coimisiun meabhair - shláinte
mental health commission

# Re: General Scheme of the Protected Disclosures (Amendment) Bill 2021

## MHC Submission

## July 2021

## Introduction

The Mental Health Commission (MHC) welcomes the opportunity to make a written submission on the General Scheme of the Protected Disclosures (Amendment) Bill 2021. The issues raised in the consultation document are of relevance to the MHC given its functions under the Mental Health 2001 Act (2001 Act), the Assisted Decision-Making Capacity Act 2015 (2015 Act) and the MHC's Strategic Plan for 2019-2022.

The MHC has considered the Joint Committee's (on Finance, Public Expenditure and Reform and Taoiseach) email dated 29 June 2021 and the attachments to same. The following is a preliminary reply based on the time allowed given the work commitments of the MHC during that period.

At the outset, the MHC noted that it made the following submissions, which are appended to this Submission–

1. a Submission to DEPER on 17 July 2020 in relation to the EU Whistleblowing directive, and
2. a Submission to the Department of Health on the General Scheme of the Protected Disclosures (Amendment) Bill 2021 on 13 January 2021 as attached.

The Vision as set out in MHC's Strategic Plan for 2019-2022 is the highest quality mental health and decision support services underpinned by a person's human rights. Clear and enhanced protected disclosure procedures shall assist in protecting those individual human rights.

The MHC is an independent statutory body established in April 2002 under the provisions of the 2001 Act. The principal functions of the MHC are to promote, encourage and foster the establishment and maintenance of high standards and good practices in the delivery of mental health services and to take all reasonable steps to protect the interests of persons detained in approved centres. The remit of the MHC was extended by the 2015 Act.

The 2015 Act provides for the establishment of the Decision Support Service (the "DSS") within the MHC https://www.decisionsupportservice.ie/ . The DSS will support decision-making by and for adults with capacity difficulties and will regulate individuals who are providing support to people with capacity difficulties. The 2015 Act will establish a modern statutory framework to support decision-making by adults who have difficulty in making decisions without help.

The MHC also wishes to note that it updated its protected disclosures policies this year, the final drafts were brought to the March 2021 Commission Meeting and approved at the April Commission Meeting. The MHC obtained external legal advice on these policies in anticipation of changes that shall be required further to the implementation of the EU Directive into Irish law. The policies shall be reviewed in January 2022 to ensure full compliance with the new legislation.

The MHC has sought to address below the five issues outlined in the letter from the Joint Committee on Finance, Public Expenditure and Reform and Taoiseach to the MHC dated 29 June 2021.

## The policy rationale for the Bill

The policy rationale of this Bill is based on the EU Directive, which is the protection of persons who report breaches of Union law (the "Whistleblower Protection Directive"). The EU has sent a strong signal that individuals seeking to expose wrongdoings in both the private and the public sectors will be protected and will not have to fear retaliation. The MHC supports and agrees with the policy rationale and the minimum requirements[1].

In summary, the minimum requirements for the Member States' internal regulations concerning the protection of whistleblowers are:

1. that all forms of retaliation against whistleblowers by their employers are prohibited; where the whistleblowers are broadly defined and include workers, persons supervised by contractors or suppliers, as well as future employees acquiring information in the course of the recruitment process;
2. oblige legal entities with over 50 workers, in both the private and the public sectors, to implement specific internal reporting channels to ensure that the whistleblower's identity is kept confidential;
3. designate the authorities competent to receive, give feedback and follow up on reports; and
4. provide for effective, proportionate and dissuasive penalties for persons that hinder reporting, retaliate against whistleblowers, or otherwise breach the duties outlined in the Whistleblower Protection Directive.

The MHC notes that most of the above issues have been addressed or are due to be addressed and further additional matters have also been addressed in the General Scheme. The MHC's specifically welcomes the following –

1. the extension of the definition of penalisation to psychiatric and/or medical referrals,
2. the requirement to publish certain information on its website and review and update the information every three years, as the easy access to independent information is key for reporting persons.
3. the extension of the protections of reporting persons under Head 21 to include the application to Court for interim relief, and
4. the imposition of penalties as per Head 24.

The MHC as a public body is subject to annual reporting requirements. One of those requirements is Section 42 of The Irish Human Rights and Equality Commission Act 2014, where 'it is required to have regard to the need to eliminate discrimination, promote equality of opportunity, and protect human rights in carrying out their functions. The MHC believes that as a result of this public duty and the statutory obligation to protect human rights in carrying out their functions, all public bodies should meet the minimum requirements and there should be no exemption from the obligation to establish internal reporting channels.

[1] The MHC does not propose to comment on matters as they relate to the private sector, operation of the Ministerial reporting channel, role of the WRC and Labour Court and Cost to Exchequer of Proposal.

## The technical, legal and drafting aspects of the Bill

The MHC would see this a matter for the relevant Department and the Attorney General's office. Furthermore, within the time allowed, the MHC has not had an opportunity to review the General Scheme in conjunction with the current legislation in sufficient detail.

Without prejudice, the MHC notes -

1. The MHC notes that a Protected Disclosures Office shall be established within the Office of the Ombudsman. Please see below suggestions on the extension of the functions of this Office. It may also be of benefit that there would be mandatory Regulations associated with the functions of this Office and its functions. This might be addressed by way of this Office issuing Guidance documents as per the below.
2. In relation to the definition of "follow up – would it be usual to define such a phrase?
3. Head 17 (4) – is the use of word "diligently" required?

## Possible areas where the Bill might be improved

The MHC would make the following points from a preliminary review of the General Scheme -

- Head 9 - sharing internal reporting channels: The MHC previously stated that Ireland should provide that local authorities / small public bodies share internal reporting channels. The sharing of resources for internal reporting channels may result in centralised expertise, increased efficiency, ensure consistency, assist with training and reduce costs. Can you confirm is this is possible within the current subsection 8 as drafted?

- Head 9 – The MHC recommends that there should be no exemption from the obligation to establish internal reporting channels.

- Head 9 - The requirements for organisations to respond and to provide feedback on investigative actions taken are positive and welcomed. However, stronger provision should be made for organisations to decline to respond or treat a communication as a protected disclosure on reasonable grounds. This could reduce the regulatory burden in cases where the process is incorrectly used or indeed where it is not used in good faith.

- Head 9/Head 10 - Bodies should have the discretion to decline to hold a physical meeting, where appropriate.

  (The above issues under Head 9 are the type of issues that could be expanded upon within Regulations.)

- Head 16/17 - The provision of a central authority in the form of the Office of the Ombudsman is a positive development. However, 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.

- Head 22 – Is it intended that the measures of support proposed here be provided by the new Protected Disclosures Office to be established within the Office of the Ombudsman? It would appear to the MHC that this would be an appropriate function to assign to such Office

- Head 25 – Would it be appropriate for the guidance documents to be issued by the new Protected Disclosures Office to be established within the Office of the Ombudsman? Furthermore, should the issue of guidance not be mandatory. It would appear to the MHC that this would be an appropriate function to assign to such Office.

- General Comment –

    1. The issue of legal aid has not been addressed – is it to be addressed in the amendments to the legislation related to the Workplace Relations Commission? This needs to be clarified.
    2. The limits to liability of Reporting Persons should be expressly addressed in the General Scheme.
    3. There does not appear to be a time period for the disclosure of a wrongdoing from the time is it witnessed / identified. Should this be addressed? There are only timeframes in relation to an employers, acknowledgement and response. Head 10 4 (d) does state a timeframe for providing feedback to the reporting person within a reasonable timeframe not exceeding three or six months in duly justified cases.
    4. The MHC would suggest that protected disclosures from job applicants (who are not employees) should be limited to a specific recruitment process in which the person has partaken.

## Possible implications/consequences arising from the Bill

Head 24 - Penalties under the Bill: The MHC welcome this provision. It is of the view that a scale would need to be established as to the type of offence / penalty. Should consideration be given to automatic penalties, is it a summary offence or indictable offence? Should there be a threat of both financial penalties and imprisonment. It would have to be established who brings the prosecution? Could it be the new Protected Disclosures Office? If so, this body could issue penalties and bring prosecutions of minor matters and could refer more serious matters to the DPP.

Administrative sanctions are often seen as an effective and efficient means of deterring misconduct (at the same noting the constitutional argument put forward in relation to administrative fines).

## Any other comments you may wish to make on the Bill

In addition to the above, the MHC as a regulator welcomes any legislative provisions which will support staff and other parties to raise concerns about the safety and quality of care for patients and other vulnerable service users. As noted above, the MHC agrees with the proposed approach to ensure that the Irish legislation is at least as broad as the current 2014 Act in terms of its material scope. The MHC also welcomes the provisions for protections for persons other than direct employees.

# APPENDIX

# Consultation on the transposition of Directive (EU) 2019/1937

## Mental Health Commission

17 July 2020

**Introduction**

The Mental Health Commission (MHC) welcomes the opportunity to provide input into the public consultation on the transposition of 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. The issues raised in the consultation document are of relevance to the MHC given its functions under the Mental Health 2001 Act (2001 Act), the Assisted Decision Making Capacity Act 2015 (2015 Act) and the MHC's Strategic Plan for 2019-2022.

The Vision as set out in MHC's Strategic Plan for 2019-2022 is the highest quality mental health and decision support services underpinned by a person's human rights. Clear and enhanced protected disclosure procedures shall assist in protecting those individual human rights.

The MHC is an independent statutory body established in April 2002 under the provisions of the 2001 Act. The principal functions of the MHC are to promote, encourage and foster the establishment and maintenance of high standards and good practices in the delivery of mental health services and to take all reasonable steps to protect the interests of persons detained in approved centres.

The 2015 Act provides for the establishment of the Decision Support Service (the "DSS") within the MHC. The DSS will support decision-making by and for adults with capacity difficulties and will regulate individuals who are providing support to people with capacity difficulties. The ADMCA 2015 will establish a modern statutory framework to support decision-making by adults who have difficulty in making decisions without help.

The MHC has a protected disclosure policy for both internal and external workers which express the commitment to;

(i) address concerns about wrongdoing that may or has arisen and,
(ii) protect workers who make reports of any suspected wrongdoing.

The MHC would be of the view and continuing to foster a healthy culture in terms of whistleblowing may support efforts to enhance ethics and integrity, demonstrate a commitment to preventing abuse and misconduct and act to build trust by complying with legislation that protects whistleblowing.

Finally, we refer to our communications on 1 July 2020 in which we sought and received clarification on a number of points.

**Question 1**

***Should Ireland avail of the option to require anonymous reports be accepted and followed-up? Please provide reasons for your answer.***

Yes. Ireland should avail of the option to require anonymous reporting be accepted and followed up. However, the MHC believes that before allowing such disclosures there should be clear statutory provisions or regulations put in place for the making of such disclosures i.e. minimum requirements must be met before anonymous disclosures would be actioned.

The MHC believes that this may address to some extent the concerns expressed by certain bodies about anonymous disclosures. Those concerns extend to spurious / vexatious disclosures, where matters cannot be progressed because there is not sufficient information and where subsequently it is found the complaint is false and there is nobody against whom action may be taken.

In reply to this question, the MHC took into consideration the principles of "natural justice" recognised at common law and given constitutional protection. Natural justice ensures a guarantee to basic fairness of procedures. The Superior Courts in Ireland have upheld these principles. The MHC believes that the State will need to reconcile these principles with the right to anonymous reporting.

There is anonymous reporting in other jurisdictions. Transparency International has in fact considered the issue and outlined that only 11 EU Member States offer the possibility to anonymously make a disclosure.[1]

- **Austria:** Anonymous disclosures are not legally prohibited. However, anonymous reporting is possible for corruption and white collar crimes. In 2013, the Federal Ministry of Justice in Austria launched a portal to enable individuals to report wrongdoing. The technical setup of the portal ensures that investigators from the Public Prosecutor's Office against Corruption and White Collar Crime are not able to trace submissions or attribute them to anyone's identity, rendering the system an anonymous method of communication.[2]
- **Czech Republic:** Disclosures based on the Administrative Procedure Code (APC) and the Government Resolution can be made confidentially and anonymously. However, the Administrative Procedure Code does not offer protection if this confidentiality/anonymity is breached.
- **Denmark:** In the financial sector anonymous reporting is accepted.
- **Estonia:** The Anti-Corruption Act 2012 (ACA) guarantees anonymity of the whistleblower when requested. If there is a risk that the source will be revealed, the investigation will be ceased and the investigators will try to gather the disclosed information through other means. However, this is not the case if the whistleblower discloses knowingly false information. If the whistleblower discloses knowingly false information, the guarantee of anonymity will be lifted, according to the ACA. Such disclosures could also lead to punishment under the Penal Code.

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[1] Transparency International, *'Mapping the EU on Legal Whistleblower Protections, Assessment before the Implementation of the EU Whistleblowing Directive'* April 2019 < https://www.transparency.nl/wp-content/uploads/2019/04/Mapping-the-EU-on-Whistleblower-Protection-TI-NL.pdf>

[2] OECD Library '*Committing to Effective Whistleblower Protection'* 16 March 2016 https://www.oecd-ilibrary.org/docserver/9789264252639-en.pdf?expires=1594806852&id=id&accname=guest&checksum=13582743ED1412AC2262C10ADBCFCF5A

- **France:** The Confidentiality of the identity of the whistleblower is guaranteed and anonymous reporting is accepted according to article 9 of The Sapin II Act[3].
- **Germany:** Disclosures made to the BAFin (financial sector) can also be made anonymously. However, reporting on an anonymous basis is not encouraged.
- **Poland:** Whistleblowers may apply to qualify as an anonymous witness.
- **Portugal:** Anonymous disclosures are not specified in legislation, although some entities (including the Central Department for Investigation and Penal Action of the Public Prosecutor's Office) allow anonymous disclosure. The Public Prosecutor's Office is obliged to follow up on disclosures of potential wrongdoing, even if they are provided anonymously;
- **Slovakia:** The 'The Act on Certain Measures Related to the Reporting of Anti-social Activities' allows for internal (workplace) anonymous disclosing;
- **Slovenia:** Disclosures to the Anti-Corruption Commission can be made anonymously (article 39, Rules of Procedure of the Commission for the Prevention of Corruption, 2012);
- **United Kingdom:** In general, it is accepted to disclose anonymously. However, it is possible that the disclosure can only be 'taken further' if all information needed is provide.[4]

As will be seen from the above, the option to anonymously disclose is those jurisdictions has been limited.

The MHC looked at how the UK allows anonymous reporting in more detail. Anonymous reporting is not provided for in legislation. However, the Department for Business Innovation & Skills states on the UK Gov Website that it allows for anonymous reporting but notes that actions may not be taken further if all information is not provided[5]. The UK Whistleblowing Charity 'Protect' in their 'Better Regulators Guide', note the difficulties with anonymous reports:[6]

> *"Anonymous disclosures - This method of disclosure makes things difficult in a number of ways, first the disclosure will be harder to investigate because it may well be only one attempt to pass on the information so there will be no opportunity for vital follow up questions. It is also difficult to safeguard the whistleblower's position through shielding their identity in an investigation, and things like consent and feedback are all but impossible".*

The UK Department of Business and Enterprise has published a code of practice and guidance document for employers which outlines the following: [7]

> *"Anonymous information will be just as important for organisations to act upon. Workers should be made aware that the ability of an organisation to ask follow up questions or provide feedback will be limited if the whistleblower cannot be contacted. It may be possible to overcome these challenges by using telephone appointments or through an anonymised email address.*

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[3] The French Anti-Corruption Law effective from 1 June 2017

[4] Transparency International, *'Mapping the EU on Legal Whistleblower Protections, Assessment before the Implementation of the EU Whistleblowing Directive'* April 2019 https://www.transparency.nl/wp-content/uploads/2019/04/Mapping-the-EU-on-Whistleblower-Protection-TI-NL.pdf

[5] GOV.UK 'Whistleblowing for employees' https://www.gov.uk/whistleblowing/who-to-tell-what-to-expect last accessed: 15 June 2020

[6] Protect *'Better Regulators - Principles for better Practise'* April 2020 https://protect-advice.org.uk/better-regulators-guide/

[7] Department for Business Innovation & Skills 'Whistleblowing: Guidance for Employers and Code of Practise' March 2017 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415175/bis-15-200-whistleblowing-guidance-for-employers-and-code-of-practice.pdf

*Workers should be made aware that making a disclosure anonymously means it can be more difficult for them to qualify for protections as a whistleblower. This is because there would be no documentary evidence linking the worker to the disclosure for the employment tribunal to consider."*

In the Netherlands[8], the Dutch Whistleblowers Authority allows anonymous reporting but notes a number of disadvantage, which will need to be taken into account if anonymous reporting is considered:

*"• The chance of misuse and false reports increases greatly. Colleagues can be accused wrongly of something.*

*• The investigation into the abuse cannot take place on the basis of hearing both sides. Nor can the employer put questions to the anonymous reporter.*

*• The reporter does not receive any feedback about the report.*

*• It is difficult to protect an anonymous reporter against disadvantage."*[9]

The above concerns should be considered in Ireland is drafting the statutory provisions relating to anonymous reporting.

[8] Dutch Whistleblowers Act <https://www.huisvoorklokkenluiders.nl/Publicaties/publicaties/2016/07/01/dutch-whistleblowers-act>

[9] Dutch Whistleblowers Authority *'Integrity in practise- reporting procedure'* July 2018<https://www.huisvoorklokkenluiders.nl/Publicaties/publicaties/2018/07/09/integrity-in-practice---reporting-procedure>

**Question 2**

***Should Ireland provide that private sector entities with fewer than 50 employees should establish internal reporting channels and procedures? If yes, what sectors should this requirement apply to? Please provide reasons for your answer.***

This answer is more appropriately addressed by those in the private sector who may have the relevant information available to answer this question.

Without prejudice to the above, the MHC believes that Ireland should provide that private sector entities with fewer than 50 employees should establish internal reporting channels and procedures, in relation to certain limited areas which may be expanded upon over time. The MHC would suggest that the starting point should be *public health, health and safety and the environment*. These issues may affect not just the specific private entity but may be a matter of public interest as has been highlighted by the current pandemic.

The MHC has reviewed a number of articles from those advising corporate and other business entities who would argue that this is not the correct starting point. That matters of public interest extend to financial services, money laundering and data protection. The MHC would not disagree. However, these areas are subject to very detailed centralised regulation which provide for a robust system for complaints, which is why they might not require to be included at the outset.

**Question 3**

***Recital 49 of the Directive provides that "This Directive should be without prejudice to Member States being able to encourage legal entities in the private sector with fewer than 50 workers to establish internal channels for reporting and follow-up, including by laying down less prescriptive requirements for those channels than those laid down under this Directive, provided that those requirements guarantee confidentiality and diligent follow-up". Should Ireland lay down less prescriptive requirements for channels for private entities with fewer than 50 employees? What should these requirements be? Please provide reasons for your answer.***

This answer is more appropriately addressed by those in the private sector who may have the relevant information available to answer this question.

Without prejudice to the above, the MHC would refer to its reply to Question 2 above. The MHC believes that private sector entities should have internal reporting structures, but recognises cost and resourcing implications. In the public sector, bodies may share resources and expertise, but in the private sector this might not be possible in certain industries. Given those possible costs and resource implications, there is a clear rationale that there be less prescriptive requirements for those private entities with fewer than 50 employees. Similar considerations / approaches are adopted for reduced requirements in some other areas for small and medium size businesses.

**Question 4**

***Should Ireland exempt public sector bodies with fewer than 50 employees from the obligation to establish internal reporting channels? Please provide reasons for your answer***

No. The MHC does not believe that Ireland should exempt public sector bodies with fewer than 50 employees from the obligation to establish internal reporting channels. All public bodies regardless of their size should be held to the same standards. They are sponsored by the public and have obligations to the public.

However, as per the reply to Question 3 costs and resourcing might be an issue. To address this please see the reply to Question 5.

Furthermore, under The Irish Human Rights and Equality Commission Act 2014, 'public bodies' are required, under section 42, to have regard to the need to eliminate discrimination, promote equality of opportunity, and protect human rights in carrying out their functions.

*42. (1) A public body shall, in the performance of its functions, have regard to the need to—*

*(a) eliminate discrimination,*

*(b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and*

*(c) protect the human rights of its members, staff and the persons to whom it provides services***.**

The MHC believes that as a result of this public duty and the statutory obligation to protect human rights in carrying out their functions, no public bodies should have an exemption from the obligation to establish internal reporting channels.

**Question 5**

***Should Ireland provide that municipalities (local authorities in the Irish context) can share internal reporting channels? Please provide reasons for your answer.***

Please refer to the reply to Question 4.

The MHC is of the view that Ireland should provide that local authorities share internal reporting channels. The sharing of resources for internal reporting channels may result in centralised expertise, increased efficiency, ensure consistency, assist with training and reduce costs.

There should be a mechanism whereby a cohort of local authorities or public bodies could share resources to manage this additional reporting requirement. For example, if there were a number of such agencies within the Department of Health they could jointly seek a resource to manage these reporting requirements. As noted above, the benefit of having one dedicated resource is that you have one person who would be or could become an expert in the field and manage the reporting consistently and effectively. Alternatively, external consultants could be procured to manage the reporting for the relevant entities on a specified basis.

The MHC would have made similar comments in terms of the sharing of resources between agencies for the engagement of data protection / freedom of information officers prior to the introduction of the Data Protection Act 2018. A number of agencies added this function to an existing member of staff's functions. This works effectively in some agencies but may be hard for such persons to keep updated on this every changing area of the law which could have adverse consequences for the agency.

The MHC strongly recommends that cross authority / agency / departmental projects of this nature be promoted.

The MHC notes that the Local Government Management Agency (LGMA) is an organisation already providing supports to local authorities and this could this be extended to address this reporting requirement.

*"The Local Government Management Agency (LGMA) is a state agency established in 2012.*

*The LGMA is an agency of local authorities, primarily funded by local authorities, and operates in the local government sector, reporting on performance as required to the Department of Housing, Local Government and Heritage.*

*The Agency aims to meet the needs of local authorities and the Department of Housing, Local Government and Heritage (DHLGH) in delivering on the public sector reform agenda in the local government sector (particularly in terms of sectoral approaches to service delivery), researching emerging and identified issues, assisting local authorities in the implementation and measurement of change, and supporting, in general, enhanced performance by the local government sector.*

*The statutory remit of the Agency extends to include:*

- *The delivery of advisory services to local authorities to assist and co-ordinate the business of local authorities*
- *The delivery of such services as may be required by local authorities in the Industrial Relations (IR) and Human Resource Management (HR) domain*

- *The delivery of such services as may be required by local authorities for the purpose of coordinating and securing compatibility in, the use of Information and Communications Technologies (ICT)*
- *The provision of advice, assistance and services to library authorities in relation to the public library service*
- *The provision of such other management services as may be required by local authorities*
- *The provision of such services for meetings of local authority chief executives and such other support services required by the County and City Management Association (CCMA)*
- *The provision of such services as required as Registrar of Public Lending Remuneration*
- *The provision of such advice, information and assistance required by the Minister of Housing, Local Government and Heritage."*

The LGMA has experience in providing services to all local authorities for example the WSTO was integrated into the LGMA in 2015 and provides support to local authorities in the transition of water services to Irish Water. It plays an active part in managing the change process and represents the interests of local authorities and staff.

**Question 6**

***Section 7 of the Protected Disclosures Act provides that the Minister for Public Expenditure and Reform can prescribe any person by reason of the nature of their responsibilities to receive reports of wrongdoing. This is similar to the approach taken in other countries with whistleblower /protection legislation, such as France and Latvia. Some countries, such as the Netherlands, have a single competent authority that receives reports and either refers them on [to] appropriate authorities for follow up or follows up itself. Should Ireland continue with the current approach to designating competent authorities or should an alternative model be considered? Please provide reasons for your answer.***

The MHC would support a single competent authority. It is of the opinion that a centralised system leads to consistency in reporting, investigating and communication which will ultimately assist the public and those seeking to report matters.

The MHC does not believe that a new agency would have to be established for this purpose. The function could be added to that of an existing agency, where it would complement that agency's current functions.

For the purposes of this exercise, the MHC considered the Dutch Whistleblower's Authority, where there is a designated body which has centralised the information and made it easier for the public in terms of obtaining information on making disclosures. The authority investigates disclosures of alleged wrongdoing that may harm the public interest and retaliation against those who have disclosed it and to provide advice to whistleblowers.

There is currently, a European Network of competent authorities, The European Network on Integrity and Whistleblowing Authorities (NEIWA). Ireland's representative in NEIWA is the Garda Ombudsman, GSOC Protected Disclosure Unit. NEIWA is working to share and develop knowledge and experience of and insights into integrity issues and contacts with people reporting abuses, thus contributing to the most uniform possible implementation of the Directive throughout the EU.

**Countries with single competent authorities include:**

**Italy:** The Italian Anticorruption Authority (ANAC) is an independent administrative authority charged with the prevention of corruption in public administrations, subsidiaries and state-controlled enterprises.

The Authority was established by Law 190 of 2012, which re-configured the former Commission for Evaluation, Integrity and Transparency in Public Administrations (CIVIT) as the National Anti-Corruption Authority (ANAC) and tasked it with the prevention of corruption and illegal behaviours in the Italian public sector.

**Slovenia**: The Anti – Corruption Commission is appointed to receive and investigate disclosures. Disclosures to the Anti-Corruption Commission can be made anonymously (article 39, Rules of Procedure of the Commission for the Prevention of Corruption, 2012)

**Question 7**

***What procedures under national law should apply in Ireland in respect of communicating the final outcome of investigations triggered by the report, as per paragraph 2(e) of Article 11? Please provide reasons for your answer.***

The MHC wishes to thank the Department for answering our query to the above question and notes that you are seeking the procedures that should be in place to communicate the outcome of the investigation and how this is followed up.

The MHC looked at the Dutch Authority's procedure. The Dutch Whistleblower's Authority procedure for reporting outcomes is as follows:

*"Procedure*

*It is advisable to indicate in the reporting procedure as well as in your investigation protocol that the reporter can expect the following messages:*

*• Confirmation of receipt after report*

*After the report has been received, the reporter must receive a confirmation of receipt as soon as possible. It is sensible to include a copy of the report or a brief description of the report as well. This makes things clear and ensures that all parties involved have the same information.*

*• Decision about the report*

*It is not obligatory to investigate every report. That is not always possible, desirable or necessary. Should you decide not to investigate a report and therefore to do nothing with it, inform the reporter of this decision and give the reasons.*

*• Follow-up steps (in the event of investigation)*

*If you do intend to investigate the report, it is advisable to inform the reporter about the follow-up steps. Do you need more information, and would you therefore like a meeting with the reporter? Maintain good contact with the reporter during the investigation. This often relieves a lot of stress in a tense period. Moreover, you can keep an eye on whether disadvantage occurs.*

*• Conclusion of the investigation*

*Inform the reporter as soon as the investigation has been completed. Report the most important conclusions. In doing so the employee knows that his or her report has been taken seriously. He or she can then also decide whether it is necessary to report the issue externally. If you keep the reporter well informed, he or she will be more inclined to find that the issue has been resolved satisfactorily. An external report is no longer necessary in that case."*[10]

The MHC has also considered how the outcomes of investigations are communicated to victims of crime under section 22 of the Criminal Justice (Victims of Crime) Act 2017.

*"22. (1) The Garda Síochána, the Ombudsman Commission, the Director of Public Prosecutions, the Courts Service, the Irish Prison Service, the director of a children detention school and the clinical director of a designated centre, as the case may be, shall, when dealing with a victim ensure that any oral or written communications with the victim are in simple and accessible language and take into*

[10] Dutch Whistleblowers Authority'*Integrity in practice – Reporting procedure' July* 2018 https://www.huisvoorklokkenluiders.nl/Publicaties/publicaties/2018/07/09/integrity-in-practice---reporting-procedure

*account the personal characteristics of the victim including any disability, which may affect the ability of the victim to understand them or be understood."*

The MHC then looked at how the Ombudsman communicates the final outcome of investigations. However according to their website[11], most complaints to the Ombudsman are straightforward and do not require a written report. A small number of complaints, due to the complexity of the issues raised or because the issues have a wider significance for public administration, result in investigation reports.

These reports include the formal findings of the investigation and the Ombudsman's recommendations for action or compensation for the complainant as well as recommendations for improved practice. They do not explicitly outline how these reports are communicated other than publishing them to their website. However, the MHC wishes to acknowledge that there may well be more detailed internal documents that are not reflected on website that may be of benefit in how they communicate decisions.

In terms of the procedures for communicating the outcome, the MHC would be of the view that there should be time limits imposed for each stage of the process, written confirmation of the decision at each stage of the process and reasons given for decisions reached.

[11] <https://www.ombudsman.ie/>

**Question 8**

***Should Ireland provide that competent authorities may close or prioritise reports received in accordance with paragraphs 3, 4 and 5 of Article 11? Please provide reasons for your answer.***

Yes. The MHC believes competent authorities should be able to close or prioritise reports as outlined.

In that regard the MHC would note –

1. There should still be a specified time period within which a matter is investigated.
2. There should be clear guidance on what is a "minor" matter, a "serious breach" or a "breaches of essential provisions falling within the scope of …" of the Directive. This should address possible inconsistencies as to what different competent authorities might consider minor.
3. Competent authorities must be allowed to adopt a proportionate approach in how they use their resources.
4. Competent authorities should be obliged to provide written reasons for their decision not to investigate - be it a minor matter, escalating a matter because it is deemed serious or not dealing with it because it does not raise any additional issues further to a previous investigation.

**Question 9**

***What measures of support should Ireland provide for reporting persons?***

Yes. The MHC believes that supports should be provided to reporting persons and that these should go beyond just psychological supports.

***What mechanisms might be used to provide such support? Who should provide that support? Please provide reasons for your answer***

If a reporting person does not have for example financial resources, this could be deterrent in bringing forward a matter, whereas if they knew they were going to get the relevant financial support they may be more encouraged to report.

The key point is that if supports would bridge the gap between a person making a protected disclosure or not, supports should be provided. There will be a cost associated with all supports. It will then be a matter for the State to decide to balance those costs as against the benefits.

In that regard, the MHC would to refer to the European Commission's report[12] which outlines that the overall costs for setting up and maintaining the whistleblower protection are quite low in comparison with the potential benefits. The report focused on Ireland where it was found that the ratio of potential benefits to costs ranged from 1.4:1 to 2.3:1. They found that the estimated systemic and incremental costs to be €7.5 million whereas the potential benefits range from €10.3 million in the lower bound to €17.2 million in the upper bound.

This is just one area which has been reviewed but the MHC thinks it is important to highlight that the benefits have outweighed the cost of implementation. All too often people use the cost of implementing such measures as a reason for not doing so. The MHC would hope that the same could apply in other areas to which this Directive applies.

The MHC would be of the view that the issue of supports would be considered once a decision is made whether to investigate or not. If the decision is to investigate, then the level of those supports should be reviewed. Some issues for consideration are –

1. Agree certain minimum supports for all.
2. A means test might be considered with regard to financial support.
3. Consideration might be given to whether legal aid could be extended to those reporting.

In relation to No.3 above, the MHC notes that Transparency Ireland operates the Transparency Legal Advice Centre (TLAC) which offers free legal advice to anyone who wishes to disclose wrongdoing, under the 2014 Act but this may need to be expanded.

The MHC is of the view that there should be a centralised organisation who assigns and controls supports to be issued to reporting persons. By centralising it should be more cost effective and efficient and ensure greater consistency and parity. The MHC has identified Transparency International Ireland as a possible organisation who may be best equipped to provide such supports.

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[12] Estimating the Economic Benefits of Whistleblower Protection in Public Procurement, September 2017 < https://op.europa.eu/en/publication-detail/-/publication/8d5955bd-9378-11e7-b92d-01aa75ed71a1/language-en>

**Question 10**

***What penalties should Ireland impose under this Article? What will make these penalties "effective, proportionate and dissuasive"? Please provide reasons for your answer***

The MHC wishes to thank the Department for answering our query to the above question.

The MHC is of the view that a scale would need to be established as to the type of offence/penalty. Should there be automatic penalties, is it a summary offence or indictable offence? Should there be a threat of both financial penalties and imprisonment.

It would have to be established who brings the prosecution, if there was a centralised body this would be made easier. This body could issue penalties and bring prosecutions of minor matters and could refer more serious matters to the DPP

Administrative sanctions may be a potential option under the Directive, they can be imposed by a regulator directly without going through the criminal process and they are often seen as an effective and efficient means of deterring misconduct (at the same noting the constitutional argument put forward in relation to administrative fines).

Administrative penalties are becoming more prevalent in domestic legislation. For example the Residential Tenancies (Amendment) Act 2019 gives powers to the Residential Tenancies Board (RTB) to impose administrative financial sanctions on landlords for breaches of certain prescribed contraventions.[13]

A number of other regulators possess the power to impose administrative financial sanctions. For example, the Revenue Commissioners can directly impose administrative financial sanctions under the *Taxes Consolidation Act 1987*. The sanction for fraudulently making incorrect tax returns is an administrative financial sanction of twice the amount of the tax owed. If this sum is not paid, recovery can be sought through civil proceedings in the High Court.

The Broadcasting Authority of Ireland can apply to the High Court to confirm the imposition of an administrative financial sanction of up to €250,000 on a broadcaster that has breached certain provisions of the *Broadcasting Act 2009*.

The Property Services Regulatory Authority may impose, on completion of an investigation, a "major sanction" within the meaning of the *Property Services (Regulation) Act 2011*, which may include a financial sanction of up to €250,000, which takes effect when confirmed by the High Court.

[13] The Oireachtas 'Spotlight on Administrative Sanctions' < < <https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2019/2019-11-20_l-rs-spotlight-administrative-financial-sanctions_en.pdf>

**Additional questions on page 8 of the Consultation Document**:

1. The personal scope set out in Article 4 of the Directive – in particular the requirement to protect and to facilitate reporting by: suppliers, board members, shareholders, unpaid trainees, volunteers and persons whose work-based relationship has yet to begin.

Reply - The MHC welcomes the broadening of the scope but clear criteria would have to be established for the manner of reporting by this expanded group.

2. How disclosures by workers in public bodies to a relevant Government Minister under Section 8 of the Protected Disclosures Act should operate in light of the requirements of the Directive.

Reply - The MHC believes that disclosures to Government Ministers could operate within the internal reporting procedures set out in Article 9, on the basis that a worker is reporting to the Minister who is the parent department for the body in which the worker is employed.

> Article 9:
>
> *"1. The procedures for internal reporting and for follow-up as referred to in Article 8 shall include the following:*
>
> *(a) channels for receiving the reports which are designed, established and operated in a secure manner that ensures that the confidentiality of the identity of the reporting person and any third party mentioned in the report is protected, and prevents access thereto by non-authorised staff members;*
>
> *(b) acknowledgment of receipt of the report to the reporting person within seven days of that receipt;*
>
> *(c) the designation of an impartial person or department competent for following-up on the reports which may be the same person or department as the one that receives the reports and which will maintain communication with the reporting person and, where necessary, ask for further information from and provide feedback to that reporting person;*
>
> *(d) diligent follow-up by the designated person or department referred to in point (c);*
>
> *(e) diligent follow-up, where provided for in national law, as regards anonymous reporting;*
>
> *(f) a reasonable timeframe to provide feedback, not exceeding three months from the acknowledgment 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;*
>
> *(g) provision of clear and easily accessible information regarding the procedures for reporting externally to competent authorities pursuant to Article 10 and, where relevant, to institutions, bodies, offices or agencies of the Union.*
>
> *2. The channels provided for in point (a) of paragraph 1 shall enable reporting in writing or orally, or both. Oral reporting shall be possible by telephone or through other voice messaging systems, and, upon request by the reporting person, by means of a physical meeting within a reasonable timeframe."*

# MEMO

**To Department of Health (DOH)**

**From Mental Health Commission (MHC)**

**Date 13.1.21**

**RE General Scheme of the Protected Disclosures (Amendment) Bill 2021**

The MHC has considered the DOH's email of 8.1.21 and the attachments to same. The following is a preliminary reply based on the time allowed given the other work committed of the MHC.

At the outset, please note that the MHC made a Submission to DEPER on 17 July 2020 in relation to the EU Whistleblowing directive, as attached.

In considering your email, the MHC reviewed the previous Submission and compared it to the Regulatory Impact Analysis document, attached at '4. Implementation of Member State Options' and compared it to the MHC's Submission. The MHC has highlighted below where recommendations are similar or differ.

**4.1 Anonymous Reporting: (Question 1 MHC Sub) - Similar Recommendations**

RIA Recommendation: Make explicit provision that anonymous whistleblowers are protected.

MHC Recommendation: Yes. Ireland should avail of the option to require anonymous reporting be accepted and followed up. However, the MHC believes that before allowing such disclosures there should be clear statutory provisions or regulations put in place for the making of such disclosures i.e. minimum requirements must be met before anonymous disclosures would be actioned.

**4.2 Establishment of internal reporting channels:**

> **- Subject to a risk assessment and notification to the EU, obligations to establish internal channels can be extended to entities with fewer than 50 employees. (Question 2 MHC Sub) MHC Recommended all entities with less than 50 should establish internal channels, the RIA document recommends certain entities**

RIA Recommendation: Provide that the Minister can, by order, designate certain entities or classes of entities with fewer than 50 employees must have internal channels, subject to a risk assessment and public consultation with notification to the EU.

MHC Recommendation: This answer is more appropriately addressed by those in the private sector who may have the relevant information available to answer this question. The MHC believes that Ireland should provide that private sector entities with fewer than 50 employees should establish internal reporting channels and procedures, in relation to certain limited areas which may be expanded upon over time. The MHC would suggest that the starting point should be public health,

health and safety and the environment. These issues may affect not just the specific private entity but may be a matter of public interest as has been highlighted by the current pandemic.

- **Provide for less prescriptive obligations for internal reporting in entities with fewer than 50 employees. (Question 3 MHC Sub) Similar Recommendations**

RIA Recommendation: Uphold key principle in PDA and Directive that workers should report internally in the first instance and ensure no ambiguity as regards protections exists in entities with no formal internal channels.

MHC Recommendation: This answer is more appropriately addressed by those in the private sector who may have the relevant information available to answer this question. The MHC believes that private sector entities should have internal reporting structures, but recognises the cost and resourcing implications for same. In the public sector, bodies may share resources and expertise, but in the private sector this might not be possible in certain industries. Given those possible costs and resource implications, there is a clear rationale that there be less prescriptive requirements for those private entities with fewer than 50 employees. Similar considerations / approaches are adopted for reduced requirements in some other areas for small and medium size businesses.

- **Exempt public bodies with fewer than 50 employees from obligation to establish formal internal channels. (Question 4 MHC Sub) Same Recommendation**

RIA Recommendation: Maintain current requirement that all public bodies regardless of size must have formal internal reporting channels.

MHC Recommendation: The MHC does not believe that Ireland should exempt public sector bodies with fewer than 50 employees from the obligation to establish internal reporting channels. All public bodies regardless of their size should be held to the same standards. They are sponsored by the public and have obligations to the public.

- **Provide that local authorities may share internal reporting channels. (Question 5 MHC sub) Differing Recommendations – RIA doc each local authority shall operate on standalone basis and MHC recommends that local authorities should share internal reporting channels**

RIA Recommendation: Maintain current requirement that each local authority shall operate their internal reporting channels on a standalone basis.

MHC Recommendation: The MHC is of the view that Ireland should provide that local authorities share internal reporting channels. The sharing of resources for internal reporting channels may result in centralised expertise, increased efficiency, ensure consistency, assist with training and reduce costs.

**4.3 Designation of competent authorities to receive external reports (Question 6 MHC Sub) Similar Recommendation**

RIA Recommendation: Establish a Protected Disclosures Office in a suitable existing public authority, such as the Ombudsman.

MHC Recommendation: The MHC would support a single competent authority. It is of the opinion that a centralised system leads to consistency in reporting, investigating and communication which will ultimately assists the public and those seeking to report matters. The MHC does not believe that a new agency would have to be established for this purpose. The function could be added to that of an existing agency, where it would complement that agency's current functions.

**4.4 Operation of external reporting channels (Question 8 MHC Sub) Same Recommendation**

RIA Recommendation: Competent authorities can close reports that are minor or repetitive and can prioritise reports during periods of high influxes of reports.

MHC Recommendation: The MHC believes competent authorities should be able to close or prioritise reports as outlined.

**4.5 Measures of support (Question 9 MHC Sub) Same Recommendation**

RIA Recommendation: The public consultation queried what supports should be offered and how should they be delivered. A number of submissions reference the current Speak Up Helpline and Legal Advice Centre operated by Transparency International Ireland as effective and appropriate support for whistleblowers. There was also some discussion about a potential single whistleblowing authority taking on a role of supporting whistleblowers through legal advice as well as financial and wellbeing supports, such as psychological support. The question of the most appropriate measures of support and the means of providing them will be further considered in the drafting process and during the implementation process following transposition.

MHC Recommendation: The MHC believes that supports should be provided to reporting persons and that these should go beyond just psychological supports.

**4.6 Penalties (Question 10 MHC Sub) Similar Recommendation**

RIA Recommendation: Provide for criminal penalties for breaches of the Directive. Create criminal penalties based on equivalent offences already in place in Irish law.

Provide for administrative or other alternative penalties for breaches of the Directive. For further consideration and discussion during drafting of the Bill.

MHC Recommendation: The MHC is of the view that a scale would need to be established as to the type of offence/penalty. Should there be automatic penalties, is it a summary offence or indictable offence? Should there be a threat of both financial penalties and imprisonment. It would have to be established who brings the prosecution, if there was a centralised body this would be made easier. This body could issue penalties and bring prosecutions of minor matters and could refer more serious matters to the DPP Administrative sanctions may be a potential option under the Directive, they can be imposed by a regulator directly without going through the criminal process and they are often seen as an effective and efficient means of deterring misconduct (at the same noting the constitutional argument put forward in relation to administrative fines).

In addition to the above, the MHC as a regulator welcomes any legislative provisions which will support staff and other parties to raise concerns about the safety and quality of care for patients and other vulnerable service users. As noted above, the MHC agrees with the proposed approach to ensure that the Irish legislation is at least as broad as the current 2014 Act in terms of its material scope. The MHC also welcomes the provisions for protections for persons other than direct employees.

The MHC would make the following points from a preliminary review of the General Scheme -

- The requirements for organisations to respond and to provide feedback on investigative actions taken are positive and welcomed. However, stronger provision should be made for organisations to decline to respond or treat a communication as a PD on reasonable grounds. This would reduce regulatory burden in cases where the process in incorrectly used or indeed where it is not used in good faith.
- Head 10 Sub 4(c) - The provision of a central authority in the form of the Office of the Ombudsman is a positive development. However, strengthened provision should be made for bodies to decline or redirect a PD where they do not believe it is within their remit. In this context, Head 10 Sub 4(c) appears to be at odds with the principle of central authority. It should be for the central authority to decide where a PD is redirected.
- Head 7 - Clarity is needed regarding the term "Supervisory body". The proposed Act should not negatively impact on the routine work of existing regulators.
- Head 10 - Bodies should have discretion to decline to hold a physical meeting, where appropriate.
- Key provisions of the Directive - New addition of job applicants. The MHC would suggest that protected disclosures from job applicants (who are not employees) should be limited to a specific recruitment process in which the person has partaken.
- Transposition by primary legislation - The MHC agrees; two competing laws would cause confusion.
- Designation of competent authorities - This process needs to be more focused. Only in circumstances where a worker has reported a wrongdoing and there is no action or insufficient action, can an employee avail of the "fall-back" option. Otherwise it would be too difficult to manage, and the process would be subject to employees' own interpretation.
- Appendix 2 – Text of Whistleblowing Directive: (39) to note the MHC does not provide references, we provide a statement of employment when requested however decisions regarding employment are made on the receipt of references for potential employees. The inclusion of a "negative employment references" in the Directive makes it very difficult to obtain a true and reflective reference from a current or past employer.
- General Comment - There does not appear to be a time period for the disclosure of a wrongdoing from the time is it witnessed/identified. Should this be addressed? There are only timeframes in relation to an employers, acknowledgement and response.

The MHC has not commented on the following matters, which it believes are outside of its remit –

- Operation of the Ministerial reporting channel (Page 3 of 7 of General Scheme) – in the MHC's submission it is stated that *"The MHC believes that disclosures to Government Ministers could operate within the internal reporting procedures set out in Article 9, on the basis that a worker is reporting to the Minister who is the parent department for the body in which the worker is employed"*
- Role of the WRC and Labour Court (Page 5 of 7)
- Cost to Exchequer of Proposal (Page 6 of 7)