

Opening Statement : The Bar of Ireland's Submission on the General Scheme of the Protected Disclosures (Amendment) Bill 2021

The Bar of Ireland welcomes the opportunity to come before the Committee, as part of its ongoing examination and analysis of this 2021 Bill and seeking to amend what has already been an important and impactful Protected Disclosure regime.

The effective transposition of any EU Directive requires a thorough understanding of the local or national context; and this is so with respect to EU Directive 2019/1937, which is being transposed by way of this Amendment Bill.

The testimonies and contributions as part of your first session - John Wilson, Noel Grace and Philip Brennan of Raiseconcern.ie – all point to the need and value of a protected disclosure regime, both in the public interest and in the interest of those directly involved.

As a representative body of lawyers, the Bar of Ireland is not as concerned with the rationale and the policy behind certain legal protections and will leave that space for other capable invitees. Instead, our submission has focused on ways in which the 2021 Bill could be improved from a legal drafting and utility point of view.

Clear and effective legislation makes our jobs as lawyers much easier when advising clients. It has the potential to prevent or reduce disputes, remove uncertainty and empower individuals.

Therefore, the purpose of our contribution is to highlight particular areas which we believe could be improved as well as some areas which we fully support. These are set out more comprehensively in our written submission, but our key observations can be surmised as follows.

Definition of Worker

Firstly, the Council is of the view that the Bill could be improved by a more comprehensive and inclusive definition for the persons entitled to whistleblowing protection. Therefore, the Council recommends that the term 'worker' be replaced by 'reporting/disclosing person' and to enumerate the term a 'reporting/disclosing person' (as is the Model of the Protected Disclosures Act and the Bill at present) with the various categories of persons that ought to be caught by the protections.

The reason we say this is that jurisprudence, and other statutory definitions of 'worker' general relate to relationship narrower than what is envisaged by the Bill.

The expansion of the understanding of ‘worker’ to include shareholder or applicant for a role is of some concern on the basis that to stretch the meaning of ‘worker’ beyond its traditionally understood meaning could result in persons that would otherwise be protected not believing they classify as a worker and therefore not making a protected disclosure.

The treatment of ‘interpersonal grievances’

Secondly, as the Committee will be aware, the EU Directive and purpose of the amendment relates to breaches of EU Law, and the wide scope that that entails.

Head 5 of the Bill sets out an exclusionary definition taking inspiration from Recital 22 of the Directive on the issue of interpersonal grievance:

“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.”

The Council, in principle, welcomes the addition of this exclusion and expects that it will provide much needed clarity to certain disputes. The use of the word ‘exclusively’ is important as it narrows the scope of the exclusion. Therefore, for example, an employee could be protected if they made a disclosure concerning their boss that they claimed was bullying them if they also believed and disclosed that the boss was bullying other employees. This type of disclosure is not captured by the exclusion and would arguably be a protected disclosure depending on the particular circumstances.

The Council recommends that efforts be made to clearly define the term ‘interpersonal grievance’. Failure to provide such a definition could lead to differing views amongst employers and employees as to what qualifies as ‘interpersonal’. In our view, the legislation should provide for an objective definition with less room for individual interpretation.

Use of Courts and Workplace Commission – existing employment law regimes:

Thirdly, the Council advises for the repeal of section 13(2) of the Protected Disclosures Act which creates a mandatory exclusion on persons bringing a claim to the Workplace Relations Commission for redress for having been dismissed or for redress or for having been penalised at work and a tort claim in the courts based on detriment suffered by them arising out their making of a protected disclosure.

In our view, this section goes too far in preventing a form of double recovery by a whistleblower. It is possible to envisage a situation in which a person has been dismissed for whistleblowing but against whom a detriment is also caused. The Council is of the view that it is more in keeping with the purposes of the Directive for the availability of remedies to be maximised. Therefore, we recommend that this provision be repealed as the courts are equipped to address legal issues concerning the cross-over of reliefs with the Workplace Relations Commission.

Reporting Channels

Fourthly, Head 9 of the Bill seeks to amend section 6 of the PD Act which provides for a public disclosure by a worker to their employer. It provides that “The reporting person shall

cooperate, where required, with any investigation or any other follow up procedure initiated in accordance with the proposed section 6(9)(d).

This subsection is vague as to what type of cooperation is envisaged. Further, the consequences for such a failure are also unclear.

While the Council approves of the Bill's general approach in Head 9 and 10, it is concerned about the ambiguity within the proposed sections 6(11) and 7(5) which would benefit from greater clarity as the Bill progresses onwards

Establishment & Resourcing of a Protected Disclosures Office

Fifthly, the Council supports the creation of the Protected Disclosures Office. This is in the interests of an efficient and whistle-blower friendly regime, identifiable by the public through appropriate awareness raising, and adequately resourced.

The Council views this as a particularly worthy development in light of the increased complexity and range of regulatory matters over which protected disclosures can now be made. As the Directive aims to cover breaches of European law in a number of complex areas, public procurement, animal and food safety and many others, the Council expects the Protected Disclosures Office to act as a safe and effective 'clearing house' which simplifies the process for potential whistleblowers.

Support measures

Finally, the Council recommends for the provision of legal aid to certain persons making or contemplating making a protected disclosure given the complexity and sensitivity of this area. Further, 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/protected disclosure and for them to be supported thereafter. We look forward to engaging with the Committee and colleagues here on this important discussion.

Seamus Clarke SC

Raphael O'Leary BL