing a new obligation on those who receive and deal with protected disclosures to protect the identity of what is known as a "person concerned" (this is any individual referred to in a protected disclosure as someone who is involved in, or associated with, the wrongdoing report). The HSE considered this to be a significant change as it mirrors the existing obligation to keep the identity of the whistleblower confidential. The HSE was of the view that this would pose an even greater challenge during the investigation process if those investigating must now maintain confidential the identity of the "person concerned" as well.[78]

GSOC welcomed the recognition that persons other than the discloser may be affected by a protected disclosure in a way that the protections offered in section 16 of the current legislation should apply to them as well. However, it noted that the term "person concerned" is defined in Head 2 of the General Scheme in a broad way and believed that further guidance would be required for persons acting under the provisions of the protected disclosures legislation. This would, GSOC believed, be particularly difficult if the protected discloser is unaware of such associations.[79]

Trade Secrets

NUIG expressed the view that the Principal Act imposes a cumbersome test for disclosers in cases involving trade secrets, thus creating a serious disincentive for workers to speak up by making protection more difficult to secure.

Recommendation 34:

The Committee recommends that consideration be given to whether, having regard to the Directive, all and any tests provided for by or under existing legislation or the current Heads for disclosers in cases involving trade secrets is appropriate and proportionate

[78] HSE Submission
[79] GSOC Submission

Head 14: Data protection

As per the explanatory note, Head 14 transposes Article 17 (Processing of personal data) of the Directive concerning data protection.

The Head indicates that it is intended to provide that:

1. Any processing of personal data carried out pursuant to this Act, including the exchange or transmission of personal data, shall be carried out in accordance with data protection law.

2. The Minister may issue regulations restricting the exercise of certain rights under data protection law to the extent, and as long as, necessary to prevent and address attempts to hinder reporting or to impede, frustrate or slow down follow-up, in particular investigations, or attempts to find out the identity of reporting persons as allowed by data protection law.

3. Personal data which are manifestly not relevant for the handling of a specific protected disclosure shall not be collected or if accidentally collected shall be deleted without undue delay.

Restriction on collection of personal data

The Garda Síochána Ombudsman Commission expressed the view that clarity on data sharing which protects the discloser but allows for efficient investigation and efficient processing of a protected disclosure is a predominant concern.

In this regard, GSOC suggested that imposing a requirement not to collect data at an early stage of an investigation (the requirement is not time-limited), particularly where a criminal wrongdoing is alleged, may limit investigative avenues and frustrate an investigation at a point where it may not be clear what material is relevant and what is not.[80]

[80] GSOC Submission

The Committee notes that the Head 14.3 currently proposes prohibiting the collection of "personal data which are manifestly not relevant". To address its concerns in the matter, GSOC suggested substituting the reference to "potentially relevant" for "relevant", resulting in the following text:

> Personal data which are manifestly not potentially relevant for the handling of a specific protected disclosure shall not be collected or if accidentally collected shall be deleted without undue delay.

The Committee is of the opinion that the change suggested by GSOC is unnecessary as use of the word "manifestly" in the provision appears to allow considerable latitude in favour of deciding that personal data may be relevant and can therefore be collected. The Committee notes that, in any event, the matter can be considered further, if necessary, on Committee Stage.

Use of data access requests to establish the identity of protected disclosers

GSOC noted that, in its experience, data access requests have been made to establish the identity of protected disclosers. GSOC stated that it was aware this was an avenue used in other agencies or departments. Any regulations issued under this Head should have regard to such efforts to breach the protections offered to a discloser and the statutory rights and protections under data legislation should be balanced with the rights and protections under the protected disclosures legislation.[81]

Recommendation 35:

The Committee recommends that care should be taken, in drafting regulations as envisaged by Head 14, to ensure to the extent possible that they cannot be used solely, principally, or incidentally for the purpose of establishing the identity of protected disclosers

[81] GSOC Submission

Head 15 Record keeping

As per the explanatory note, Head 15 transposes Article 18 of the Directive, which requires recipients of protected disclosures to keep accurate records of the disclosure.

The Committee has no comment to make in relation to this Head.

Part IV – Protected Disclosures Office (Heads 16-20)

Part IV (Heads 16-20) provides for the establishment of Protected Disclosures Office in the Office of the Ombudsman to receive and redirect disclosures made under section 7 of the Act, to receive and advise on disclosures referred by Ministers under section 8 of the Act and to set out its powers as "investigator of last resort".

Head 16: Establishment of a Protected Disclosures Office

Head 16 provides for the establishment of a Protected Disclosures Office (PDO) in the Office of the Ombudsman and sets out the functions of the office.

Interaction between Protected Disclosures Office and other bodies

The Office of the Ombudsman welcomed the intention that the proposed Protected Disclosures Office was to be independent in its functions, mirroring the statutory provision in relation to the Ombudsman's Office itself. However, it observed that the drafting of the Protected Disclosures Office's functions needed to be carefully scrutinised to ensure that its independence was not compromised, particularly in relation to its functions in respect of ministerial disclosures. It also observed that there should be a mechanism to ensure that whistleblowing disclosures by Protected Disclosures Office staff were not investigated by the Protected Disclosures Office itself.[82]

[82] Office of the Ombudsman Submission

Recommendation 36:

The Committee recommends that the Bill is drafted to ensure the independence of the Protected Disclosures Office, particularly in relation to its functions in respect of disclosures made to Ministers (Head 11)

Recommendation 37:

The Committee also recommends that alternative mechanisms be provided to deal with disclosures by Protected Disclosures Office staff

Recommendation 38:

The Committee further recommends that careful consideration is given in the drafting of the Bill to the relationship between the PDO and the Department and where responsibility for the issuing of any guidance should reside as between the Minister, the Department, or the Protected Disclosures Office

While welcoming the establishment of a central authority within the Office of the Ombudsman, the Mental Health Commission expressed the view that the provision could be enhanced to allow public bodies to decline or redirect a protected disclosure where they do not believe it is within their remit.

The Mental Health Commission suggested that it may also be of benefit to have mandatory regulations associated with the functions of this office. This might, the Commission suggested, be addressed by way of the office issuing guidance documents, which should be mandatory.[83]

GSOC suggested that Head 16 (3) (a) be amended to include a requirement that disclosures are securely transmitted.

[83] MHC Submission

IBEC welcomed the establishment of a Protected Disclosures office, suggesting that a purpose of the office should be to give guidance and support to employers endeavouring to comply with their obligations as set out under the Principal Act, particularly considering what it described as the new burdensome obligations in the draft Heads of Bill. It expressed the view that there is sufficient redress available for employees for breaches of the Principal Act through the Workplace Relations Commission whereby employees can bring claims under the Principal Act and be rewarded thereunder for any breaches of the legislation, and therefore that no further avenue for reporting persons should be required.[84]

Transparency International Ireland (TII) suggested that the Protected Disclosures Office should be delegated with responsibility, among other things, 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.[85]

TII told the Committee that it understood the Protected Disclosures Office would help Departments and other prescribed persons like regulatory agencies to investigate and assess concerns that they might not be able to otherwise and it suggested that the office report on the operation of the Act as it relates to the conduct of Departments and prescribed bodies so as to help improve or enhance internal procedures aimed at ensuring that both whistleblowers are protected and that the concerns they raise are acted on promptly.[86]

TII added: "It is not clear from the heads of Bill, from what we can see, what the precise powers of that office will be. It should be more than just a postbox through which people can raise concerns."[87]

This concern was shared by Committee members.

TII said it was essential that State agencies, whether they are prescribed persons or Departments, were equipped with the training awareness and resources they need to be

[84] IBEC Submission
[85] TII Submission
[86] JCFPERT Meeting 27 May 2021, P.10.
[87] Ibid

able to effectively assess concerns and then refer them on to whatever agency they believe has the particular capacity or is the appropriate one to deal with them.[88]

The Mental Health Commission said it would also welcome the establishment of a Protected Disclosures Office, stating that a centralised system was critical and would ensure consistency in reporting, investigation, and communication. It said it also believed it could provide supports to and guidelines for public bodies and people who want to identify wrongdoing.[89]

Asked what it would like to see done to ensure that the public at large is made aware of the existence of the Protected Disclosures Office, that their rights can be protected and that the statutory entitlements they have under the Protected Disclosures Act are available to them, the MHC stated that public bodies and most corporate bodies tended "to look after themselves more than they look after individuals":

> Where an individual is raising a wrongdoing, careers may be at stake and systems may be called into question so there is a defensive instinct among people who have power and those at the top, as we have seen over the last ten or 20 years. There is a defensive instinct so the idea of a Leviathan or an oversight or scrutiny body that people can go to, with guaranteed impartiality, would add value.[90]

The Department of Public Expenditure and Reform (DPER) told the Committee that the establishment of the Protected Disclosures Office would make it easier for workers to report wrongdoing to prescribed persons and that the office would have a key role in directing reports to the right place.[91]

> The office will also cover any gaps in coverage by following up on disclosures directly if there are no appropriate prescribed persons to report to for a particular matter. Prescribed persons will also be subject to the obligation to acknowledge, follow-up and give feedback in respect of all disclosures they receive. The protected

[88] Ibid
[89] JCFPERT Meeting 29 September 2021, P.6.
[90] JCFPERT Meeting 29 September 2021, P.16.
[91] JCFPERT Meeting 6 October 2021, P.3.

disclosures office will also provide expert support to Ministers in respect of any protected disclosures they receive.

Recommendation 39:

The Committee is of the opinion that the drafting of the PDO's functions needs to be carefully scrutinised in general but specially to ensure that it remains independent, particularly in relation to its functions in respect of ministerial disclosures. The Committee also recommends that there should be a mechanism to ensure that whistleblowing disclosures by PDO staff are not investigated by the PDO itself

Resourcing of the Protected Disclosures Office

The Office of the Ombudsman observed that whether the resourcing of the Protected Disclosures Office is adequate, as required by Article 11(1) of the Directive, will depend on several factors, including clarity in relation to the Protected Disclosures Office's remit and powers. It cautioned that a large portion of the Protected Disclosures Office's resources could be expended on determining exactly how it could operate, including on possibly costly litigation. It noted that detailed engagement with the Department of Public Expenditure and Reform would be required in relation to implementation of the legislation, including matters such as: [92]

- The number of staff allocated
- The type of staff allocated, including specialist expertise and training
- Support provided, including accommodation, ICT, and communications
- The relationship between the Protected Disclosures Office and the Department
- Issuing of any guidance on the operation of the regime

[92] Office of the Ombudsman Submission

The Garda Síochána Ombudsman Commission stated that such an office must be staffed with suitability trained personnel and not just be an "add on" in the current multi-functioning Ombudsman Office. The commission also stated that it would be against any view that suggested that the Ombudsman Office can "absorb" the responsibilities under the new regime without appropriately trained personnel being provided to deal with the issues and powers arising from protected disclosure legislation.[93]

Raiseaconcern noted that the creation of a Protected Disclosures Office was not a requirement of the EU Whistleblowing Directive. It suggested that the success or otherwise of the proposed office was dependent on adequate levels of trained resources and an adequate budget to operate and to outsource to competent independent third parties work that cannot be undertaken internally.[94]

Raiseaconcern also noted the potential for a more ambitious role for the Protected Disclosures Office with respect to the identification of patterns of relevant wrongdoing either by public bodies or in a particular sector.

The Committee is of the opinion that that adequately resourcing the proposed Protected Disclosures Office is vitally important to the overall success of the transposition of the Directive. Should the office be under resourced, it could face difficulties in dealing with caseload and other mandatory objectives in a timely manner and become a chokepoint in the processing of protected disclosures rather than a strong facilitator.

Recommendation 40:

The Committee accordingly recommends that there should be detailed engagement between those in the Office of the Ombudsman and in the nascent office charged with its establishment and the Department of Public Expenditure and Reform regarding its set-up and operation and the resources required in this regard

[93] GSOC Submission
[94] Raiseaconcern Submission

Recommendation 41:

The Committee further recommends that in resourcing the Protected Disclosures Office there should be some capacity for the appropriate collection of data for the purposes of identifying particular patterns of relevant wrongdoing within a public body or a sector and that appropriate aggregate information in relation to such patterns should be published by the Protected Disclosures Office

Recommendation 42:

The Committee also recommends that resourcing of the Protected Disclosures Office should be explicitly addressed in its annual reports and that consideration should be given to including this as a statutory requirement

Head 17: Follow up of disclosures made to the Protected Disclosures Office in the manner prescribed by section 7 of the Principal Act

As per the explanatory note, Head 17 provides for the Protected Disclosures Office (Head 16) to act as a prescribed person of last resort to address situations where there are gaps in the provision of a prescribed person to report to under the Act or where assistance is required in directing the disclosure to an appropriate prescribed person.

Disclosures made to bodies which they consider not to be within their remit

While welcoming the provision of a central authority in the form of the Office of the Ombudsman, the Mental Health Commission suggested that the provision could be enhanced to allow public bodies to decline or redirect a protected disclosure where they do not believe it is within their remit.[95]

[95] MHC Submission

Recommendation 43:

The Committee recommends that, where bodies consider that a disclosure relates to a matter not within their remit, there should be an onus on them to redirect the disclosure to the appropriate body or to the Protected Disclosures Office; and that the Protected Disclosures Office should have statutory authority to make determinations regarding remit in relation to matters referred to it

Drafting Issues

The Mental Health Commission questioned whether the use of word "diligently" is required in Head 17(4).

GSOC suggested that Head 17(2) should be amended to include a requirement that disclosures are securely transmitted.[96]

Recommendation 44:

The Committee recommends that that during the drafting of the Bill a requirement be inserted that disclosures be securely transmitted

Head 18: Role of the Protected Disclosures Office in respect of disclosures made to a Minister of the Government or a Minister of State

As per the explanatory note, Head 18 provides for the Protected Disclosures Office to receive from a Minister a disclosure made to that Minister under section 8 of the Protected Disclosures Act 2014. The office would be required to conduct an initial assessment of the disclosure and make a recommendation as to the authority to whom the disclosure should be referred for further action. Where a suitable authority cannot be identified within the appropriate timeframe, the office itself should carry out any follow up required.

The Committee has no comment to make in relation to this Head.

[96] GSOC Submission

Head 19: Provisions applying to persons who receive disclosures referred by the Protected Disclosures Office

Head 19 sets out the obligations that apply to individuals to whom the Protected Disclosures Office refers a disclosure. As per the explanatory note to the Head, this ensures that the core rules of the Directive, that disclosures be followed up and feedback be given to the reporting person, are respected.

The Garda Síochána Ombudsman Commission observed that difficulties may arise in fulfilling the obligations under subsection (d) to communicate the outcome of investigations without infringing the matters set out in subsection (f) which states that they be subject to the provisions of Heads 14 and 15 concerning data protection and record keeping in respect of any disclosure referred to them.

Recommendation 45:

The Committee recommends that clarity be provided as to what exactly is required when communicating the outcome of an investigation under subsection (d) to avoid any infringement with respect to the provisions of Heads 14 and 15

Head 20: Powers of the Protected Disclosures Office to investigate disclosures received

Head 20 sets out the powers of the Protected Disclosures Office in situations where it is required to conduct its own follow up of matters raised in a protected disclosure.

The Committee has no comment to make in relation to this Head.

Part V – Protections (Heads 21-24)

Part V (Heads 21-24) provides for amendments to the Protected Disclosures Act to allow volunteers, unpaid trainees, board members and job applicants to access the mechanisms of the Workplace Relations Commission and the Labour Court to seek redress for penalisation and for the provision of penalties for certain breaches of the Act.

Head 21: Protection from retaliation

As per the explanatory note, Head 21 –

- Provides for board members, volunteers, unpaid trainees, and job applicants to have access to the mechanisms of the Workplace Relations Commission and the Labour Court for claims for redress for penalisation for having made a protected disclosure.
- Section 3 of the Workplace Relations Act 2015 provides that for the purposes of a complaint under section 41(1) of that Act, the meaning of "employee" and "employer" is as defined in the relevant enactment, which in this case is section 12(1) of the Principal Act. Amending the definitions of employee and employer in section 12(1) will enable the persons listed in subhead 1 to seek redress from the Workplace Relations Commission
- Schedule 2 of the Principal Act (as amended by section 52(1) of the Workplace Relations Act 2015) provides that redress shall be determined by reference to the remuneration of the successful claimant. Subhead 3 allows for compensation to be awarded (subject to an appropriate limit) in cases where a determination based on remuneration is not possible.
- Subhead 4 allows complainants to seek interim relief in respect of all forms of penalisation, as required by Article 21(6) of the Directive. Currently, interim relief applies only in the context of alleged dismissal for having made a protected disclosure.

Departmental View

The Department of Public Expenditure and Reform told the Committee the legislation would further strengthen the position of whistleblowers who are penalised and must resort to the WRC or the courts for redress in that the burden of proof would now lie with the employer to prove any alleged act of penalisation did not arise as a consequence of a protected disclosure. The Department that it was also extending the provision of interim relief beyond dismissal to cover other acts of penalisation, so the courts will be able to intervene more quickly to protect whistleblowers from penalisation.[97]

Notice to employer of alleged retaliation

GSOC recommended that, if an instance of retaliation occurs during an investigation, an administrative letter should be sent to the employer putting them on notice as soon as possible of the alleged retaliation. This would be with a view to allowing the investigation to be completed and the discloser to be protected from any instance that could be an instance of intimidation to put a discloser off continuing with the investigation.[98]

Recommendation 46:

The Committee recommends that consideration be given during the drafting of the Bill to including a provision that employers be given notice by appropriate means as soon as possible of any alleged retaliation by them against a discloser, with a view to protecting the discloser from intimidation

Limiting of awards for compensation

Dr. Lauren Kierans, NUIM, noted that a cap on compensation is not in compliance with the requirement under the Directive for "full compensation" for damages suffered for having made a protected disclosure. She recommended, therefore, removal of the cap on compensation introduced under Head 21(1)(3), amending Schedule 2 of the 2014 Act and

[97] JCFPERT Meeting 29 September 2021 P.3.
[98] GSOC Submission

removal of the cap on compensation currently under the 2014 Act for successful claims by employees for unfair dismissal/penalisation under sections 11 and 12 of the 2014 Act.

Dr. Kierans stated that interim relief under Head 21(4) should apply to all workers who suffer retaliation and not be limited to claims by employees only.[99]

TII suggested that 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) of the Safety, Health, and Welfare at Work Act 2005 (requiring the employer to pay compensation of such amount (if any) as is just and equitable in the circumstances).[100]

The Bar stated that the €13,000 cap was for the new non-traditional categories of persons who were now being encompassed in the legislative scheme, including shareholders, people who have applied for jobs and board members, and that they were the only ones who would have their compensation capped. The Bar stated that this could be seen as a proportionate response to the fact their damages would not seem to be as weighty as another person who was in employment because maybe they are a job applicant, for example, and it may be a proportionate response to try to match the balance that is there between employers and employees:

The judge could be the ultimate decider of a cap on the merits of a case before the court, but it is a legislative choice for the Oireachtas to decide what cap is relevant in the circumstances.[101]

Recommendation 47:

The Committee recommends that where a person previously made a protected disclosure and continues to suffer the effects of penalisation, they should be entitled to make a new request for compensation under this Act

[99] Dr Lauren Kierans, NUIM Submission
[100] TII Submission
[101] JCFPERT Meeting 29 September 2021, P.18.

Members of the Committee and the Department were in agreement on the need for firm timelines and for interim feedback on protected disclosures.

Recommendation 48:

The Committee recommends that provision is made in the legislation creating an obligation to provide interim feedback to persons who have made a protected disclosure

Protection of employees found to have been dismissed for making a protected disclosure

TII also suggested that 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. TII suggested that 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) of the Safety, Health, and Welfare at Work Act 2005.

The Irish Business and Employers Confederation (IBEC) stated that it believed the legislation in this area is open to abuse, particularly given what it sees as high compensatory awards available to reporting persons. Accordingly, IBEC believed that caution should be exercised in the transposition process.[102]

IBEC pointed to difficulties in application considering, among other things, that

- a person may be associated with more than one organisation (for example a recruitment agency)

[102] IBEC Submission

- €13,000 compensation for those who are not in receipt of remuneration from the employer such as volunteers and job candidates is a disproportionately high and an unacceptable figure
- there may be an avenue for misuse of the Act by individuals who have been unsuccessful job applicants, suggesting that they should first have to establish prima facie case that there is a causative link between a disclosure and any retaliation that may have taken place

The Committee notes that IBEC's position appears to conflict with Article 21(5) of the Directive, which provides as follows:

> In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds.

The Committee notes that Recital 95 of the Directive provides that "While the types of legal action may vary between legal systems, they should ensure that compensation or reparation is real and effective, in a way which is proportionate to the detriment suffered and is dissuasive".

Recommendation 49:

On this basis, the Committee recommends that thought be given to amending section 12 (1) of the Protected Disclosures Act to provide the same awards as are provided for under section 28 (3) (c) of the Safety, Health, and Welfare at Work Act 2005

Recommendation 50:

The Committee also recommends that consideration be given to amending section 11 of the Act that provides for protection of employees who are dismissed for having made a protected disclosure as are provided for under section 28 (3)(c) of the Safety, Health, and Welfare at Work Act 2005

The burden of proof

IBEC suggested that the Heads of Bill should allow for compensation to be reduced by up to 50% in circumstances where the reporting person is making the disclosure and is motivated by other factors, beyond the investigation of the relevant wrongdoing, stating that this would assist in deterring individuals from pursuing claims that are not genuine and would be more proportionate given the punitive nature of the whistleblowing regime on employers.[103]

In contrast to IBEC's position, NUIG expressed the view that this reversal of the burden of proof is a critical aspect of the Directive, noting that, in its view, this was not provided for in the draft Bill.[104]

The Committee notes IBEC's concerns regarding the possibility that the broader definition of reporting person, combined with a reversal of the burden of proof, would likely give rise to a significant increase in the number of claims with an allied likelihood that some of them would be unsubstantiated or even vexatious. The Committee notes, however, that Recital 93 of the Directive provides that "once the reporting person demonstrates prima facie that he or she reported breaches or made a public disclosure in accordance with this Directive and suffered a detriment, the burden of proof should shift to the person who took the detrimental action, who should then be required to demonstrate that the action taken was not linked in any way to the reporting or the public disclosure".

[103] IBEC Submission
[104] NUIG Submission

Recommendation 51:

The Committee recommends that, in drafting the Bill or amendments to the Bill at Third Stage, consideration be given to how this shifting of the burden of proof should be clearly reflected and provided. The Committee do not support the proposals made by IBEC in relation to reduced compensation

Recommendation 52:

The Committee is of the opinion that clarity should be provided in respect of the proposed time-limit for presenting a complaint and recommend that where there is a period of continuous or ongoing penalisation, the time-period for presentation of a complaint shall run from the date of the last incident

Continuous or ongoing penalisation

TII recommended that Head 21 should be amended to make it clear that, where there is a period of continuous or ongoing penalisation, the time limit runs from the date of the last incident, which would include the date of dismissal.[105]

Dr. Kierans suggested that the 2014 Act should be amended so that the time for presenting a complaint under section 12 or section 13 begins on the date of the last act or omission and that, where an act or omission extends over a period, the "date of the act or omission" means the last day of that period.[106]

Recommendation 53:

The Committee recommends that an amendment should be included that would provide clarity in respect of the proposed time limit for presenting a complaint

[105] TII Submission
[106] Dr Lauren Kierans, NUIM Submission

Drafting Issues

The HSE expressed the view that greater clarity in relation to the rights of "job applicants" is needed, and greater definition is required as to what constitutes the employing agency. The 2014 Act broadly defines "penalisation" as "any act or omission that affects a worker to the worker's detriment" and lists examples including suspension, lay-off or dismissal, or unfair treatment. The general scheme proposes to expand the definition of "penalisation" by adding further examples to this list, including a negative performance assessment and failure to convert a temporary employment contract into a permanent one. The HSE suggested there needs to be clarity around this before the Bill is enacted.

The HSE expressed the view that greater clarity would be helpful on how an employer will make reparation following findings of penalisation concerning volunteers or unpaid trainees, board members or job applicants, and the extent to which such groups would have access to the WRC.[107]

Recommendation 54:

The Committee is of the opinion that during the drafting of the Bill it will be necessary to provide clarity in relation to the definition of 'penalisation'. It further recommends that greater clarity should be provided as to how employers will make reparations to non-traditional workers including volunteers, unpaid trainees, board members and job applicants, and the extent to which these groups should have access to the WRC

Head 22: Measures of support

As per the explanatory note, Head 22 transposes Article 20 of the Directive. The Article provides for certain measures of support to be provided to workers intending to make or who have made a protected disclosure, in particular the following:

[107] HSE Submission

(a) comprehensive and independent information and advice, which is easily accessible to the public and free of charge, on procedures and remedies available, on protection against retaliation, and on the rights of the person concerned;

(b) effective assistance from competent authorities before any relevant authority involved in their protection against retaliation, including, where provided for under national law, certification of the fact that they qualify for protection under this Directive; and

(c) legal aid in criminal and in cross-border civil proceedings in accordance with Directive (EU) 2016/1919 and Directive 2008/52/EC of the European Parliament and of the Council (48), and, in accordance with national law, legal aid in further proceedings and legal counselling or other legal assistance.

Article 20 also provides:

- Member States may provide for financial assistance and support measures, including psychological support, for reporting persons in the framework of legal proceedings, and
- The support measures referred to in this Article may be provided, as appropriate, by an information centre or a single and clearly identified independent administrative authority.

Provision for Financial Assistance

NUIG noted that despite there being significant potential legal costs for whistleblowers, the Heads do not currently appear to make provision for financial assistance.[108]

The Mental Health Commission highlighted the absence of provision for legal aid and queried whether this is it to be addressed by way of amendment to legislation related to the Workplace Relations Commission.[109]

[108] NUIG Submission
[109] MHC Submission

The Bar stated that it recommended the provision of legal aid to certain persons making or contemplating making a protected disclosure: "The council views the provision of legal aid and psychological support as consistent with the ethos of the directive, which seeks to empower would-be reporting persons into making a fully informed decision as to whether they will make a report or protected disclosure and for them to be supported thereafter."[110]

The Bar also noted that whistleblowers can have an uphill battle to bring disclosures to bear, stating that they are sometimes isolated and incur great financial expense, particularly if there is retaliation involved.

> Having the added problem of having to resource a potential case against another party that is well funded and well able to carry on a battle through the courts or elsewhere means that a person could be dissuaded from bringing forth a protected closure because he or she knows that there is a long battle ahead. There is a high price to pay, both personally and financially, because of making a protected disclosure. We feel that not only should psychological support be made available to persons who make protected disclosures, but that civil legal aid should also be available to them.[111]

The Mental Health Commission also supported the provision of support services to people making protected disclosures and noted that a change in culture was required:

> An individual who identifies wrongdoing often goes up against people who usually have power and authority… Wrongdoers will use any tactic and to press down upon someone who identifies that. We therefore need protections in place for the individual… It is about changing the culture in Ireland… [and] …looking at how we in Ireland can accept that and support people who are acting in the public interest.[112]

[110] JCFPERT Meeting 29 September 2021, P.4.
[111] JCFPERT Meeting 29 September 2021, P.8.
[112] JCFPERT Meeting 29 September 2021, P.10.

The Committee is of the view that free and independent psychological counselling services should be made available to those who make protected disclosures.

Transparency International Ireland noted that the Directive provides, under measures to support Article 20 and elsewhere, for free legal aid to be given to people making protected disclosures. It noted that the "balance is tipped in favour of employers, whether in the public or private sector, and it is essential that workers are given free legal aid and support when taking challenges".[113]

TII also noted that trade unions "play a pivotal role in promoting the welfare of whistleblowers and in educating workers on their responsibilities to make sure their colleagues do not suffer as a result of speaking up". It further noted that it is often co-workers rather than employers who are responsible for direct reprisals against the whistleblower.114

The Department of Public Expenditure and Reform told the Committee that it had been "very taken" with the issues raised regarding support services and had been "giving it some thought". The Department noted that TII was planning a pilot service in this area and the Department would be looking at it with great interest in terms of it perhaps helping to inform DPER when planning future initiatives.[115]

Recommendation 55:

The Committee notes that Article 21(7) unequivocally provides that persons comprehended by Article 4 of the Directive "shall not incur liability of any kind as a result of reports or public disclosures under this Directive" and recommends that the text of the Bill include clear provision to this effect

The Committee notes that Head 22 is lacking in detail in terms of the support measures to be made available to workers intending to make or who have made a protected disclosure

[113] JCFPERT Meeting 27 May 2021, P.23.
[114] JCFPERT Meeting 27 May 2021, P.23.
[115] JCFPERT Meeting 6 October 2021, P.6.

than is Article 20 of the Directive – in relation to legal aid in criminal and in cross-border civil proceedings, for example.

The Committee notes that the obligations imposed by Article 21 of the Directive on Member States to provide measures of support to reporting persons are limited to the three requirements listed under Article 20.1. These requirements include ensuring that reporting persons have access to free and comprehensive independent information, access to advice on procedures and remedies available to them regarding the protection against retaliation, and further a means of certifying that they are entitled to the benefit of statutory protection from a prescribed person. While Member States are also encouraged to provide free legal aid and psychological support to reporting persons in difficulty under Articles 20(2) and 20(3), this is not a mandatory obligation.

Recommendation 56:

The Committee recommends that specific provision for access to legal aid for whistleblowers be made in the legislation, along with a reference to other appropriate supports, which should include counselling

Other key points in relation to Head 22 that emerged from evidence received, both written and oral, are summarised below. The Committee is of the opinion that it would be of assistance in considering the Bill on Second and Committee Stages if the Department was to provide a statement clarifying the position in relation to each.

- The Mental Health Commission sought clarity as to whether the measures of support proposed would be provided by the new Protected Disclosures Office to be established within the Office of the Ombudsman, believing that this would be an appropriate function to assign to such an office.[116]
- GSOC noted that clarification is required as to what "effective assistance" amounts to as this is an obligation placed on prescribed persons.[117]

[116] MHC Submission
[117] GSOC Submission

- TII expressed the view that prescribed persons should be required to provide material assistance to persons who have made a disclosure under the Act, by:[118]
  (a) confirming that the same reporting person is believed to have made a protected disclosure in a manner consistent with the Act; and/or
  (b) providing reporting persons access to a fund established for the purpose of meeting the costs of litigation arising from a protected disclosure.
- TII also suggested that to avoid any risk of the word "employee" being interpreted unduly narrowly, it should be removed altogether. Alternatively, it could be amended to read that relevant information must come to the attention of the reporting person in a work-related context.

Head 23: Protections for persons concerned

As per the explanatory note, Head 23 transposes Article 22(1) of the Directive, which provides that the Directive shall not prevent persons concerned from being fully able to enjoy the right to an effective remedy and a fair trial as well as the presumption of innocence and the rights of defence, including the right to be heard and the right to access their file.

Drafting issues

The Health Service Executive (HSE) referred to the fact that Head 23 provides for the right of a "person concerned" to access their file and expressed the view that the position in relation to protection of "person concerned' needs to be further defined and clarified. [119]

The Committee is of the opinion that it would be of assistance, in considering the Bill at Third Stage, if the Department were to provide a statement clarifying the position in relation to the rights of persons concerned.

[118] TII Submission
[119] HSE Submission

Head 24: Penalties

As per the explanatory note, Head 24 —

- Transposes Article 23 of the Directive, which requires effective, proportionate and dissuasive penalties for certain breaches of the Directive.
- The Minister will decide on the precise form of these penalties during the drafting process in consultation with the Office of the Attorney General.

The Committee heard testimony on the importance of penalties along with detailed views on they might be provided for in the Bill. Some of the strong points made by witnesses included:

- The MHC was of the view that a scale would need to be established as to the type of offence / penalty. It asked whether consideration should be given to automatic penalties, and whether, where there is a summary offence or indictable offence, there should be a threat of both financial penalties and imprisonment.[120]
- The MHC suggested that it would have to be established who would bring the prosecution and further suggested it could be the new Protected Disclosures Office. If so, this body could issue penalties and bring prosecutions for minor matters and could refer more serious matters to the DPP, noting that administrative sanctions are often seen as an effective and efficient means of deterring misconduct and at the same noting the constitutional argument put forward in relation to administrative fines.[121]
- GSOC expressed the view that there is a need for the penalties to be brought in at the time of enactment to ensure that there is a deterrent.
- TII suggested that provision should be made for appropriate penalties for any person who:[122]

[120] MHC Submission
[121] Ibid
[122] TII Submission

(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.'

Recommendation 57:

The Committee recommends that, in deciding on the penalties to be provided for in the Bill, the Minister take account of the views expressed to the Committee

Recommendation 58:

The Committee further recommends that the phrase "reporting person" should be used instead of "worker" in relation to this section on penalties

Part VI – Miscellaneous and supplementary (Heads 25 & 26)

Part VI provides for the Minister to issue statutory guidance to assist public bodies in implementing the legislation and for reporting on the numbers of protected disclosures made.

Head 25: Guidelines for public bodies

As per the explanatory note, Head 25 —

- Replaces section 21(3) and(4) of the Protected Disclosures Act, which provided that the Minister for Public Expenditure and Reform could issue guidelines for public bodies in respect of establishing and maintaining procedures for handling protected disclosures made by their staff under section 6 of the Act.
- The Head extends this to provide that the Minister may issue guidelines in respect of disclosures made to prescribed persons under section 7 of the Act and disclosures made by workers in public bodies to Ministers under section 8 of the Act.

GSOC favoured guidelines intended to ensure that disclosers have access to equitable assistance regardless of what body they interact with during the disclosure process.[123]

The Mental Health Commission (MHC) suggested that it would be appropriate for the guidance documents to be issued by the new Protected Disclosures Office to be established within the Office of the Ombudsman, and furthermore, that the issuing of guidance should be mandatory.[124]

The Committee noted that the Office of the Ombudsman did not make a similar suggestion, but observed that detailed engagement with the Department would be required in the issuing of any guidance on the operation of the proposed protected disclosures regime.

The Committee is of the opinion that guidelines to help to avoid divergence in the treatment of disclosures by relevant bodies are essential.

[123] GSOC Submission
[124] MHC Submission

Head 26: Reporting

As per the explanatory note, Head 26 —

- Transposes the reporting obligations that apply to prescribed persons under Article 17 of the Directive.
- The Head also amends section 21 of the Protected Disclosures Act, which provides for all public bodies, to prepare annual reports on the numbers of protected disclosures received, to align these requirements with the Directive.
- The proposed amendment also clarifies that the annual report should cover the preceding calendar year and, for administrative efficiency, that the report can be incorporated into the body's annual report, where one is published.

Potential Issues Arising with Reporting

The Health Service Executive (HSE) was of the view that issues arise in relation to the reporting requirements outlined in Head 26. These include the requirement to report, "if ascertained, the estimated financial damage and the amounts recovered following investigations and proceedings".[125]

Recommendation 59:

The Committee recommends that consideration be given to how reporting requirements may interact with other legislation, particularly the obligation to provide financial information following the conclusion of investigations and proceedings

[125] HSE Submission

Reporting Template

The Garda Síochána Ombudsman Commission (GSOC) suggested that a template for such a report as described should be available for download to ensure consistency in reporting and the template should be updated as required centrally.[126]

The Committee welcomes this suggestion, noting that such a template could be beneficial in facilitating the preparation of the relevant report, and could improve comparability between reports prepared by different bodies.

Improved Accessibility to Information

Dr. Lauren Kierans, NUIM, suggested that prescribed persons should be required to publish their protected disclosures annual report on their dedicated protected disclosures webpage and that all public bodies must include in their protected disclosures annual reports clear and easily accessible information regarding the procedures for making protected disclosures internally.[127]

Recommendation 60:

The Committee is of the opinion that these steps would enhance accessibility to protected disclosures annual reports and facilitate those seeking to make protected disclosure within the bodies concerned. Therefore, the Committee recommends the inclusion of such a provision in the Bill

Broader Use of Reporting/Risk Management

Raiseaconcern suggested that all of the protected disclosures process under the amended Act should be considered as part of a risk management system, and that it should be a mandatory requirement to undertake a root cause analysis to establish the broader causes that prevailed which facilitated or enabled the wrongdoing to take place and did not identify it before the whistleblower came forward.

[126] GSOC Submission
[127] Dr Lauren Kierans, NUIM Submission

Observing that this would mitigate the risk of recurrence and suggesting that sharing of information gained could be incorporated in reporting requirements. Raiseaconcern suggested that the Protected Disclosures Office could play a role in this function in the public interest.[128]

The Committee notes that these suggestions could produce greatly beneficial results, but may also present significant challenges, notably in terms of resourcing. The Committee suggests that careful consideration be given during the drafting of the Bill as to whether such a provision should be included.

[128] Raiseaconcern Submission

CHAPTER 4 – Lived Experience

Issues Relating to Existing Legislation Raised by Those Appearing Before the Committee:

In advance of the commencement of the formal pre-legislative scrutiny process, the Committee met with individual whistleblowers and representatives of organisations that dealt with protected disclosures. The purpose of these meetings was to hear the personal testimony of whistleblowers and their lived experience of the operation of the Protected Disclosures Act 2014 and to inform the Committee's consideration of the amending legislation in the context of aspects that required improvement or should be included in the new legislation. Issues that were arose at that meeting and during the Committees' meetings during pre-legislative scrutiny of the Bill are discussed below.

Non-Governmental Organisation (NGO) Perspective

Transparency International Ireland (TII) was founded in 2004 and engages in lobbying, research and advocacy aimed at addressing the risk of corruption. In 2011, it launched the country's only freefone helpline for whistleblowers and witnesses of wrongdoing, Speak Up, and since then has helped approximately 1,850 clients, of whom approximately one in three have been categorised as having made protected disclosures. TII observed a 120% increase in the volume of calls to the helpline after the 2014 Act was introduced.[129]

Survey Results

TII also gathers data through its integrity at work survey and has found that most people blowing the whistle at work say that they have not suffered as a result. Of the 150 or so private sector employees who took part in its integrity at work survey in 2016 and said that they had spoken up about wrongdoing at work at some point during their careers, only 21% said that their disclosures had had a negative impact on them. In contrast, 28% said that the outcome had been positive. This finding is similar to those highlighted in employee surveys in other jurisdictions and suggests that most employers act responsibly. Nevertheless, TII indicated that this statement should not be taken at face value – if one in five workers is penalised for speaking up and that figure is translated to the Irish workforce, it suggests that

[129] JCFPERT Meeting 27 May 2021, P.2.

more than 30,000 people have suffered some type of detriment for blowing the whistle at some point in their careers.130 TII also stated that its research showed that most workers want to report to their line manager in the first instance and this is reflected in international research also.131

Risks Involved in Speaking Up

TII notes that despite the introduction of safeguards, "whistleblowers continue to bear the overwhelming burden and risk of speaking up":

> …workers lose more than 90% of protected disclosure claims brought before the Workplace Relations Commission, WRC. Work 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 professions again. The impact of reprisal on family, physical well-being, and the mental health of whistleblowers can be devastating.132

Role of Journalists

The journalist, Mr. Mick Clifford, who said he had encountered dozens of people who had made disclosures, told the Committee that suggestions at the disclosures tribunal that the legislation should be amended to ensure disclosures were not leaked to journalists would be "retrograde". He noted that in one case of which he was aware, involving a disclosure related to the misuse of public funds in a State agency, it was "reasonable to wonder whether anything of substance would have been done if the issue had not found its way into the public domain".[133]

Time Delays and Communication Difficulties

Mr. Clifford also highlighted the time taken to complete investigations on foot of disclosures and said he was aware of two cases that were still live more than three years after the disclosures were made:

[130] JCFPERT Meeting 27 May 2021, P.3.
[131] JCFPERT Meeting 27 May 2021, P.6.
[132] JCFPERT Meeting 27 May 2021, P.3.
[133] JCFPERT Meeting 27 May 2021, P.4.

> Frankly, I find it difficult to accept that matters could not be progressed with greater urgency, especially given that many cases have been farmed out to external agencies for investigation.

Asked if the process had become very legalised and whether this was part of the reason for slowness. Mr. Clifford said that was possible, but he found delays difficult to understand as several State organisations farmed out investigations to outside agencies. Further factors were the slow co-operation from people asked to provide evidence and that once an investigation has been completed, there is often a protracted period before the whistleblower is informed that there has been an outcome - he or she is not given the full result - and told what exactly is being done in pursuit of it. Mr. Clifford said he agreed the legislation would benefit from the inclusion of strict timelines.[134]

TII said it welcomed the provisions whereby employers over a certain size or in a defined sector would be required to provide feedback. Disclosures will have to be acknowledged within seven days and an outline of what action has been taken provided within three to six months. TII added that clear guidance will be essential for employers and public bodies on how to assess and investigate concerns so that whistleblowers were not left waiting years for a response.135 TII added that the "balance of power is not with the discloser; it is with the employer" and employees were often very disconcerted when they discovered that something was going on, but their employer does not react in the way that the employee thinks they ought to react, and an investigation is dragged out.136

Ms Julie Grace outlined her negative experience of whistleblowing in a local authority and told the Committee that she was "deprived of a timeline and further deprived of communications, including the determination".137 She told the Committee that "the elephant in the room about the Protected Disclosures Act 2014 is that whether by accident or by design, it is not time-bound" and "it seems no resolution needs ever to emerge".

[134] JCFPERT Meeting 27 May 2021, P.9.
[135] JCFPERT Meeting 27 May 2021, P.9.
[136] JCFPERT Meeting 27 May 2021, P11.
[137] JCFPERT Meeting 22 September 2021, P.5.

> Unfortunately for bona fide whistleblowers who expect a fair process in a timely manner with an outcome advised to them, I can only say that since I submitted my protected disclosure application to the relevant Minister in June 2016, the entire protected disclosures process has failed for me.[138]

Ms Grace outlined the cost to her personally of blowing the whistle:

> The remedy in the Protected Disclosures Act 2014 is minuscule when compared with the actual cost to me for my honesty and integrity. It does not even consider the whole retaliation element.[139]

Mr. Noel McGree also noted that of the 26 Heads in the general scheme, "not one of them relates to time limits".140

Communication

Allied to the time delays and lack of information regarding the outcome of investigate processes, the whistleblowers also outlined a lack of communication as a major source of frustration and concern. Ms Julie Grace told the Committee she was effectively kept in the dark and only learned snippets of information through freedom of information requests.141

Raiseaconcern noted that the new legislation proposed that feedback must be given to disclosers: "What is fed back in that process may be limited because other people are perhaps being investigated whose rights also have to be protected, but at least now there is a channel of feedback to the discloser."142

Mr. Noel McGree, however, questioned what exactly providing an update would mean in practice:

> I received an update recently, which was a one-line email stating that the investigation of my protected disclosure was ongoing. That was it. The Department I was dealing with met its obligation to provide me with an update, but the update

[138] Ibid
[139] JCFPERT Meeting 22 September 2021, P.7.
[140] JCFPERT Meeting 22 September 2021, P.18.
[141] JCFPERT Meeting 22 September 2021, P.16.
[142] JCFPERT Meeting 22 September 2021, P.17.

> provided me with nothing new. I have no new time period and I was not given any new information. This is the type of difficulty we are up against.143

Penalisation

Regarding penalisation, Mr. Mick Clifford told the Committee he had on numerous occasions encountered disclosers who were adamant they had been penalised because of their actions:

> I am acutely aware a discloser may well perceive penalisation when it is not happening, but experience has shown me that in many cases, penalisation does occur.144

He suggested that one element of the Act that might require further examination was that dealing with protections for disclosers and issues relating to penalisation.

TII also stated that its clients "regularly express that they have suffered reprisals for making disclosures" and that unscrupulous employers will invent things so they can accuse an employee to distract from a wrongdoing.

Ms Grace told the Committee: "Doing the right thing, as a public servant, and blowing the whistle on wrongdoing did not present the biggest challenge for me. What has presented extreme challenge over the past 17 years is the victimisation, penalisation and retaliation that I have endured and suffered, coming from actions of individuals who are protected inside State-funded organisations and who are personally cosseted by the public purse. It is unfair that they are shielded from all accountability for their actions and that they are enabled to engage in malicious strategies to delay, to deny and to wait for the whistleblower to die."[145]

[143] JCFPERT Meeting 22 September 2021, P.18.
[144] JCFPERT Meeting 27 May 2021, P.5.
[145] JCFPERT Meeting 22 September 2021, P.7.

False Complaints

Mr. John Wilson also told the Committee that the legislation should include penalties for people who deliberately make false allegations and portray themselves as bone fide whistleblowers.[146]

Fear of Reprisal

TII noted that the fear of futility as much as the fear of reprisal that served to deter people from speaking up and that one of the most common sources of complaints to its helpline related to a failure to investigate wrongdoing. TII also noted that employers faced difficulties in dealing with protected disclosures and that they often struggle to meet the expectations of workers who might reasonably ask that they be kept informed of the progress of investigations and they may not be aware that a whistleblower was being penalised.[147]

Personal Costs

The whistleblowers who met with the Committee all outlined the personal, emotional, and financial costs to them of making protected disclosures.

As to how important it was that they could access compensation, Ms Julie Grace said the focus should be on timely restitution rather than compensation: “It should reflect the losses and reflect where a person is in their career. If somebody has lost their home over it, that should be reflected… I would call for that restitution to be measured with the losses.”148

Mr. Noel McGree told the Committee that while people were human and can all make mistakes, “we are destroyed mentally and financially. Our lifestyle and everything is gone. We are no more.”149

Supports, Reporting Channels and Culture

TII stated that when a client came to it, it was often the situation that he or she was aware of a wrongdoing but was afraid to disclose and wanted to know the protections. “Support

[146] JCFPERT Meeting 22 September 2021, P.16.
[147] JCFPERT Meeting 27 May 2021, P.3.
[148] JCFPERT Meeting 22 September 2021, P.15.
[149] JCFPERT Meeting 22 September 2021, P.22.

for people making disclosures is very important because people want to know how to approach this technical and legal arena."150 TII added:

> One of our goals is to make sure that people do not litigate. If workers and employers are at loggerheads and are before the Workplace Relations Commission or the civil courts, we see that as a failure. These protections and the legislation should not be seen as the last resort. We want to encourage employers to make sure they have the necessary support in place so that people can seek advice and think these dilemmas through before things escalate. We also want employers to be well positioned to act on concerns promptly and thoroughly.151

Regarding reporting channels, TII told the Committee that "the work must start within the organisation to build a culture where staff feel safe enough to come forward and raise a concern in the first instance, and where that report can be dealt with rapidly because that is where people want to go".152

Mr. Clifford told the Committee that his encounters with whistleblowers had "largely occurred when they have perceived that internal efforts have failed… People going outside tends to be largely a last resort, unfortunately".153 TII added that "It is only where the person believes the employer has not taken decisive action in response to the concern that he or she will seek to report externally."154

Dr. Lauren Kierans, National University of Ireland Maynooth (NUIM), outlined her research regarding channels for disclosures and told the Committee that she assessed case law relating to the Protected Disclosures Act 2014 between July 2014 and July 2020 and found that in 85.6% of cases, the worker involved had made a disclosure internally in the first instance and in 22% of such cases, the worker subsequently went externally because he or she was dissatisfied with the response received or there was no response at all:

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150 JCFPERT Meeting 27 May 2021, P.5.
151 JCFPERT Meeting 27 May 2021, P.7.
152 Ibid
153 Ibid
154 Ibid

> Essentially, this means workers mostly go internally but if the disclosure is not handled correctly, they go externally. It is to be hoped that the new obligations under the EU directive will enhance the responses internally to workers' disclosures, meaning they will not have to go outside the organisation with the disclosure. 155

Regarding security for whistleblowers TII added that "the answer lies in providing training for the disclosure recipients and a greater awareness of the rights of both the discloser and the persons of concern":

> When somebody makes a disclosure of wrongdoing in the workplace, it can be hard to hear that from an employer's perspective, and everyone feels under threat. If you treat the situation whereby everyone knows he or she is taken care of and that both the whistleblower and those who are implicated are going to be protected, that would enhance how things play out in the workplace and, it is hoped, would create a more secure environment for everybody.[156]

Culture

Raiseaconcern stated that passing legislation alone regarding protected disclosures was not enough and it needed to be accompanied by a Government-backed initiative to promote a positive attitude towards this whole area:

> Ireland should promote a culture where we encourage, as well as offer, legislative protection to workers who raise concerns about workplace wrongdoing. This culture would create the environment within which Ireland's national and public interests would be best served by making it a better place to work, a better place to do business and a better place with which to do business. We encourage the Government to align this amended legislation with a public awareness programme promoting such a culture.157

Mr. John Wilson also outlined his very negative experience of whistleblowing and told the Committee that a major change in attitude towards whistleblowers was needed in Ireland.

[155] JCFPERT Meeting 27 May 2021, P.8.
[156] JCFPERT Meeting 27 May 2021, P.14.
[157] JCFPERT Meeting 22 September 2021, P.5.

He said he would welcome any legislation that offered protection to bona fide whistleblowers, but "the sad reality is that until there is a major culture change in Ireland relating to the treatment of people who report wrongdoing in the workplace, life will continue to be very difficult for these people. The acceptance of the role of bona fide whistleblowers must become the rule and not the exception".158

Mr. Noel McGree also criticised the culture whereby resources were devoted to defending allegations of breaches of the Protected Disclosures Act:

> The Protected Disclosures Act 2014 is not Government's best work. It is littered with half-finished aspirations and unqualified requests. It is actioned by weak and unenforceable guidelines, recommendations and framework documents which permit ambiguity and provide loopholes to those seeking to frustrate or abuse the intended purpose of the Act. If someone is assaulted in Ireland, the State represents the victim assaulted and those accused are prosecuted by the State through the Offices of the Director of Public Prosecutions. If a person is assaulted for being a whistleblower, penalised for making a protected disclosure, as defined by the Protected Disclosures Act, the State will finance the defence of those accused of corruption and penalisation through the Chief State Solicitor's Office. This explains why some politicians, in particular Ministers who are identified as recipients of protected disclosures under the Act, lack the courage required to support whistleblowers. The Ministers understand that such support means standing with David against Goliath, standing up to the vast State resources employed to defend those who breach the Protected Disclosures Act. This culture is anti-whistleblower. Our culture needs to change before the Act changes.[159]

Perpetrators Potentially May Deal with Accusations Against Themselves

Asked about the provisions of the current legislation that allow protected disclosures to be made to Ministers, Mr. Noel McGree noted that there was a lot of ambiguity in the Act

[158] JCFPERT Meeting 22 September 2021, P.8.
[159] JCFPERT Meeting 22 September 2021, P.9.

which leaves the decisions on actions to be taken by people, such as Ministers, who are in receipt of protected disclosures:

> The biggest issue around making a protected disclosure to a Minister is that a Minister is an executive authority over a Department. You are drawing a concern to that Minister regarding that Department. Very often, what the Minister will do is simply return the protected disclosure, concern or submission to the Department to deal with so you are effectively back to investigating yourself and alerting officials in the Department that somebody is speaking up and raising concern. We have all spoken today about the change in the culture towards whistleblowers. That culture is very real. It has been identified in some Departments already with mention of things such as silo culture and dysfunction within Departments. When you are handing something as delicate as a protected disclosure back to the officials in the Department, you are leaving them open to disclosure and penalisation…. What we are finding from inside the public service is that public officials, senior civil servants, are just not held to account. They are allowed to make arbitrary decisions… Secretaries General or senior civil servants… are allowed to make the decision as to whether the independent investigation of protected disclosures is accepted or not. That is just not fair or proper. [160]

Ms Julie Grace also referred to Ministers delegating the task of investigation back to the perpetrators.[161]

Witnesses were asked about a situation where a person makes a protected disclosure to an individual who is an officeholder, such as a Minister in a particular Department, and that individual subsequently leaves their role, should the responsibility for acting on disclosure remain with the individual, with the role or both. Ms Julie Grace said there needs to be a

[160] JCFPERT Meeting 22 September 2021, P.11 and 12.
[161] JCFPERT Meeting 22 September 2021, P.6.

very clear definition and that the matter should stay with the Department as the Minister would be acting in a corporate capacity rather than on a personal basis.[162]

Importance of Accountability and Transparency

The whistleblowers also criticised the lack of accountability and transparency they experienced. Mr. John Wilson told the Committee that "when a bona fide whistleblower makes a complaint and if and when it is upheld, it is vitally important to instil confidence in other whistleblowers that there is accountability and somebody is made pay the price".163

Use of Public Funds to Defend Cases

The Committee heard that taxpayers' money and money paid into the State was used to defend entities, whether a Department, an agency or a third level institution, regarding disclosures and this prolonged the time it takes to deal with it. The State had put in place whistleblower legislation, but certain parts of the State appear to challenge it at every corner to the extent that the whistleblower involved was the person who suffers and the wrongdoing continued. The Committee heard this appeared to be containment in a highly aggressive way with the State itself culpable of causing further damage and harm to the individuals concerned. The financial muscle on one side took on an individual, which caused mental breakdowns and illness before person gave up.164

TII stated that it appeared "the default position of State agencies, whether in medical negligence claims, claims on wrongful dismissal or penalisation under this Act, seems to be to challenge the application. I do not think it is a problem unique to this particular area of law".165

The Committee is of the view that that legal costs arising from defending cases involving protected disclosures should be listed in the annual reports of public bodies, Departments, local authorities, or compiled and published in some other area.

[162] JCFPERT Meeting 22 September 2021, P.15.
[163] JCFPERT Meeting 22 September 2021, P.16.
[164] JCFPERT Meeting 27 May 2021, P.2.
[165] JCFPERT Meeting 22 September 2021, P.22.

Mr. Mick Clifford agreed regarding the points about the public sector, that there appeared to be a scenario whereby in the private sector if a disclosure is made, the relationship with the shareholders of that entity is such that they want the issue resolved, on the basis it will make the company or entity in the private sector function better and it is regarded in this way. 'In the public sector there is an issue whereby senior management, in particular if it is a serious issue, perceive it as being a personal attack on them and they respond on this basis and… they do so with the full resources of the State behind them. It is certainly the case that it is very difficult to see how the public interest is being served in this scenario and it is definitely an area that, hopefully, could be addressed in some way through legislation.'166

Mr. Noel McGree outlined his experience of making a protected disclosure regarding the misuse of public service resources. He said he had lost his career and his home, and his family had suffered. Meanwhile, the State employed at least eight different independent external firms, funded from the public purse, to investigate, review, or challenge his reports:

> All energies and efforts are focused on me, the discloser, while the corruption, the disclosure, is ignored and continues to this day… In its current form, the Protected Disclosures Act 2014 does not deliver protection. It does not prevent corruption and waste and it does not provide savings for the State or ensure better efficiency of public spending. It serves only as a financial burden on the State as it incurs the huge expense of financing the defence of the corrupt and the assault of the whistleblower.167

Mr. McGree said he made a second protected disclosure highlighting his treatment and reporting what he termed "serious organised corruption", but his treatment was referred to line managers as a HR matter.

> The Protected Disclosures Act 2014 is theory. The reality is different… The Protected Disclosures Act 2014 did not protect me; it defined me, identified me, labelled me and placed a target on my back. My penalisation escalated unabated and continues to this day… When those involved in the criminal activity became aware that I had

[166] JCFPERT Meeting 27 May 2021, P.23 and 24.
[167] JCFPERT Meeting 27 May 2021, P.9.

> reported their criminal enterprise, my family and I came under sustained attack, intimidation and abuse. We were followed, assaulted and abused. Our home was attacked and damaged by men in balaclavas late at night. Our car was vandalised and a dead rat was left at our front door.[168]

Failure of the Act to Protect Disclosers

Mr. McGree also told the Committee that the Protected Disclosures Act did not protect him:

> … it even removed other protections that should have been available to me. It did not prevent the triumph of evil. I am not alone; I am just invisible. Every tactic is employed to ensure that whistleblowers like me remain invisible and silent. The reality is there are many people in Ireland who, like me, have been let down by the Protected Disclosures Act 2014. 169

Mr. McGree also outlined his concerns about the terms of reference of investigations constraining the full examination of disclosures. He noted how he had dealt with nine different external independent investigators from HR, legal and auditing perspectives but the terms of reference were set by the Department: "They are private firms but are paid from the public purse... their hands were completely tied by the terms of reference".170

Mr. McGree also referred to the cost of investigations noting that in a reply to a parliamentary question the Minister for Finance had stated in response to a question regarding the breakdown of the number of protected disclosures since 2016 (A total of 510 protected disclosures were made between 2014 and 2021) that the cost of at that point of one ongoing investigation had been €55,000:

> The investigation was still ongoing at that time. A private firm was being paid to carry out an independent external investigation. The sum is a low and conservative figure, but if one multiplies it by the 510 protected disclosures that are being investigated, it comes to approximately €30 million of public funding going to private firms to investigate protected disclosures and produce reports that can then be just

[168] JCFPERT Meeting 22 September 2021, P.10.
[169] JCFPERT Meeting 22 September 2021, P.10.
[170] JCFPERT Meeting 22 September 2021, P.17 and 18.

> ignored, denied, challenged, forgotten and buried by civil servants because the findings are unpalatable or likewise if they say the civil servants did a great job and there is nothing to see here and they can be embraced. That is a lot of public money on only 510 protected disclosures since 2014. It is not an onerous task...

Mr. McGree continued:

> As bad as we all are here, the committee should have some sympathy for our wives, husbands, children and families who are suffering along with us and have been good enough to stand beside us and support us. It is one horrible, dangerous road to be cast aside and left alone. In this isolation and being left alone, the only person we are told to subscribe to is our Minister.

Mr. John Wilson said there was a need for an independent office to deal with protected disclosures: "We need a properly financed, independent office to deal with protected disclosures."171

Departmental Perspective

The Department of Public Expenditure and Reform, which drew up the Heads of the Bill, told the Committee that the directive was a significant piece of EU legislation which was specific about how protected disclosures were supposed to be managed.[172] It stated that, in many areas, Member States transposing it had limited discretion, but, in the context of the discretion that was available and in considering how to transpose the Directive, it had also taken the opportunity to reflect on how Ireland's domestic legislation had been operating and consider what could be done to improve it, including an overhaul of the statutory guidance on the Act. It added that what mattered most was not necessarily what was written in the legislation but how that legislation operated in practice, and that strong legislation was important in support the right organisational culture that will encourage workers to speak up without fear of reprisal.[173]

[171] JCFPERT Meeting 22 September 2021, P.22.
[172] JCFPERT Meeting 6 October 2021, P.2.
[173] JCFPERT Meeting 6 October 2021, P.2-5.

DPER stated that one issue that had beset the current arrangements was the confusion and multiplicity of potential channels operating side by side: "What we would like to do with the legislation that we are trying to develop here is to be clear as to what the processes are for individual reporters in given instances."[174]

The Department said it also recognised the impact of delays on individuals who made disclosures and the new feedback provisions were an effort to address this aspect: "We are clear that this legislation needs to have a firm set of timelines to minimise the burden and toll that such a process can hold for individuals. The timeframe set out in the legislation will hopefully provide some comfort and reassurance around that."[175]

The Department added that "the legislation on its own is never going to be enough, but it is the structure and the robust framework that we can put in place".[176] That it wanted to do more to help in a cultural shift towards recognising the value and bravery of people who reported wrongdoing, often at significant cost to themselves.[177]

The Department added that it had been struck by the testimonies and contributions of the whistleblowers who appeared before the Committee which highlighted situations where the processes and procedures in place under legislation did not serve the needs of specific people: "We can see all too clearly the impact that it has on their lives and circumstances. We all want to try to take into account those experiences and to ensure that, in devising this new legislation, we learn from what they can tell us."[178]

The Committee notes that the Department stated that practical operation rather than what was written in the legislation was most important. The Committee strongly welcomes this view. The Committee also notes that the Department has observed the testimonies of whistleblowers to the Committee, and that it has said it has been struck by them and will take them into account. The Committee is appreciative that the Department has taken a

[174] JCFPERT Meeting 6 October 2021, P.10.
[175] Ibid
[176] JCFPERT Meeting 6 October 2021, P.13.
[177] Ibid
[178] JCFPERT Meeting 6 October 2021, P.4.

rounded view of the issues and is hopeful that this will feed into providing an improved Principal Act and more importantly an improved protected disclosures regime.

APPENDIX 1 - Terms of Reference

JOINT COMMITTEE ON FINANCE, PUBLIC EXPENDITURE AND REFORM, AND TAOISEACH TERMS OF REFERENCE – STANDING ORDERS 94, 95 AND 96 (as amended) JULY 2020

Standing Orders 94, 95 and 96 – scope of activity and powers of Select Committees and functions of Departmental Select Committees

Scope and context of activities of Select Committees.

94. (1) The Dáil may appoint a Select Committee to consider and, if so permitted, to take evidence upon any Bill, Estimate or matter, and to report its opinion for the information and assistance of the Dáil. Such motion shall specifically state the orders of reference of the Committee, define the powers devolved upon it, fix the number of members to serve on it, state the quorum, and may appoint a date upon which the Committee shall report back to the Dáil.

(2) It shall be an instruction to each Select Committee that—

(*a*) it may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders;

(*b*) such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil;

(*c*) it shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Order 125(1); and

(*d*) it shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

(i) a member of the Government or a Minister of State, or

(ii) the principal office-holder of a State body within the responsibility of a Government Department or

(iii) the principal office-holder of a non-State body which is partly funded by the State,

Provided that the Committee may appeal any such request made to the Ceann Comhairle, whose decision shall be final.

(3) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice to the Business Committee by a Chairman of one of the Select Committees concerned, waives this instruction.

Functions of Departmental Select Committees.
95. (1) The Dáil may appoint a Departmental Select Committee to consider and, unless otherwise provided for in these Standing Orders or by order, to report to the Dáil on any matter relating to—

(*a*) legislation, policy, governance, expenditure and administration of—

(i) a Government Department, and

(ii) State bodies within the responsibility of such Department, and

(*b*) the performance of a non-State body in relation to an agreement for the provision of services that it has entered into with any such Government Department or State body.

(2) A Select Committee appointed pursuant to this Standing Order shall also consider such other matters which—

(*a*) stand referred to the Committee by virtue of these Standing Orders or statute law, or

(b) shall be referred to the Committee by order of the Dáil.

(3) The principal purpose of Committee consideration of matters of policy, governance, expenditure and administration under paragraph (1) shall be—

(*a*) for the accountability of the relevant Minister or Minister of State, and

(*b*) to assess the performance of the relevant Government Department or of a State body within the responsibility of the relevant Department, in delivering public services while achieving intended outcomes, including value for money.

(4) A Select Committee appointed pursuant to this Standing Order shall not consider any matter relating to accounts audited by, or reports of, the Comptroller and Auditor General unless the Committee of Public Accounts—

(a) consents to such consideration, or

(b) has reported on such accounts or reports.

(5) A Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann to be and act as a Joint Committee for the purposes of paragraph (1) and such other purposes as may be specified in these Standing Orders or by order of the Dáil: provided that the Joint Committee shall not consider—

(a) the Committee Stage of a Bill,

(*b*) Estimates for Public Services, or

(*c*) a proposal contained in a motion for the approval of an international agreement involving a charge upon public funds referred to the Committee by order of the Dáil.

(6) Any report that the Joint Committee proposes to make shall, on adoption by the Joint Committee, be made to both Houses of the Oireachtas.

(7) The Chairman of the Select Committee appointed pursuant to this Standing Order shall also be Chairman of the Joint Committee.

(8) Where a Select Committee proposes to consider—

(*a*) EU draft legislative acts standing referred to the Select Committee under Standing Order 133, including the compliance of such acts with the principle of subsidiarity,

(*b*) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,

(*c*) non-legislative documents published by any EU institution in relation to EU policy matters, or

(*d*) matters listed for consideration on the agenda for meetings of the relevant Council (of Ministers) of the European Union and the outcome of such meetings,

the following may be notified accordingly and shall have the right to attend and take part in such consideration without having a right to move motions or amendments or the right to vote:

(i) members of the European Parliament elected from constituencies in Ireland,

(ii) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and

(iii) at the invitation of the Committee, other members of the European Parliament.

(9) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department consider—

(*a*) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

(*b*) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions of Standing Order 130 apply where the Select Committee has not considered the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or

summer recess periods) of the report being laid before either or both Houses of the Oireachtas.

Powers of Select Committees.

96. Unless the Dáil shall otherwise order, a Committee appointed pursuant to these Standing Orders shall have the following powers:

(1) power to invite and receive oral and written evidence and to print and publish from time to time—

(a) minutes of such evidence as was heard in public, and

(b) such evidence in writing as the Committee thinks fit;

(2) power to appoint sub-Committees and to refer to such sub-Committees any matter comprehended by its orders of reference and to delegate any of its powers to such sub-Committees, including power to report directly to the Dáil;

(3) power to draft recommendations for legislative change and for new legislation;

(4) in relation to any statutory instrument, including those laid or laid in draft before either or both Houses of the Oireachtas, power to—

(*a*) require any Government Department or other instrument-making authority concerned to—

(i) submit a memorandum to the Select Committee explaining the statutory instrument, or

(ii) attend a meeting of the Select Committee to explain any such statutory instrument: Provided that the authority concerned may decline to attend for reasons given in writing to the Select Committee, which may report thereon to the Dáil, and

(*b*) recommend, where it considers that such action is warranted, that the instrument should be annulled or amended;

(5) power to require that a member of the Government or Minister of State shall attend before the Select Committee to discuss—

(a) policy, or

(*b*) proposed primary or secondary legislation (prior to such legislation being published), for which he or she is officially responsible: Provided that a member of the Government or Minister of State may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil: and provided further that a member of

the Government or Minister of State may request to attend a meeting of the Select Committee to enable him or her to discuss such policy or proposed legislation;

(6) power to require that a member of the Government or Minister of State shall attend before the Select Committee and provide, in private session if so requested by the attendee, oral briefings in advance of meetings of the relevant EC Council (of Ministers) of the European Union to enable the Select Committee to make known its views: Provided that the Committee may also require such attendance following such meetings;

(7) power to require that the Chairperson designate of a body or agency under the aegis of a Department shall, prior to his or her appointment, attend before the Select Committee to discuss his or her strategic priorities for the role;

(8) power to require that a member of the Government or Minister of State who is officially responsible for the implementation of an Act shall attend before a Select Committee in relation to the consideration of a report under Standing Order 197;

(9) subject to any constraints otherwise prescribed by law, power to require that principal office-holders of a—

(*a*) State body within the responsibility of a Government Department or

(*b*) non-State body which is partly funded by the State,

shall attend meetings of the Select Committee, as appropriate, to discuss issues for which they are officially responsible: Provided that such an office-holder may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil; and

(10) power to—

(*a*) engage the services of persons with specialist or technical knowledge, to assist it or any of its sub-Committees in considering particular matters; and

(b) undertake travel;

Provided that the powers under this paragraph are subject to such recommendations as may be made by the Working Group of Committee Chairmen under Standing Order 120(4)(*a*).

APPENDIX 2 - Written Submissions

Links to written Submissions Received

Reference	Submitter	
JCFPERT-R-0394	Banking and Payments Federation Ireland (BPFI)	Submission
JCFPERT-R-0396	Office of the Planning Regulator (OPR)	Submission
JCFPERT-R-0406	Irish Council for Civil Liberties (ICCL)	Submission
JCFPERT-R-0408	Mental Health Commission (MHC)	Submission
JCFPERT-R-0409	Health Service Executive (HSE)	Submission
JCFPERT-R-0410a	Garda Síochána Ombudsman Commission (GSOC)	Cover Letter
JCFPERT-R-410b	GSOC	Submission

JCFPERT-R-0412a	Irish Business and Employers Confederation (IBEC)	Cover Letter
JCFPERT-R-0412b	IBEC	Submission
JCFPERT-R-0414	Dr L Kierans, National University of Ireland, Maynooth (NUIM)	Submission
JCFPERT-R-0415a	Office of the Ombudsman	Cover Letter
JCFPERT-R-0415b	Office of the Ombudsman	Submission
JCFPERT-R-0416a	Raiseaconcern	Cover Letter
JCFPERT-R-0416b	Raiseaconcern	Submission
JCFPERT-R-0421a	Transparency Ireland	Cover Letter
JCFPERT-R-0421b	Transparency Ireland	Submission
JCFPERT-R-0432	National University of Ireland, Galway (NUIG)	Submission
JCFPERT-R-0433	Bar of Ireland	Submission
JCFPERT-R-0437	Central Bank	Submission
JCFPERT-R-0439	Law Society	Submission

JCFPERT-R-0439	Commission for Communications Regulation (ComReg)	Cover Letter
JCFPERT-R-0439	ComReg	Submission

APPENDIX 3 – Public Stakeholder Engagement

Public Engagement with Stakeholders Prior to Pre-legislative Scrutiny

Prior to the formal pre-legislative scrutiny process the Committee engaged with a range of stakeholders who had experience in dealing with protected disclosures.

The Official Report of the meeting is available here.

Witnesses present for the meeting were:

- Mr. John Devitt, Transparency International Ireland
- Ms Stephanie Casey, Transparency International Ireland
- Ms Lorraine Heffernan, Transparency International Ireland
- Dr. Lauren Kierans, National University of Ireland Maynooth
- Mr. Michael Clifford, Journalist.

Public Engagement with Stakeholders No.1

The Committee engaged with independent witnesses who had experience as whistleblowers, Raiseaconcern, and Whistleblowers Ireland, on Tuesday, 22 September 2021

The Official Report of the meeting is available here.

Witnesses present for the meeting were:

- Mr. Philip Brennan, Raiseaconcern
- Mr. John Wilson
- Mr. Noel McGree
- Ms Julie Grace, Whistleblowers Ireland.

Public Engagement with Stakeholders No.2

The Joint Committee continued scrutiny of the General Scheme of the Bill on Thursday, 29 September 2021 when it met with representatives of the Bar of Ireland, the Irish Council for Civil Liberties (ICCL), and the Mental Health Commission (MHC).

The Official Report of the meeting is available here.

Witnesses present for the meeting were:

- Mr. Seamus Clarke SC, The Bar of Ireland
- Mr. Raphael O'Leary BL, The Bar of Ireland
- Mr. Ray Merrick, ICCL
- Mr. Ronan Kennedy, ICCL
- Mr. John Farrelly, MHC
- Ms Orla Keane, MHC
- Ms Joanna Macklin, MHC

Public Engagement with Stakeholders No.3

The Joint Committee continued scrutiny of the General Scheme of Bill on Wednesday, 6 October 2021, when it met with representatives of the Department of Public Expenditure and Reform (DPER).

The Official Report of the meeting is available here.

Witnesses present for the meeting were:

- Mr. Colin Menton, DPER
- Ms Ciara Morgan, DPER
- Mr. Pat Keane, DPER

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