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Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach
Leinster House
Dublin 2

Issued by email to: financecommittee@oireachtas.ie

**Re: Pre-Legislative Scrutiny of the General Scheme of the Protected Disclosures (Amendment) Bill 2021**

Dear Mr McGuinness TD,

Thank you kindly for the invitation to make a written submission on the General Scheme of the Protected Disclosures (Amendment) Bill 2021. I am a Lecturer in Law at Maynooth University where I deliver a module on Whistleblowing Law and Practice to final year LLB students. I also deliver a Professional Certificate on Whistleblowing Law, Practice and Policy. I trained under the supervision of one of the world's foremost experts in the area of whistleblowing law, Professor David Lewis and I undertook my PhD, 'An Empirical Study of the Purpose of the Irish Protected Disclosures Act 2014' at the Whistleblowing Research Unit at Middlesex University, London. The core contribution of my doctoral thesis was the development of a framework for assessing national whistleblowing legislation, in light of international best standards and the EU Whistleblowers Directive. My monograph 'Whistleblowing and the Protected Disclosures Act in Ireland: Law, Rights and Policy' is due to be published in the autumn of 2021 by Clarus Press. Round Hall published my Annotated Statute on the Protected Disclosures Act 2014, that I co-authored with Associate Professor Anthony Kerr SC, in 2017. I have published both journal and non-journal articles, a book chapter on whistleblowing law in an employment law textbook, and a book chapter in a French whistleblowing law textbook.

I am a member of the interdisciplinary research network, the International Whistleblowing Research Network ('IWRN') and I founded the Irish Whistleblowing Law Society ('IWLS'), a scholarly society dedicated to fostering knowledge, interest, and awareness in all aspects of whistleblowing law. I have delivered protected disclosures training on behalf of Transparency

Ireland's Integrity at Work programme since May 2017 to over 1,100 senior staff from public sector bodies, regulators, governmental departments, and charities.

Please see attached my written submission on the General Scheme of the Protected Disclosures (Amendment) Bill 2021. If you have any further queries regarding same, please do not hesitate to contact me.

Best wishes,

Dr Lauren Kierans BL


**Dr Lauren Kierans BL: Written Submissions on the General Scheme of the Protected Disclosures (Amendment) Bill 2021.**

## 1. Background to the Protected Disclosures Act 2014

The Protected Disclosures Act 2014 ('2014 Act') is Ireland's first pan-sectoral whistleblowing legislation. It was enacted on 15 July 2014 and was designed to remedy the deficiencies of the preceding sectoral approach to whistleblower protection, which had entailed the inclusion of different whistleblowing provisions in different pieces of legislation. This sectoral approach to whistleblower protection was deemed to be ineffective as it was leaving thousands of people with little or no guidance or protection against legal action and retaliation for speaking out against wrongdoing.[1] The 2014 Act was modelled primarily on the UK and New Zealand whistleblowing legislation.[2] At an early stage, it was considered that the enactment of the 2014 Act had 'led to a significant change in the perceived environment for whistleblowing.'[3] Further, in a study carried out by Blueprint for Free Speech in 2018, which measured the whistleblower laws and policies for all EU countries against nine key European and international standards, Ireland scored the highest mark, achieving a score of 67.7%.[4] Also, the positive light in which the 2014 Act has been viewed is reflected in Transparency International's 'A Best Practice Guide for Whistleblowing Legislation', which referred specifically to the 2014 Act on numerous occasions as being a good practice example of whistleblowing legislation.[5] In April 2018, the European Commission in a communication to the European Parliament, the European Council, and the European Economic and Social

[1] Transparency International Ireland, 'An Alternative to Silence: Whistleblower Protection in Ireland' (TII January 2010) 4.

[2] Whistleblowers Ireland, 'Brendan Howlin promises the whistleblower legislation will be 'best in the world'' (Whistleblowers Ireland, 28 February 2012) <https://whistleblowersireland.com/2012/02/28/brendan-howlin-promises-whistleblower-legislation-in-ireland-will-be-best-in-the-world/> accessed 17 June 2021. At the time of publication of The Draft Heads of the Protected Disclosures in the Public Interest Bill 2012, the UK's Public Interest Disclosure Act 1998 (the provisions of which were incorporated into the Employment Rights Act 1996) was generally considered to represent an example of good practice. In 2009, the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights deemed the UK legislation to be the model in this field of legislation as far as Europe is concerned. Pieter Omtzigt, 'Explanatory Memorandum, The Protection of "whistle-blowers"' (*Council of Europe*, 29 September 2009) para 37 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12302> accessed 17 June 2021.

[3] Organisation for Economic Co-operation and Development, *Committing to Effective Whistleblower Protection* (OECD Publishing 2016) 178.

[4] Blueprint for Free Speech, 'Gaps in the System: Whistleblower Laws in the EU' **(**Blueprint for Free Speech 2018) 5.

[5] Transparency International, 'A Best Practice Guide for Whistleblowing Legislation' (TI 2018) 8, 9-10, 11, 15, 23, 24, 30, 35, 43, 55, and 62.

Committee, on strengthening whistleblower protection at EU level, listed Ireland as being one of ten Member States that has comprehensive whistleblowing legislation in place.[6]

Despite being lauded in the international sphere, the 2014 Act is currently under review and will require some necessary amendments in order to transpose, by 17 December 2021, 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 ('Directive'). A public consultation was carried out by the Department of Public Expenditure and Reform between June and July 2020 and the submissions to this consultation have helped inform the approach to transposition of the Directive.[7] On foot of this, the General Scheme of the Protected Disclosures (Amendment) Bill 2021 ('Heads of Bill') was published on 12 May 2021.[8]

The Heads of Bill consist of twenty-six Heads, divided into six parts: Part I- Preliminary and General; Part II- Application of the Bill; Part III- Reporting channels; Part IV- Protected Disclosures Office; Part V- Protections; and Part VI- Miscellaneous and Supplementary.

The key areas in the Heads of Bill that require improvement are discussed in section 2 below.

## 2. Recommendations for improvement of the Heads of Bill

### 2.1 *Head 2: Interpretation*

***Issue***

Head 2(2) amends the definition of 'penalisation' contained in s 3 of the 2014 Act. The amendment of the definition of 'penalisation' alone and not the definition of 'detriment' under s 13(3) of the 2014 Act conflicts with the position under art 19 of the Directive which provides that 'Member States shall take the necessary measures to prohibit any form of retaliation against persons…'.[9]

***Rationale***

There is currently a wide definition of 'penalisation' under the 2014 Act. An employer is prohibited from carrying out any act or omission that affects a worker to the worker's detriment and this includes an open-ended list of various forms of treatment which may constitute penalisation[10] as the definition of penalisation in the 2014 Act uses the phrase 'in particular includes'[11] and on that basis additional matters could also be claimed as penalisation.

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[6] Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on strengthening whistleblower protection at EU level Brussels' COM(2018) 214 final.

[7] Department of Public Expenditure and Reform, 'Protected Disclosures Act: Information for Citizens and Public Bodies' (*DPER*) <www.gov.ie/en/publication/e20b61-protected-disclosures-act-guidance-for-public-bodies/#eu-whistleblowing-directive> accessed 14 June 2021.

[8] Minister McGrath publishes General Scheme of Protected Disclosures (Amendment) Bill (*DPER*, 12 May 2021) <www.gov.ie/en/press-release/d263a-minister-mcgrath-publishes-general-scheme-of-protected-disclosures-amendment-bill/> accessed 14 June 2021.

[9] Directive 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 [2019] OJ L 305/17, art 19.

[10] Protected Disclosures Act 2014, s 3(1).

[11] *Ryan v A-G* [1965] IR 294 (SC) 313 where Mr Justice Kenny conducted a literal/grammatical analysis of Article 40.3.1° and 2° of the Constitution and held that Article 40.3 contained a guarantee to protect an unspecified number of personal rights. Article 40.3.2° provides that 'The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property

'Detriment' is defined for the purposes of s 13 as including: *(i)* coercion, intimidation or harassment; *(ii)* discrimination, disadvantage or adverse treatment in relation to employment (or prospective employment); *(iii)* injury, damage or loss; and *(iv)* threat of reprisal.[12] This is arguably an exhaustive list as it does not use the words 'in particular includes' but merely 'includes' thus limiting the forms of retaliation that workers can avail of redress for.

Employees are entitled to bring claims for penalisation before the WRC under s 12/Sch 2 of the 2014 Act, whilst all other 'workers' (including employees) must bring claims for 'detriment' as defined before the civil courts under s 13 of the 2014 Act.

The limited definition of 'detriment' under s 13 (3) of the 2014 Act conflicts with the position under art 19 of the Directive which provides that 'Member States shall take the necessary measures to prohibit any form of retaliation against persons…'.[13] Thus, the definition of 'detriment' does not prohibit 'any form of retaliation'. The Directive defines retaliation as 'any direct or indirect act or omission which occurs in a work-related context, is prompted by internal or external reporting or by public disclosure, and which causes or may cause unjustified detriment to the reporting person.'[14] Therefore, a broad definition of retaliation should encompass any act or omission occurring in a work-related context and which causes detriment to the worker.[15] It provides further that this includes threats of retaliation and attempts of retaliation, including in particular in the form of:

> (a) suspension, lay-off, dismissal or equivalent measures;
>
> (b) demotion or withholding of promotion;
>
> (c) transfer of duties, change of location of place of work, reduction in wages, change in working hours;
>
> (d) withholding of training;
>
> (e) a negative performance assessment or employment reference;
>
> (f) imposition or administering of any disciplinary measure, reprimand or other penalty, including a financial penalty;
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> (g) coercion, intimidation, harassment or ostracism;
>
> (h) discrimination, disadvantageous or unfair treatment;

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rights of every citizen'. Mr Justice Kenny stated that 'The words "in particular" show that sub-s. 2 is a detailed statement of something which is already contained in sub-s. 1 which is the general guarantee. But sub-s. 2 refers to rights in connection with life and good name and there are no rights in connection with these two matters specified in Article 40. It follows, I think, that the general guarantee in sub-s. 1 must extend to rights not specified in Article 40.'

[12] Protected Disclosures Act 2014, s 13(3).

[13] Directive 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 [2019] OJ L 305/17, art 19.

[14] Directive 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 [2019] OJ L 305/17, art 5(11).

[15] Directive 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 [2019] OJ L 305/17, Recital 44.

(i) 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;

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

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

(l) 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;

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

(n) cancellation of a licence or permit;

(o) psychiatric or medical referrals.[16]

The Heads of Bill adopts this list from the Directive and includes it in Head 2(2) and proposes to amend the definition of 'penalisation' in s 3 of the 2014 Act. Unfortunately, by adopting the list of the examples of the forms of retaliation from the Directive into the definition of 'penalisation' in the Heads of Bill, this means that only employees are protected under this comprehensive and non-exhaustive list, and workers are still only able to avail of redress under s 13 for the more limited types of 'detriment'. A better approach would be that on amendment of the 2014 Act, the definition of 'penalisation' is replicated in the definition of 'detriment' in s 13 so that all workers, and not just employees, can avail of the more comprehensive forms of retaliation under the definition of that term rather than under the narrow definition of 'detriment'.

***Recommendation***

Define 'detriment' in s 13 of the 2014 Act in the same terms as the non-exhaustive, comprehensive definition of 'penalisation' in Head 2(2).

**2.2 Head 8: Anonymous disclosures**

***Issue***

Head 8 proposes to insert s 5A into the 2014 Act. The concern regarding this Head is in relation to the approach adopted in s 5A(2). Section 5A(2) purports to transpose art 6(2) of the Directive, however, this is a complete misinterpretation of that article. Article 6(2) provides that 'Without prejudice to existing obligations to provide for anonymous reporting by virtue of Union law, this 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.'

This article therefore provides that Member States are entitled to decide whether anonymous disclosures are included in their national legislation, it does not provide that organisations themselves can decide whether to accept and follow-up on disclosures. This section as it is

[16] Directive 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 [2019] OJ L 305/17, art 19.

currently drafted will 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 on-going damage from the relevant wrongdoing.

***Rationale***

Anonymous disclosures are not explicitly provided for in the 2014 Act. However, in the original incarnation of the 2014 Act, the Draft Heads of the Protected Disclosures in the Public Interest Bill 2012 ('Draft Heads'), anonymous disclosures were explicitly excluded. Head 11 of the Draft Heads provided that 'A disclosure made anonymously shall not be a protected disclosure for the purposes of this Act.'[17]

The issue of excluding anonymous disclosures from the ambit of the Draft Heads was discussed in 2012 at a number of sittings of the Joint Committee on Finance, Public Expenditure and Reform ('Committee'). The issue was raised by the National Union of Journalists who highlighted that whistleblowers might speak to journalists on an anonymous basis.[18] It was also raised by Transparency Ireland, who argued that 'Most people want to report anonymously' and recommended that 'the legislation protects a worker making an anonymous disclosure where the worker can be identified as the source of a protected disclosure.'[19] The Committee issued a report on foot of the submissions made on the Draft Heads, and it acknowledged therein that the 'issue of confidentiality versus anonymity must be examined.'[20] Following the release of the report, the Protected Disclosures Bill 2013 was published which referred only to the issue of confidentiality[21] but made no mention of anonymous disclosures.

Although the 2014 Act does not refer explicitly to anonymous disclosures, the guidance published by DPER ('DPER Guidance') in March 2016 for the purpose of assisting public bodies in their establishment and maintenance of protected disclosures procedures ('Procedures').[22] addresses this issue in para E(12). The DPER Guidance recommends that Procedures should distinguish between confidentiality and anonymity, as these terms can cause confusion for both disclosers and recipients.[23] The DPER Guidance emphasises that public bodies should give a commitment to act on information disclosed anonymously, to the extent that it is possible.[24] This advice is clarified further by a recommendation that the Procedures should include a statement that investigations of such disclosures may be restricted, and that in the event of retaliation against the discloser, it may be difficult or impossible to provide protection if anonymity is maintained.[25] The DPER Guidance also stresses that Procedures should make it clear that unless a discloser reveals their identity, they will not be able to avail of the protections under the 2014 Act.[26]

[17] The Draft Heads of the Protected Disclosures in the Public Interest Bill 2012, Head 11.
[18] Joint Committee on Finance, Public Expenditure and Reform Deb 23 May 2012.
[19] Joint Committee on Finance, Public Expenditure and Reform Deb 13 June 2012.
[20] Joint Committee on Finance, Public Expenditure and Reform, *Report on hearings in relation to the Scheme of the Protected Disclosures in the Public Interest Bill, 2012* (31/FPER/010, 2012) 12.
[21] Protected Disclosures Bill 2013, s 16.
[22] Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (DPER 2016).
[23] ibid para E(12.1).
[24] ibid.
[25] ibid para E(12.2).
[26] ibid para E(12.1).

In addition, the first part of the WRC Code of Practice on protected disclosures provides that disclosures can be made anonymously.[27] Importantly, the WRC Code of Practice sets out the rationale behind this position and explains that the focus needs to be on the alleged wrongdoing and not on the discloser. The WRC Code of Practice states:

> Yes, a disclosure may be made anonymously. It should be noted that a disclosure made anonymously may potentially, of itself, present a barrier to the effective internal investigation of the matter reported on.
>
> Focus should be on the reported wrongdoing and not on the person making the disclosure.[28]

Further, in the third part of the WRC Code of Practice, the 'Model Whistleblowing Policy', it provides that anonymous disclosures can be made, but encourages confidential disclosures, stating that:

> A concern may be raised anonymously. However on a practical level it may be difficult to investigate such a concern. We would encourage workers to put their names to allegations, with our assurance of confidentiality where possible, in order to facilitate appropriate follow-up. This will make it easier for us to assess the disclosure and take appropriate action including an investigation if necessary.[29]

The OECD asserts that there should be protection of identity through the availability of anonymous reporting.[30] Transparency International also promotes the affording of protection to anonymous disclosures.[31] Further, the UK Department for Business, Energy and Industrial Strategy provides that it is good practice for managers to have a facility for anonymous disclosures.[32] The Data Protection Working Party takes the view that a worker should be informed that their identity will be protected and that they will not be penalised for making a disclosure, but if despite these assurances a worker still wants to make an anonymous disclosure then it should be processed through the whistleblowing scheme.[33] The 'Whistling While They Work: A good-practice guide for managing internal reporting of wrongdoing in public sector organisations'[34]('WWTW Guide') provides that organisations should accept

[27] Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464, [33]-[34].
[28] ibid.
[29] ibid app.
[30] Organisation for Economic Co-operation and Development, 'G20 Anti-Corruption Action Plan Protection of Whistleblowers, Study on Whistleblower Protection Framework, G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers' (OECD 2011) 31.
[31] Transparency International, 'International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest' (TI 2013) 6, provides that 'full protection shall be granted to whistleblowers who have disclosed information anonymously and who subsequently have been identified without their explicit consent.'
[32] Department for Business, Energy and Industrial Strategy, 'Whistleblowing Guidance for Employers and Code of Practice' (BEIS March 2015) 8.
[33] Article 29 Data Protection Working Party Opinion 1/2006 of 1 February 2006 on the Application of EU data protection rules to internal whistleblowing schemes in the field of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime [2006] 00195/06/EN WP 117, 11.
[34] The introduction to the WWTW Guide explains that the guide 'sets out the results from four years of research into how public sector organisations can better fulfil their missions, maintain their integrity and value their employees by adopting a current best practice approach to the management of whistleblowing.' Peter Roberts, AJ Brown and Jane Olsen, Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations (ANU E Press 2011).

anonymous disclosures and give a commitment that they will be acted on.[35] The WWTW Guide explains that flexibility in disclosure options facilitates the reporting of wrongdoing, especially in encouraging 'risk-averse complainants' to come forward.[36] The WWTW Guide recommends that in order to get around any limitations on investigating anonymous disclosures, organisations should state in their Procedures that a commitment to investigate anonymous disclosures will only apply to those disclosures that contain a sufficient amount of information to facilitate such an investigation.[37] The WWTW Guide suggests that Procedures should explain that an appropriate level of information is necessary in a disclosure, as the organisation will be prohibited from consulting further with the discloser to gain further information or clarification if the disclosure is made anonymously.[38]

It is worth noting that the rate of disclosures being made anonymously can vary. For example, according to the findings of the WWTW survey, of the Australian agencies surveyed in the study (n=304), 68.1% said that they would accept anonymous disclosures, whilst 28% indicated they would not, with a 39% non-response rate. Of those agencies that accepted anonymous disclosures, the estimated proportion of anonymous disclosures was 5.46%.[39] However, according to the Irish IAW survey, 33% of employees surveyed (n=878) said that a key influencing factor for reporting wrongdoing in the workplace is if they could report anonymously.[40] If an organisation is receiving high rates of anonymous disclosures, this may be a warning sign to the organisation that there is a serious issue with the culture in the organisation that workers do not feel safe in raising their concerns openly. As the Ethics Resource Centre highlights, their survey data shows that 'employees would rather sacrifice anonymity and report to someone they know and trust.'[41]

A significant complication with the approach in the Heads of Bill as regards anonymous disclosures is s 301 of the US Sarbanes-Oxley Act 2002 ('SOX') which already requires companies listed in the US and their subsidiaries to establish protocols for anonymous reporting (there are approximately 700 US-owned firms operating in Ireland that employ about 155,000 people[42]).[43] The proposal under the Heads of Bill is likely to create confusion and deny many Irish and migrant workers the same rights as those subject to SOX.

***Recommendation:***

Delete s 5A from the legislation.

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[35] Peter Roberts, AJ Brown and Jane Olsen, *Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press 2011) 48.
[36] ibid.
[37] ibid.
[38] ibid 51.
[39] ibid 48.
[40] Transparency International Ireland, 'Speak Up Report 2017' (TII 2017) 39.
[41] Ethics Resource Center, *Inside the Mind of a Whistleblower A Supplemental Report of the 2011 National Business Ethics Survey* (Ethics Resource Center 2012) 11.
[42] US Department of State, 'US Relations with Ireland' (*US Department of State*) <www.state.gov/u-s-relations-with-ireland/> accessed 14 July 2021.
[43] The Sarbanes-Oxley Act was passed by US Congress in 2002 after the Enron and WorldCom scandals in order to protect employees of publicly traded companies who report violations of Securities and Exchange Commission regulations or any provision of federal law relating to fraud against the shareholders. Sarbanes-Oxley Act of 2002, s 301(4)(B) provides that in relation to complaints, each audit committee shall establish procedures 'for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.'

## 2.3 Head 10 External reporting channels

### 2.3(i) *Issue*

Head 10 amends s 7 of the 2014 Act and deletes the term 'substantially' from s 7(1)(b)(ii). Section 7(1)(b)(ii) of the 2014 Act states that 'the information disclosed, and any allegation contained in it, are substantially true.' The deletion of the term 'substantially' alone from this section does not reflect the threshold for disclosures to competent authorities under the Directive.

### *Rationale*

The prescribed persons system established under the 2014 Act was influenced by the existence of such a system under the UK Employment Rights Act 1996 ('1996 Act'). The Directive requires EU Member States to also introduce an external disclosures system known as 'competent authorities.'[44] Section 7 of the 2014 Act concerns disclosures to prescribed persons. In order to make a protected disclosure under s 7, there is a higher evidential burden than a disclosure under s 6 of the 2014 Act to an employer or other responsible person, under s 8 to a Minister, and under s 9 to a legal adviser, in that the worker must reasonably believe that the information disclosed, and any allegation contained in it, are substantially true.[45] Further, in making the disclosure to a prescribed person under s 7 of the 2014 Act, the worker must reasonably believe that the relevant wrongdoing falls within the description of matters in respect of which the person is prescribed.[46]

The threshold for disclosures to prescribed persons under the 2014 Act must be amended under the transposition of the Directive, which requires the same legal threshold as an internal disclosure.

Article 6 of the Directive states:

> 1. Reporting persons shall qualify for protection under this Directive provided that:
>
> (a) they had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive; and
>
> (b) they reported either internally in accordance with Article 7 or externally in accordance with Article 10, or made a public disclosure in accordance with Article 15.'[47]

Article 10 of the Directive provides for external reporting and states that **'**Without prejudice to point (b) of Article 15(1), reporting persons shall report information on breaches[48] using the channels and procedures referred to in Articles 11 and 12, after having first reported through

[44] European Parliament and Council Directive 2019/1937/EC of 23 October 2019 on the protection of persons who report breaches of Union Law [2019] OJL305/17 art 5(14) defines 'competent authority' as 'any national authority designated to receive reports in accordance with Chapter III and give feedback to the reporting person, and/or designated to carry out the duties provided for in this Directive, in particular as regards follow-up.'
[45] Protected Disclosures Act 2014, s 7(1)(b)(ii).
[46] ibid s 7(1)(b)(i).
[47] European Parliament and Council Directive 2019/1937/EC of 23 October 2019 on the protection of persons who report breaches of Union Law [2019] OJL305/17 art 6.
[48] ibid art 5(2) provides ''information on breaches' means information, including reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur in the organisation in which the reporting person works or has worked or in another organisation with which the reporting person is or was in contact through his or her work, and about attempts to conceal such breaches'.

internal reporting channels, or by directly reporting through external reporting channels.'[49] There are no additional requirements for an external disclosure under art 10 to a competent authority as there is for a public disclosure under art 15.[50] This will ultimately encourage workers to avail of this external reporting channel, in the knowledge that they will attract protection to the same degree as when, or if, they had made their disclosure internally.

The proposal under Head 10 to amend s 7(1)(b)(ii) and merely delete the term 'substantially' fails to reflect the lower threshold of disclosures to such recipients under the Directive.

***Recommendation***

Delete section s 7(1)(b)(ii) in its entirety.

### 2.4 Head 11 Ministerial reporting channels

***Issue***

Head 11 proposes to substitute a new s 8 in the 2014 Act regarding disclosures to a Minister. It introduces additional thresholds for disclosures by a worker to be protected than those that already apply under s 8 of the 2014 Act.

***Rationale***

Under the 2014 Act, a public body worker can make a disclosure to a Minister.[51] The Minister to whom the disclosure is made must have a function relating to the public body. The same evidential threshold applies as if the disclosure was made to the worker's employer under s 6. Thus, for disclosures made under this section there is no additional evidential test beyond that contained in s 5 regarding disclosures of relevant information, that being that the worker reasonably believes that the information disclosed tends to show one or more relevant wrongdoings and the information came to their attention in connection with their employment.[52]

It is important to note art 25(2) of the Directive, which provides 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.' Therefore, in transposing the Directive, s 8 of the 2014 Act cannot be weakened. The introduction of additional tests for a disclosure to a Minister to be protected is a regressive clause and must be deleted.

***Recommendation***

[49] ibid art 10.
[50] ibid art 15 provides 'A person who makes a public disclosure shall qualify for protection under this Directive if any of the following conditions is fulfilled: (a) the person first reported internally and externally, or directly externally in accordance with Chapters II and III, but no appropriate action was taken in response to the report within the timeframe referred to in point (f) of Article 9(1) or point (d) of Article 11(2); or (b) the person has reasonable grounds to believe that: (i) the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or (ii) in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach. 2. 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.'
[51] Protected Disclosures Act 2014, s 8.
[52] ibid s 5(2).

Delete the proposed introduction of s 8(c) under Head 11.

### 2.5 Head 21: Protection from retaliation

#### 2.5(i) *Issue*

The first issue regarding Head 21 relates to the subject of compensation. This issue has two strands to it, that are interrelated. Firstly, Head 21(3) provides for a cap of €13,000 for awards for penalisation for certain employees who are not in receipt of remuneration. A cap of this nature falls foul of the requirement under the Directive for 'full compensation' for damages suffered for having made a protected disclosure.

Secondly, in unfair dismissal claims under s 11 of the 2014 Act, the employee, if successful, is entitled to redress that is considered appropriate in all the circumstances by the adjudication officer or the Labour Court.[53] The redress ordered can consist of reinstatement,[54] re-engagement,[55] or compensation.[56] Normally, for an unfair dismissal claim, an employee is entitled to be awarded up to 104 weeks' remuneration (ie two years' remuneration),[57] however, an employee who was dismissed wholly or mainly for having made a protected disclosure is entitled to be awarded up to 260 weeks' remuneration (ie five years' remuneration). Remuneration includes allowances in the nature of pay and benefits in lieu of or in addition to pay.[58] In addition, for a s 12 penalisation claim, a decision of the Adjudication Officer will do one or more of the following: *(i)* declare that the complaint was or was not well founded;[59] *(ii)* require the employer to take a specified course of action;[60] and/or *(iii)* require the employer to pay compensation as is just and equitable having regard to all the circumstances up to a maximum of five years' remuneration.[61] In respect of the issue of a cap on an award of compensation, I would argue that there should be no cap on compensation that can be awarded to an employee who is dimisssed or suffers penalisation for having made a protected disclosure.

#### *Rationale*

The Heads of Bill proposes for a specific limitation on redress for members of the administrative, management or supervisory body of an undertaking, including non-executive members; volunteers and unpaid trainees; and natural persons who acquire information on a relevant wrongdoing during a recruitment process or other pre-contractual process. Head 21(3) provides that 'Schedule 2 of the Principal Act is amended to provide that where a complainant is a person referred to in subhead (1) and they are not in receipt of remuneration in respect of the work-related context in which they have made a protected disclosure, the maximum amount that may be awarded by way of compensation for penalisation shall be €13,000.'[62] The Explanatory Note to the Heads of Bill 2021 notes that this provision 'allows for compensation to be awarded (subject to an appropriate limit) in cases where a determination based on remuneration is not possible.'[63] The maximum award proposed under Head 21(3) of €13,000

[53] Unfair Dismissals Act 1977, s 7(1) as amended.
[54] ibid s 7(1)(a).
[55] ibid s 7(1)(b).
[56] ibid s 7(1A), as inserted by Protected Disclosures Act 2014, s 11(1)(d). Such compensation must be calculated in accordance with Unfair Dismissals (Calculation of Weekly Remuneration) Regulations 1977, SI 1977/287.
[57] ibid s 7(1)(c).
[58] ibid s 7(3).
[59] ibid sch 2, s 1(3)(a).
[60] ibid sch 2, s 1(3)(b).
[61] ibid sch 2, s 1(3)(c). Such compensation must be calculated in accordance with Unfair Dismissals (Calculation of Weekly Remuneration) Regulations 1977, SI 287/1977.
[62] Protected Disclosures (Amendment) Bill 2021 General Scheme, Head 21(3).
[63] ibid Head 21, Explanatory Note.

reflects s 82(4)(b) of the Employment Equality Acts 1998–2015 which provides for a cap of €13,000 on the amount of compensation that can be awarded by the WRC for the effects of acts of discrimination or victimisation where the complainant is not in receipt of remuneration.[64]

Article 21(8) of the Directive provides that 'Member States shall take the necessary measures to ensure that remedies and full compensation are provided for damage suffered by persons referred to in Article 4 in accordance with national law.' Recital 94 of the Directive explains that 'Beyond an explicit prohibition of retaliation provided in law, it is crucial that reporting persons who do suffer retaliation have access to legal remedies and compensation. The appropriate remedy in each case should be determined by the kind of retaliation suffered, and the damage caused in such cases should be compensated in full in accordance with national law.'[65] Further, recital 95 of the Directive states 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. Of relevance in this context are the Principles of the European Pillar of Social Rights, in particular Principle 7 according to which 'Prior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access to effective and impartial dispute resolution and, in case of unjustified dismissal, a right to redress, including adequate compensation.'. The remedies established at national level should not discourage potential future whistleblowers. For instance, providing for compensation as an alternative to reinstatement in the event of dismissal might give rise to a systematic practice, in particular by larger organisations, thus having a dissuasive effect on future whistleblowers.[66]

Section 27 of the Safety, Health and Welfare at Work Act 2005 ('2005 Act') provides protection for employees against dismissal and penalisation for inter alia making a complaint or representation to their safety representative, or employer, or the Health and Safety Authority about any matter relating to safety, health, or welfare at work.[67] Section 28 of the 2005 Act provides that a decision of an Adjudication Officer in relation to a complaint of a contravention of s 27 can include a requirement that the employer pays the employee compensation of such amount (if any) as the Adjudication Officer considers just and equitable having regard to all the circumstances.[68] Thus, there is no cap on the amount of compensation that can be awarded, and therefore the WRC already has jurisdiction to make awards for compensation that are not capped.

There is no provision for an award of damages to be capped in a claim by 'workers' before the civil courts under s 13 of the 2014 Act and the only limitation on the amount that can be awarded is the monetary jurisdiction of the particular court in which the claim is brought.[69]

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[64] Employment Equality Acts 1998–2015, s 82(4)(b).
[65] Directive 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 [2019] OJ L 305/17, Recital 94.
[66] ibid Recital 95.
[67] Safety, Health and Welfare at Work Act 2005, s 27(c).
[68] ibid s 28(c), as inserted by Workplace Relations Act 2015, s 52(1) and sch 7, pt 1, item 21.
[69] The general monetary jurisdiction of the District Court is €15,000, Courts of Justice Act 1924, s 77(a)(i), (iii) and (v) carried forward by the Courts (Supplemental Provisions) Act 1961, s 33, and amended from time to time, most recently by the Courts and Civil Law (Miscellaneous Provisions) Act 2013; the general monetary jurisdiction of the Circuit Court is €75,000 or €60,000 for personal injury actions, Courts (Supplemental Provisions) Act 1961, Third Schedule, as amended by the Courts and Civil Law (Miscellaneous Provisions) Act 2013; the general

Therefore, employees who bring claims before the WRC are treated less fairly than other workers who can only bring claims before the civil courts or employees who bring their claim before the civil courts under s 13 for detriment.

By contrast to the current position in Ireland under the 2014 Act, in the UK there is no cap on the amount of compensation that can be awarded to employees who are dismissed, where the reason or principal reason is that he or she made a protected disclosure.[70] It is arguable that the position in the UK is much more robust than the Irish position and is more in line with international best practice principles. Transparency International recommends that a full range of remedies should be available for persons who suffer repercussions for having made a protected disclosure, stating that a 'full range of remedies must cover all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower whole' and includes compensation for lost past, present and future earnings, and status.[71] Further, the Mahon Tribunal recommended in its Final Report that limits on the amount of compensation that may be awarded to a whistleblower be removed.[72] The 2014 Act should have adopted such recommendations and provided for uncapped compensation just as the UK legislation did. There is evidence in Ireland of persons who have made disclosures of wrongdoing being unable to secure employment in the same area of employment ever again.[73] As a result, such persons need to be compensated appropriately and a limitation on the amount of compensation that can be awarded will mean that this is not achieved.

***Recommendation***

(a) Remove the cap on compensation introduced under Head 21(1)(3), amending Sch 2 of the 2014 Act.

(b) Remove the cap on compensation currently under the 2014 Act for successful claims by employees for unfair dismissal/penalisation under ss 11 and 12 of the 2014 Act.

**2.5(ii)** ***Issue***

monetary jurisdiction of the High Court is for claims of damages in excess of €75,000, or for personal injuries actions in excess of €60,000, there is no ceiling on the amount of damages that can be awarded.

[70] Employment Rights Act 1996, s 137(1).

[71] Transparency International, 'International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest' (TI 2013) 9.

[72]Tribunal of Inquiry into Certain Planning Matters and Payments, *Final Report* (2012) 2531.Frank Dunlop and James Gogarty blew the whistle on corruption in the planning process from the late 1980s to the late 1990s which resulted in the establishment of the Flood/Mahon Tribunal. Full report is available at: <www.flood-tribunal.ie/asp/Reports.asp?ObjectID=310&Mode=0&RecordID=50> accessed 10 October 2018.

[73] Internal auditor, Eugene McErlean, was unable to secure work as an auditor again after having been removed from his position by AIB in 2002 at the same time as having made disclosures to the Financial Regulator about overcharging of customers by the Bank. In 2011, McErlean was appointed to the Citizens Information Board. Department of Employment Affairs and Social Protection, 'Minister Burton announces appointment of Eugene McErlean to Citizens Information Board' (*Department of Employment Affairs and Social Protection*, 12 September 2011) <www.welfare.ie/en/pressoffice/Pages/Minister-Burton-announces-appointment-of-Eugene-McErlean-to.aspx> accessed 16 March 2019. Further, Olivia Greene, a former home loan supervisor for Irish Nationwide Building Society, had also been unable to find employment since making disclosures about alleged mismanagement at the Building Society in 2009. Greene states that 'I have sent out 60 or more applications for jobs but all have been refused even the ones which I am well qualified for. I am totally unemployable in financial services now.' Jamie Smyth, 'Ireland's lonely whistleblowers' *Financial Times* (Dublin, 25 November 2013) <www.ft.com/content/e5c1cf4e-4876-11e3-a3ef-00144feabdc0> accessed 10 October 2018; See also: Claire McCormark, 'Nationwide whistleblower couple fight to keep home' *Sunday Independent* (Dublin, 19 April 2015) <www.independent.ie/business/personal-finance/property-mortgages/nationwide-whistleblower-couple-fight-to-keep-home-31153711.html> accessed 10 October 2018.

The second issue that arises under Head 21 concerns Head 21(4). Head 21(4) provides that 'An employee, within the meaning of section 12(1) who claims to have suffered penalisation wholly or mainly for having made a protected disclosure may apply to the Circuit Court for interim relief within 21 days immediately following the date of the last instance of penalisation.'

Again, there are two aspects to this issue under Head 21(4). Firstly, the limitation of the provision as regards its application to 'employees' only. Secondly, the timeframe for the initiation of the claim.

***Rationale***

*Issue 1: Application*

Section 11(2) of the 2014 Act provides that employees who bring a claim for redress for a dismissal which is an unfair dismissal by virtue of s 6(2)(ba) of the 1977 Act may also make an application for interim relief under sch 1 of the 2014 Act.[74] This is the first time that interim relief has been introduced into an employment law statute in Ireland.[75] Head 21(4) proposes to extend access to interim relief remedies for claims of penalisation under s 12 to employees, members of the administrative, management or supervisory body of an undertaking, including non-executive members; volunteers and unpaid trainees; and natural persons who acquire information on a relevant wrongdoing during a recruitment process or other pre-contractual process.

The value of interim relief protection for whistleblowers is acknowledged by the Directive, which provides in Recital 96 that:

> Of particular importance for reporting persons are interim remedies pending the resolution of legal proceedings that can be protracted. Particularly, actions of interim relief, as provided for under national law, should also be available to reporting persons in order to stop threats, attempts or continuing acts of retaliation, such as harassment or to prevent forms of retaliation, such as dismissal, which might be difficult to reverse after the lapse of lengthy periods and which can ruin the individual financially, a perspective which can seriously discourage potential whistleblowers.[76]

Article 21(6) of the Directive provides 'Persons referred to in Article 4 shall have access to remedial measures against retaliation as appropriate, including interim relief pending the resolution of legal proceedings, in accordance with national law.'[77]

The inclusion of interim relief remedies in whistleblowing legislation is also stressed by the Council of Europe Parliamentary Assembly, Resolution 1729 (2010) Protection of "whistle-blowers", which states at para 6.2.5. that 'Relevant legislation should afford bona fide whistle-blowers reliable protection against any form of retaliation through an enforcement mechanism to investigate the whistle-blower's complaint and seek corrective action from the employer, including interim relief pending a full hearing and appropriate financial compensation if the effects of the retaliatory measures cannot reasonably be undone.'[78] Further, Transparency International's 'International Principles for Whistleblower Legislation' provides that 'a full

[74] Protected Disclosures Act 2014, s 11(2); ibid sch 1.
[75] Injunctions in employment disputes have been granted in Ireland since the decision of Mr Justice Costello in *Fennelly v Assicurazioni Generali SpA* [1985] 3 ILTR 73 (HC).
[76] Directive 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 [2019] OJ L 305/17, Recital 96.
[77] ibid art 21(6)
[78] Council of Europe Parliamentary Assembly, Resolution 1729 (2010) Protection of "whistle-blowers", para 6.2.5.

range of remedies must cover all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower whole. This includes interim and injunctive relief; attorney and mediation fees; transfer to a new department or supervisor; compensation for lost past, present and future earnings and status; and compensation for pain and suffering.'[79]

The difficulty with the proposal under Head 21(4) to provide interim relief for employees only who allege penalisation only means that 'workers' other than employees cannot avail of this remedy as they are limited to 'detriment' claims under s 13 of the 2014 Act. Interim relief must be available for all workers who suffer retaliation and not just 'employees' who file claims under s 11 for unfair dismissal or s 12 for penalisation.

*Issue 2: Time limits for interim relief applications*

Head 21(4) requires that interim relief applications for penalisation must be made within twenty-one days immediately following the date of the last instance of penalisation. This is a welcome introduction as regards the specification that time runs from the date of the 'last instance of penalisation'. However, the concern arises as regards the timeframe for filing claims for penalisation under s 12 before the WRC.

Complaints must initially be presented in writing[80] to the Director General of the WRC within six months of the date of the alleged contravention.[81] The date on which a complaint or dispute is referred is the date it is received by the WRC.[82] If a complaint is not received within the six-month time frame, an extension may be granted by an Adjudication Officer up to a maximum time limit of twelve months where, in the opinion of the Adjudication Officer, the complainant has demonstrated reasonable cause for the delay.[83]

This time limit for presenting a claim to the Director General of the WRC has been applied quite stringently, and in a penalisation claim, the WRC will not take into consideration any act or omission that occurred outside of the six-month period prior to the receipt of the claim. For example, in *Accounts Administrator v A University*[84] the claim was received by the WRC on 28 June 2016, however, the complainant stated that the penalisation commenced when she was suspended on 12 June 2015. Therefore, the WRC held that it was prohibited from delaing with the claim, as it had no jurisdiction because the claim was submitted out of time, holding that 'the date of contravention which the complaint relates to began over twelve months before the claim was submitted to the WRC.' This decision was in spite of the fact that the complainant was still suspended from her employment at the time that she filed her protected disclosure claim.

In contrast, in the UK, where the claim must be presented before the end of the period of three months, beginning on the date of the act or failure to act to which the complaint relates,[85] the

[79] Transparency International, 'International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest' (TI 2013) 9.
[80] Workplace Relations Act 2015, s 41(9)(a).
[81] ibid s 41(6).
[82] Workplace Relations Commission, 'Procedures in the Investigation and Adjudication of Employment and Equality Complaints' (WRC October 2015) 3.
[83] Workplace Relations Act 2015, s 41(8).
[84] *Accounts Administrator v A University* ADJ-00004380.
[85] Employment Rights Act 1996, s 48(3). ibid s 48(3)(b), provides that this time period may be extended 'within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.'

UKEAT held in *Tait v Redcar and Cleveland BC*[86] that a suspension is an act which extends over a period, and therefore the last day of the suspension is considered to be the date on which the employee is informed that the suspension is at an end. The appellant relied on s 48(3)(a) of the 1996 Act which provides that where there may be a series of similar acts or failures, the time period for presenting a complaint begins on the date of the last act or failure. Section 48(4)(a) of the 1996 Act provides that 'where an act extends over a period, the 'date of the act' means the last day of that period.' The UKEAT referred to the principal authorities on the meaning of the phrase 'an act extending over a period' in the equivalent provisions in discrimination legislation and held that:

> With the benefit of that elucidation, it seems to us that a disciplinary suspension is clearly "an act extending over a period" within the meaning of the statute. Although there is no doubt an initial "act" of suspension, the state of affairs thereafter in which the employee remains suspended pending the outcome of the disciplinary proceedings can quite naturally be described not simply as a consequence of that act but as a continuation of it.[87]

Unfortunately, neither the 2014 Act nor the Workplace Relations Act 2015 ('2015 Act') provides for a time limit where there are a series of similar acts or failures, and it would not be open to an Adjudication Officer to rely on discrimination legislation, as the language used therein is different to that in the 2015 Act and the 2014 Act.[88] Therefore, even though the complainant in *Accounts Administrator v A University*[89] was still suspended at the time that the complaint was received by the WRC on 28 June 2016, this, unfortunately, was not capable of being subject to a penalisation assessment. This is clearly a limitation under the 2014 and 2015 Acts and undoubtedly led to an injustice being suffered by the complainant. Subsequent to this decision, the complainant was subject to a further six months of suspension, until it was lifted by the respondent in November 2017, following the publication of a report[90] that vindicated some the complainant's allegations.[91] The complainant subsequently received payment from the respondent in June 2018, following a settlement agreement facilitated by a mediation process.[92] Despite the filing of the complaint in June 2016, the time frame for the amelioration of the penalisation suffered by the complainant was unnecessarily protracted due to the limitations under the relevant legislation. The inclusion of a provision similar to that in s 48(3)(a) of the 1996 Act in the 2015 Act would be a much more reasonable approach. Further, the different treatment as regards when time starts to run for a penalisation claim under s 12 and an interim relief application under Head 21(4) means that an employee may be 'in time'

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[86] *Tait v Redcar and Cleveland BC* (UKEAT/0096/08/ZT, 2 April 2008).
[87] ibid [2(6)].
[88] Employment Equality Act 1998, s 77(5)(a), as inserted by Equality Act 2004, s 32, provides that 'a claim for redress in respect of discrimination or victimisation may not be referred under this section after the end of the period of 6 months from the date of occurrence of the discrimination or victimisation to which the case relates or, as the case may be, the date of its most recent occurrence.'
[89] *Accounts Administrator v A University* ADJ-00004380.
[90] Richard Thorn, 'Independent Review of Certain Matters and Allegations Relating to the University of Limerick' *Final Report* (October 2017).
[91] Maria Flannery, 'University of Limerick president lifts suspension on whistleblowers and offers widespread apologies' *Limerick Leader* (Limerick, 23 November 2017) <www.limerickleader.ie/news/home/283601/breaking-university-of-limerick-president-lifts-suspension-on-whistleblowers.html> accessed 14 July 2021.
[92] Carl O'Brien, 'UL makes settlements of up to €150,000 with whistleblowers' *The Irish Times* (Dublin, 18 June 2018) <www.irishtimes.com/news/education/ul-makes-settlements-of-up-to-150-000-with-whistleblowers-1.3534094> accessed 14 July 2021.

for their interim relief application, but 'out of time' for the hearing of the substantive penalisation claim before the WRC.

***Recommendation***

(a) Interim relief under Head 21(4) must apply to all workers who suffer retaliation and not be limited to claims by employees only.

(b) The 2014 Act should be amended to provide that the time period for presenting a complaint under s 12 or s 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.

### 2.6 Head 26 Reporting

***Issue***

Head 26 substitutes s 22 of the 2014 Act with a new s 21. Section 21(3) provides that where a public body publishes an annual report of its activities, that its protected disclosures annual report may be included as a chapter in its annual report. There are some notable difficulties with this provision. Firstly, the protected disclosures annual report should be included where the organisation provides its clear and easily accessible information regarding the procedures for making protected disclosures internally and to prescribed persons under Head 9 (new s 6(9)(f)). Secondly, all prescribed persons should be publishing their annual reports on their dedicated webpage for protected disclosures, established under Head 10 (new s 7(13)).

***Rationale***

Under s 22 of the 2014 Act, every public body (which includes the prescribed persons under the 2014 Act) is obliged to prepare and publish a report by 30 June each year detailing the number of protected disclosures made to it in the immediately preceding year, and any action taken in response to those protected disclosures. The annual report must be in such a form that it does not enable the identification of the person involved in the matters included in the report.[93] There is currently no published guidance on how public bodies should comply with this obligation.

A similar obligation was introduced in the UK in April 2017 under The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017, SI 2017/507 ('SI 2017/507'), although the obligation is limited to prescribed persons only.[94] At the same time, the UK Department for Business, Energy and Industrial Strategy ('UK BEIS') published its 'Whistleblowing, Prescribed Persons Guidance'.[95] The 2017 UK BEIS guidance for prescribed persons emphasises that 'The purpose of this report is for prescribed persons to demonstrate that every disclosure they receive from a worker is given reasonable consideration and they are dealt with on a case-by-case basis and to a defined set of policies and procedures, ensuring a consistent approach.'[96] It further provides that:

[93] Protected Disclosures Act 2014, s 22.
[94] The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017, SI 2017/507. The power for the Secretary of State to make the regulations requiring person prescribed for the purposes of s 43F of the Employment Rights Act 1996 to produce annual reports on disclosures of information made to the person by workers derives from s 148 of the Small Business, Enterprise and Employment Act 2015, which inserted s 43FA into the Employment Rights Act 1996.
[95] Department for Business, Energy and Industrial Strategy, 'Whistleblowing, Prescribed Persons Guidance' (BEIS April 2017).
[96] ibid 10.

> The aim is to increase transparency in the way that whistleblowing disclosures are dealt with and to raise confidence among whistleblowers that their disclosures are taken seriously. Producing reports highlighting the number of disclosures received and how they were taken forward will go some way to assure individuals who blow the whistle that action is taken in respect of their disclosures.[97]

Thus, the reports are an opportunity for prescribed persons to clarify the expectations that workers have when making their disclosures to prescribed persons.[98] Also, annual reporting obligations ensure that there are systematic processes in respect of how prescribed persons handle disclosures. Therefore, this reporting obligation should result in a consistent standard of best practice for prescribed persons in how they should handle disclosures.[99] According to the responses to the UK prescribed bodies' annual reporting requirements on whistleblowing consultation undertaken in 2014, 55% of respondents believed that a duty to report annually would both encourage consistency across prescribed persons and improve transparency, whilst 65% believed that it would increase confidence in prescribed persons and the way in which they handled disclosures.[100]

The position in the UK is more comprehensive than the 2014 Act, as SI 2017/507 prescribes that within six months of the end of the reporting period, the prescribed person's annual report must be placed on its website or published in a manner that the prescribed person considers appropriate for bringing the report to the public's attention.[101]

In March 2021, I conducted research on the annual reports of prescribed persons under the 2014 Act. The compliance rate of all 110 prescribed persons was assessed. Of the 107 prescribed persons included in this assessment,[102] 13% (fourteen) did not publish an annual report, 69% (seventy-four) demonstrated partial reporting compliance, and 18% (nineteen) had full compliance (ie published six annual reports). With regard to the rates of partial compliance, 6% (six) of prescribed persons had one annual report, 7% (seven) of prescribed persons published two annual reports; 11% (twelve) had three annual reports; 22% (twenty-three) had four annual reports; 24% (twenty-six) had five annual reports. From the assessments, it is clear that prescribed persons have some difficulty in complying with their statutory obligation under s 22 of the 2014 Act to publish annual reports. Firstly, the low rate of full compliance with s 22 since its incarnation indicates an indifference to the obligation to publish annual reports, potentially on the basis that there is no accountability provision included in s 22 in the event of

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[97] Department for Business, Energy and Industrial Strategy, 'Whistleblowing, Prescribed Persons Guidance' (BEIS March 2015) 7. This is repeated in its 2017 Guidance, Department for Business, Energy and Industrial Strategy, 'Whistleblowing, Prescribed Persons Guidance' (BEIS April 2017) 8 and the Northern Ireland Department for the Economy, 'Guide to the Public Interest Disclosure (Northern Ireland) Order 1998' (Department for the Economy October 2017) 11.

[98] Department for Business, Energy and Industrial Strategy, 'Prescribed Bodies: Annual Reporting Requirements on Whistleblowing, Government Response' (BEIS March 2015) 20.

[99] Department for Business, Energy and Industrial Strategy, 'Small Business, Enterprise and Employment Bill, Prescribed persons: annual reporting requirements on whistleblowing' (BEIS August 2014) 4.

[100] Department for Business, Energy and Industrial Strategy, 'Prescribed Bodies: Annual Reporting Requirements on Whistleblowing, Government Response' (BEIS March 2015) 18.

[101] The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017, SI 2017/507, reg 4.

[102] Three prescribed persons were omitted from the assessment as they shared an annual report with another prescribed person. These were the Registrar of Companies and the Registrar of Friendly Societies; the Director of Legal Metrology and the National Standards Authority of Ireland; and the Director of Insolvency Service of Ireland and the Official Assignee in Bankruptcy in the Insolvency Service of Ireland. The new prescribed persons under SI 2020/367 were included in this assessment, although they were not prescribed persons at the time of the publication of the annual reports. However, it was deemed appropriate to include them as they are public bodies and were therefore subject to the obligation under s 22 of the 2014 Act to prepare and publish protected disclosures' annual reports.

non-compliance. Secondly, the research conducted to locate the protected disclosures was at times quite cumbersome. Those prescribed persons that had a dedicated webpage on protected disclosures often included their annual reports there, thus increasing accessibility, transparency, and accountability.

***Recommendation***

(a) Head 26 should be amended to provide that prescribed persons must publish their protected disclosures annual report on their dedicated protected disclosures webpage.

(b) Head 26 should also be amended to the effect that all public bodies must include their protected disclosures annual reports where they provide clear and easily accessible information regarding the procedures for making protected disclosures internally.

**2.7 Miscellaneous recommendations**

2.7(i) *Burden of proof*

On publication of the Heads of Bill, the Minister for Public Expenditure and Reform referred to the reversal of the burden of proof in retaliation proceedings, but the Heads of Bill are silent on this issue.[103] The Directive proposes a shifting of the burden of proof to the person against whom the claim is brought. Article 21(5) of the Directive provides that:

> 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.[104]

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. Therefore, s 5(8) needs to be retained and then both penalisation claims under s 12, detriment claims under s 13, and breach of confidentiality claims under s 16 should be amended so that it is presumed that the penalisation/detriment was in retaliation for the protected disclosure.

2.7(ii) *Trade secrets*

The Heads of Bill do not address the issue of trade secrets (currently included in s 5(7A) and requiring a 'general public interest' test).

Section 5(7A) was inserted into the 2014 Act as a result of the transposition of European Parliament and Council Directive 2016/943/EC of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure[105] into Irish law in June 2018 by the European Union (Protection of Trade Secrets)

[103] Minister McGrath publishes General Scheme of Protected Disclosures (Amendment) Bill (*DPER*, 12 May 2021) <www.gov.ie/en/press-release/d263a-minister-mcgrath-publishes-general-scheme-of-protected-disclosures-amendment-bill/> accessed 14 June 2021.

[104] Directive 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 [2019] OJ L 305/17, art 21(5).

[105] European Parliament and Council Directive 2016/943/EC of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1.

Regulations 2018.[106] Section 5(7A) provides that 'Where a worker, referred to in subsection (1), makes a disclosure of relevant information in the manner specified by that subsection, and in respect of that disclosure of relevant information it is alleged that the disclosure concerned the unlawful acquisition, use, or disclosure of a trade secret (within the meaning of the European Union (Protection of Trade Secrets) Regulations 2018 (S.I. No. 188 of 2018)), disclosure is a protected disclosure provided that the worker has acted for the purposes of protecting the general public interest.'[107]

Recital 98 of the Directive provides:

> Directive (EU) 2016/943 of the European Parliament and of the Council lays down rules to ensure a sufficient and consistent level of civil redress in the event of unlawful acquisition, use or disclosure of a trade secret. However, it also provides that the acquisition, use or disclosure of a trade secret is to be considered lawful to the extent that it is allowed by Union law. Persons who disclose trade secrets acquired in a work-related context should only benefit from the protection granted by this Directive, including in terms of not incurring civil liability, provided that they meet the conditions laid down by this Directive, including that the disclosure was necessary to reveal a breach falling within the material scope of this Directive. Where those conditions are met, disclosures of trade secrets are to be considered allowed by Union law within the meaning of Article 3(2) of Directive (EU) 2016/943. Moreover, both Directives should be considered as being complementary and the civil redress measures, procedures and remedies as well as exemptions provided for in Directive (EU) 2016/943 should remain applicable for all disclosures of trade secrets falling outside the scope of this Directive.[108]

Article 21(7) provides:

> In legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labour law, persons referred to in Article 4 shall not incur liability of any kind as a result of reports or public disclosures under this Directive. Those persons shall have the right to rely on that reporting or public disclosure to seek dismissal of the case, provided that they had reasonable grounds to believe that the reporting or public disclosure was necessary for revealing a breach, pursuant to this Directive.
>
> Where a person reports or publicly discloses information on breaches falling within the scope of this Directive, and that information includes trade secrets, and where that person meets the conditions of this Directive, such reporting or public disclosure shall be considered lawful under the conditions of Article 3(2) of the Directive (EU) 2016/943.[109]

[106] European Union (Protection of Trade Secrets) Regulations 2018, SI 2018/188.
[107] Protected Disclosures Act 2014, s 5(7A).
[108] Directive 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 [2019] OJ L 305/17, Recital 98.
[109] ibid art 21(5).

Thus, s 5(7A) of the 2014 Act is in conflict with art 21(7). All that is required is that a worker makes a protected disclosure in order attract immunity without having to establish that in making of the disclosure the worker was acting for the purpose of protecting the general public interest. Section 5(7A) of the 2014 Act must be deleted.

2.7(iii) *Cooperation by reporting person with investigation*

A requirement has been introduced under both Head 9 (inserting s 6(11)) and Head 10 (inserting s 7(5)) for reporting persons to co-operate, as required, with any investigation or follow-up initiated by a prescribed person or recipient of an internal disclosure. This requirement does not arise in the Directive and must be deleted. There should be no onus on a discloser to cooperate with an investigation and by including such a requirement, this may be used by a recipient to ignore a disclosure of relevant wrongdoing on the ground that the discloser did not cooperate.

2.7(iv) *Feedback*

Head 9 amends s 6 of the 2014 Act and inserts s 6(9)(e) requiring employers who receive internal disclosures to provide feedback to the discloser within a reasonable timeframe, not exceeding three months from the acknowledgement of receipt, or if no acknowledgement was sent to the reporting person, three months from the expiry of the seven-day period after the report was made. Head 10 inserts s 7(4)(d) into the 2014 Act requiring that prescribed persons provide feedback to 'the reporting person within a reasonable timeframe not exceeding three months or six months in duly justified cases.' This is replicated in Head 19 in relation to the time frame for feedback by the Protected Disclosures Office. These timeframes are taken from the Directive, however, it is important to note art 25(1) of the Directive which states '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).' Thus, in amending the 2014 Act, it is strongly recommended that the outer time limits are not adopted but that shorter time frames for feedback are included in the legislation so that workers are assured from the earliest stage possible that their disclosure is receiving attention and is being taken seriously.

## 3. Conclusion

As set out in the introduction section of this written submission, the Irish Protected Disclosures Act 2014 has been extolled internationally. The transposition of the Directive is an excellent opportunity to retain this international acclaim. However, the approach to transposition must be underpinned by reference to art 25 of the Directive, which provides that:

> 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.[110]

[110] ibid art 25.

The summary of the recommendations herein are as follows:

- Define 'detriment' in s 13 of the 2014 Act in the same terms as the non-exhaustive, comprehensive definition of 'penalisation' in Head 2(2).
- Delete s 5A from the legislation.
- Delete section s 7(1)(b)(ii) in its entirety.
- Delete the proposed introduction of s 8(c) under Head 11.
- Remove the cap on compensation introduced under Head 21(1)(3), amending Sch 2 of the 2014 Act.
- Remove the cap on compensation currently under the 2014 Act for successful claims by employees for unfair dismissal/penalisation under ss 11 and 12 of the 2014 Act.
- Interim relief under Head 21(4) must apply to all workers who suffer retaliation and not be limited to claims by employees for unfair dismissal and penalisation only.
- The 2014 Act should be amended to provide that the time period for presenting a complaint under s 12 or s 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.
- Head 26 should be amended to provide that prescribed persons must publish their protected disclosures annual report on their dedicated protected disclosures webpage.
- Head 26 should be amended to the effect that all public bodies must include their protected disclosures annual reports where they provide clear and easily accessible information regarding the procedures for making protected disclosures internally.
- Section 5(8) of the 2014 Act must be retained and then both penalisation claims under s 12 and detriment claims under s 13 should be amended so that it is presumed that the penalisation/detriment was in retaliation for the protected disclosure.
- Section 5(7A) of the 2014 Act must be deleted.
- The requirement under both Head 9 (inserting s 6(11)) and Head 10 (inserting s 7(5)) for reporting persons to co-operate, as required, with any investigation or follow-up initiated by a prescribed person or recipient of an internal disclosure must be deleted.
- The timeframes in Head 9 and Head 10 for feedback need to be shortened.

I believe that based on my research into the operation of the 2014 Act that the issues set out above need to be addressed in order for the amended legislation to comply fully with the Directive, and to ensure that the more favourable treatment and non-regression clause in art 25 of the Directive is not contravened.

Dr Lauren Kierans BL
15 July 2021