Submission on the General Scheme of the Protected Disclosures (Amendment) Bill (2021)

Irish Council for Civil Liberties (ICCL)

July 2021

Irish Council for Civil Liberties

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Introduction & Summary of Recommendations

Introduction:

This submission sets out the views of the Irish Council for Civil Liberties on the Protected Disclosures (Amendment) Bill 2021. The purpose of this Bill is to transpose Directive (EU) 2019/1937 of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union law (hereafter referred to as the Whistleblowing Directive) into national law before the December 2021 deadline. The submission draws upon existing human rights standards and provisions for the protection of whistle-blowers and examines the provisions of the Bill and the Directive in light of same. Throughout the analysis, we offer recommendations to alter the Draft Heads of Bill in order to ensure that key human rights provisions are effectively incorporated into national law as part of the transposition process.

Summary of Recommendations:

- That consideration is given in the Bill to an explicit recognition of the value of whistleblowing outside of the context of employment/work as per the UN Convention Against Corruption.

- That further consideration is given to how the to be established Whistleblowing Office could potentially examine protected disclosures that arise outside of a work/employment context. ICCL calls for an appropriate revision of Section 5(2)(b) of the 2014 Act to facilitate this.

- That the text in 10(b)i of the Draft Heads of Bill should be amended to offer protection to those who seek to disclose wrongdoing or information which is in the public interest regardless of their relationship to the organisation they are reporting. A revised text could read as follows;

  > *"The disclosure contains information about wrongdoing that is of relevance to the public interest"*

- That the decision to derogate from the Directive and limit the requirement to establish internal whistle blowing channels to private sector firms with more than 49 employees is reversed.

- That head 8 of the Draft Heads of Bill is amended to ensure that legal entities are obliged to investigate and follow up on anonymous disclosures.

- That the to-be established Protected Disclosures Office should be tasked with providing a "one stop shop" for whistleblowing information and support.

- That this "one-stop-shop" be placed on a statutory footing as part of this Bill in order to more effectively transpose Article 20.3 of the Directive.

- That a specific commitment is made to the provision of psychological support for whistle-blowers in the final text of the Bill.

What Does International Human Rights Law Have to Say on the Protection of Whistle-Blowers?

There are a number of significant interventions by human rights organisations which serve to illustrate the way in which whistle-blowing protections can be understood in the context of human rights obligations. According to the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression;

> *"Source and whistle blower protections rest upon a core right to freedom of expression. Article 19 of the Universal Declaration of Human Rights guarantees the right to seek, receive and impart information and ideas through any media and regardless of frontiers. The International Covenant on Civil and Political Rights enshrines the same rights in its article 19, which emphasizes that the freedom applies to information and ideas of all kinds. Sources and whistle blowers enjoy the right to impart information, but their legal protection when publicly disclosing information rests especially on the public's right to receive it."*[1]

The right to *receive* as well as to *report* information is critical for the "animation" of these same rights. It allows individuals and groups to seek out information and to develop opinions which are protected against interference as per article 19(1) of the ICCPR[2]. In addition, the ability to both receive and report information facilitates effective and meaningful participation in public affairs which is protected by article 25 of the ICCPR[3] and safeguards the right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights.[4]

[1] Report of the Special Rapporteur to the GA on the Protection of Sources and Whistleblowers (2015) pp4
[2] International Covenant on Civil and Political Rights Article 19
[3] International Covenant on Civil and Political Rights Article 25
[4] European Convention on Human Rights Article 10

How Can These Rights Be Effectively Translated into Law?

In a 2015 report by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, five principles which should be considered in the development of legislation to protect whistle-blowers are designated. These principles draw on the provisions of relevant human rights law as outlined above and are a useful yardstick by which to measure the effectiveness of the transposition of the Directive into Irish law. In this section, ICCL will set out the five principles in turn and offer an assessment as to whether the proposed legislation sufficiently addresses each principle.

1: The Term "Whistle-Blower" Should be Broadly Defined and Focus Attention on Alleged Wrongdoing.

According to the UN Special Rapporteur, a broad definition of whistle-blower is desirable in order to encapsulate all relevant categories of whistle-blowing. This includes, inter alia, the "right to know", accountability and democratic governance. The Rapporteur defines a whistle-blower as;

> *"A person who exposes information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety."*[5]

It is instructive to note that this definition does not limit whistle-blowing protections to those who engage in whistleblowing in the context of a work/employment relationship. An individual may seek to disclose public interest information outside of the context of such a relationship. It is also worth noting that the UN Convention Against Corruption (UNCAC)[6] does not designate an employment relationship as necessary to submit a protected disclosure. This could include, for example, patients who whistle-blow on wrongdoing carried out in a hospital or parents based on what they have witnessed in a school. Head 7 of the Draft Heads of Bill seeks to amend Section 3 of the Principal Act in order to expand the definition of "worker" to extend the protections afforded under Article 4 of the Directive. While this is welcome and extends the already strong protections that exist for whistle-blowers in Ireland, the enhanced schedule is limited to those who have an existing work or employment relationship with an organisation.

Recommendation:

That consideration is given to an explicit recognition of the value of whistleblowing outside of the context of employment/work as per the UNCAC. The UN Special Rapporteur cites Ghanaian Law[7] and Indian Law[8] as providing models in this regard where protections are extended widely to any individual who seeks to make a protected disclosure. Head 16, which seeks to establish a Protected Disclosures

[5] *ibid* pp23
[6] UN Convention Against Corruption (UNCAC)
[7] Whistle-Blower Act 720, sect. 12 (2006)
[8] The Whistle Blowers Protection Act, 2011, chap. II, sect. 4 (1)

Office could have a role in this regard and we would recommend that further consideration is given to how this office could potentially examine protected disclosures that arise outside of a work/employment context. With this in mind, ICCL calls for an appropriate revision of Section 5(2)(b) of the 2014 Act[9] in the course of the redrafting of the General Scheme of the Bill.

2: Public Interest Information Should be Disclosed

Building on the previous principle, it should be noted that whistleblowing may not always involve specific individual or institutional malfeasance but rather can relate to the uncovering or other discovery of information which it is in the public's interest to know. In this sense, it would be desirable to see a general protection being legislated for which would encapsulate disclosures in the public interest. For example, The Council of Europe Committee of Ministers recommends that States adopt protections for those who report threats or harms to the public interest, which;

> *"should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment".*[10]

Head 12 of the Draft Heads of Bill seeks to substitute the existing Section 10 of the 2014 Act with text which aligns with Article 15 of the Directive. While the provisions related to public disclosures here are welcome, they solely relate to protections where either, a worker has made a disclosure and no action has been taken as per section 10(a), where there is a low risk of the wrongdoing being addressed as per 10 (b)ii, or where, as per 10(b)i;

> *"The disclosure contains information about a relevant wrongdoing that may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage;"*

This provision is broadly in line with the text in Article 15-1(b)i of the Directive which states;

> *"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;"*

Recommendation:

It is the view of ICCL that the threshold to qualify for protection for those making public disclosures in the public interest is set too high in both the Directive and the Draft Heads of Bill. It is our recommendation that the text in 10(b)i of the Draft heads of Bill should be amended to offer protection to those who seek to disclose wrongdoing or information which is in the public interest regardless of their relationship to the organisation they are reporting. This builds on our previous recommendation seeking to broaden the definition of whistle-blower to those who obtain information outside of a work/employment context. A revised text could read as follows;

> *"The disclosure contains information about wrongdoing that is of relevance to the public interest"*

The protection of the public interest as it relates to the disclosure of information has a strong standing in international human rights law and there are well developed principles which relate to the protection of source confidentiality. These rules derive from the guarantee of the right to seek, receive

[9] Protected Disclosures Act 2014 5(2)(b)
[10] Council of Europe Recommendation CM/Rec (2014)7

and impart information, which is enshrined in article 19 of the International Covenant on Civil and Political Rights.[11] In addition, the European Court of Human Rights has highlighted the vital role that source protection plays in the reporting of matters of public interest.[12]

3: Internal institutional and external oversight mechanisms should provide effective and protective channels for whistle blowers to motivate remedial action; in the absence of such channels, public disclosures should be protected and promoted.

When working properly, internal whistleblowing mechanisms should provide a pathway for workers who perceive wrongdoing to have their concerns addressed in a competent, timely and protected manner. While provisions in the Draft Heads of Bill for in-house whistleblowing mechanisms for companies are welcome, there are a number of pit-falls that legislation should seek to avoid. Firstly, while we are glad to see the partial transposition of articles 7-9 of the Directive (Chapter II) into law, it is disappointing to note that these provisions will not apply to private sector entities with fewer than 50 employees. It should be noted that Article 15 of the 2014 Council of Europe Recommendation on whistleblowing does not place a lower threshold for number of employees required to put protections in place.[13]

This was a matter which the Department of Public Expenditure and Reform sought input on as part of the Consultation on the transposition of the Directive into Irish Law in June and July of 2020. It should be noted that a number of expert organisations, including Transparency International Ireland, RaiseAConcern, The International Whistleblowing Research Network and a number of academics working in the area called for organisations with fewer than 50 employees to be included, as did the Communications Regulator, The Garda Ombudsman Commission, the Workplace Relations Commission and several other organisations. The measure was opposed by IBEC[14].

In choosing to derogate from the Directive in this manner, the government has chosen to fall short of the recommendations of the European Commission and the 'gold standard' as set out by the UN Special Rapporteur. The International Whistleblowing Research Network in their submission set out the fact that excluding workplaces with fewer than 50 employees from an obligation to establish proper channels for whistle-blowers excludes a very large proportion of the working population from protection. Firms with 1-10 staff (micro enterprises) employ 28% of the private sector and constitute 92% of all enterprises. Small enterprises (10-49 staff) employ 22% of people in the private sector and constitute 6.4% of all enterprises.[15]

In their submission, Transparency International Ireland highlight that as of November 2016, only 10% of private sector employers had a whistleblowing policy in place[16]. The absence of an existing legal compunction to establish such policy is undoubtedly having an impact on the private sector's willingness to address the same. To leave such a large percentage of the workforce without protection is, in the view of ICCL, unacceptable. Particularly in the light of such compelling evidence from experts.

[11] International Covenant on Civil and Political Rights Article 19
[12] European Court of Human Rights, *Goodwin v. United Kingdom*, application No. 17488/90 para. 39
[13] Council of Europe Recommendation CM/Rec(2014)7
[14] Consultation on the transposition of Directive (EU) 2019/1937 of the European Parliament and the Council on the protection of persons who report breaches of Union law (EU Whistleblowing Directive)
[15] The International Whistleblowing Research Network, Submission on the transposition of Directive (EU) 2019/1937
[16] Transparency International Ireland Submission on the transposition of Directive (EU) 2019/1937

Recommendation:

That the decision to derogate from the Directive and limit the requirement to establish internal whistle blowing channels to private sector firms with more than 49 employees is reversed. Furthermore, all entities should be compelled to establish internal reporting channels as per Article 9 of the Directive. Implementing such channels should not impose an excessive burden on employers if free-of-charge guidance is made available to employers and workers as per article 20 of the Directive and there is provision for a "one-stop-shop" for information provided for in the to-be established Protected Disclosures Office. (See recommendations on pp10) It is worth noting that Transparency International's *Integrity at Work Network* provides significant support to organisations in Ireland seeking to establish and maintain effective reporting channels[17] alongside the Speak Up helpline[18] and the Transparency Legal Advice Centre.[19]

4: Whistle blowers should be guaranteed confidentiality and the possibility of anonymity in their reporting

We acknowledge the fact that guaranteeing the confidentiality of protected disclosures may be difficult in certain circumstances, particularly in small organisations or within specific fields where information is only available to a very small cohort of individuals. However, whistle-blowing laws should protect strongly against retaliation. The guarantee of the ability to disclose anonymously is crucial in this regard. The distinction between *confidential* disclosure and *anonymous* disclosure is important. A confidential guarantee will mean that an individual making a disclosure is known to those operating the internal channels. Anonymous disclosures allow for information to be provided without the need for the person to make themselves known to the internal channels or other reporting structure. While anonymity may diminish the ability to follow up with the individual, it does provide a strong safeguard where few people have access to the information being reported on and where the whistle-blower lacks confidence in the ability of the reporting mechanisms to prevent retaliation. Furthermore, it ensures that the focus remains on the information being disclosed as opposed to the individual or their reasons for disclosure.

While the possibility of anonymous disclosure is left open-ended by the Directive[20], it is clear that international best practice suggests that anonymity should be facilitated. This is a view which is also shared by the OECD[21] and a resolution on whistle-blowing passed by the European Parliament is unequivocal in this regard;

> *"[The Parliament] believes that the option to report anonymously could encourage whistle-blowers to share information which they would not share otherwise; stresses, in that regard, that clearly regulated means of reporting anonymously, to the national or European independent body responsible for collecting reports, verifying their credibility, following up on the response given and providing guidance to whistle-blowers, including in the digital environment, should be introduced, setting out exactly the cases in which the means of reporting anonymously apply; stresses that the identity of the whistle-blower and any information allowing his or her identification should not be revealed without his or her consent; considers that any breach of anonymity should be subject to sanctions;*

[17] Transparency International Ireland *Integrity at Work Network*
[18] Transparency International Ireland *Speak Up Helpline*
[19] Transparency International Ireland *Legal Advice Centre (TALC)*
[20] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, Article 6
[21] G20 Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation

In their submission to the Consultation on the Directive, Transparency International Ireland were strongly in favour of the ability to disclose anonymously. In a 2016 *Integrity at Work*[22] survey carried out by Transparency International Ireland, 33% of respondents stated that a key factor in assessing if they would make a disclosure would be if they could do so anonymously.

Recommendations:

The failure to make investigation of anonymous disclosures mandatory is disappointing. While this is not required as part of the transposition of the Directive into law, it is a missed opportunity to further strengthen whistle-blower protection and flies in the face of international best practice. It is the recommendation of ICCL that Head 8 of the Draft Heads of Bill is amended to ensure that legal entities are obliged to investigate and follow up on anonymous disclosures.

5: Whistle blowers must be protected from the threat or imposition of retaliation, remedies should be made available to those targeted and penalties should be imposed on those who retaliate

According to the UN Special Rapporteur, in the absence of protections against retaliation and the prospect of redress, few individuals would disclose wrongdoing. In transposing the Directive, the range of remedies available to those who believe they have been penalised for making a disclosure is increased through the introduction of the ability to claim "interim relief". This is a welcome expansion of the use of temporary injunctions which were previously only available in cases of dismissal. The reversal in the "burden of proof" in these cases, as indicated by the Ministerial press-release is also to be welcomed.[23] In this sense then, Ireland already largely meets the obligations as set out in article 20.1 of the Directive. However, further provision should be made to offer practical support to whistle-blowers who choose to make a disclosure. Article 20.2 of the Directive sets out;

> *"Member States may provide for financial assistance and support measures, including psychological support, for reporting persons in the framework of legal proceedings"*

Furthermore, Article 20.3 of the Directive recommends that;

> *"The support measures referred to in this Article may be provided, as appropriate, by an information centre or a single and clearly identified independent administrative authority."*

Recommendations:

While head 22 of the Draft Heads of Bill sets out a partial transposition of the Directive, it is the view of ICCL that these protections should be enhanced. Head 22.1 for example sets out a Ministerial obligation to provide;

> *"either directly or via a third party, for comprehensive and independent information and advice on making a protected disclosure and the rights and protections available under this*

[22] 2016 Integrity at Work Survey Transparency International Ireland

[23] Department of Public Expenditure and Reform Press release; *Minister McGrath publishes General Scheme of Protected Disclosures (Amendment) Bill*

Act to be made available to the public in a manner that is easily accessible and free of charge."[24]

While this is welcome, it is difficult to understand why a specific designated competent authority has not been identified to centralise this task. It is the position of ICCL that the mooted Protected Disclosures Office should be tasked with providing this service and that this should be placed on a statutory footing as part of this Bill in order to more effectively transpose Article 20.3 of the Directive.

Secondly, while head 22.2 makes reference to providing "effective assistance" to any relevant authority involved in protecting a whistle-blower from retaliation, more clarity is needed. Article 20.2 specifically name-checks financial and psychological support for reporting persons. While the ability to claim "interim relief" as previously outlined is welcome, ICCL would welcome a specific commitment to the provision of psychological support in the final text of the bill.

[24] Protected Disclosures (Amendment) Bill 2021

Conclusion

Ireland already enjoys a high standard of protection from whistle-blowers from a comparative perspective. While the 2014 Act is often cited in policy and academic literature as being an effective piece of legislation for the protection of whistle-blowers, Directive 2019/1937 offers an opportunity for Ireland to go further in the protection of those who make protected disclosures. There are a number of opportunities to strengthen the 2014 Bill that have unfortunately been missed in the process of transposition. It is the view of ICCL that the Bill can be enhanced by taking the opportunity to fully transpose the Directive and incorporate further recommendations, which we have outlined in the course of this submission. We would strongly urge the Committee to take our recommendations on board and to heed the responses to the consultation on the transposition of the Directive from last year, such as those from Transparency International Ireland, The International Whistleblowing Research Network and ReportAConcern. In choosing to derogate from a number of areas of the Directive we are passing up the opportunity to set the gold standard for protected disclosure and are choosing to ignore a number of key provisions of international conventions which Ireland is party to, including the UNCAC, the ICCPR and the ECHR. It is the position of ICCL that every effort should be made to ensure that this Bill respects those conventions which Ireland is a party to and is amended in such a way that ensures that human rights considerations are to the forefront of our whistle-blower protection regime.

About ICCL

The Irish Council for Civil Liberties (ICCL) is Ireland's oldest independent human rights body. It has been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped legalise homosexuality, divorce, and contraception. We drove police reform, defending suspects' rights during dark times. In recent years, we led successful campaigns for marriage equality and reproductive rights.

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