Submission to the Department of Public Expenditure and Reform 2017 Public Consultation on the Protected Dislcosures Act

I write on behalf of Transparency International (TI) Ireland to offer its submission on the Protected Disclosures Act 2014. Please let us know if you should like any further information or clarification on any of the recommendations that follow.

Yours faithfully,

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Transparency International Ireland (TI Ireland) is an independent, not-for-profit and non-partisan organisation. Its vision is an Ireland that is open and fair – and where entrusted power is used in the interest of everyone. TI Ireland's mission is to empower people with the support they need to promote integrity and stop corruption in all its forms.

TI Ireland was established in 2004 and has focused much of its resources on whistleblowing, as research shows that it is one of the most effective tools in exposing and preventing corruption and other forms of wrongdoing. Despite the important role whistleblowers play, we know that they have often suffered as a result of speaking up. TI Ireland's Alternative to Silence Report in January 2010 set out some of the experiences of Irish whistleblowers and the shortfalls in existing legislative protection.

TI Ireland campaigned for comprehensive whistleblowing legislation and, as has been acknowledged by two Ministers of Public Expenditure and Reform, provided valuable input in respect of the Protected Disclosures Act 2014 (Act).

In doing so, TI Ireland drew upon international best practice and guidance (including Transparency International's 'International Principles for Whistleblower Legislation'), its own research and the experiences of callers to its Speak Up Helpline, which was established in 2011.

In 2016, TI Ireland launched the Transparency Legal Advice Centre (TLAC), which is an independent law centre providing free legal advice to workers on the application of the Act to their circumstances. It also launched Integrity at Work (IAW), a multi-stakeholder, not-for-profit initiative for organisations in the public, private and non-profit sectors. Through training, best practice exchange, online resources and specialist advice and guidance, IAW promotes supportive environments for anyone reporting concerns of wrongdoing. Both initiatives receive seed-funding from the Department of Public Expenditure and Reform (Department).

TI Ireland makes the following submissions in response to the call for submissions of the Government Reform Unit in respect of the review of the Act, drawing upon TI Ireland and TLAC's experiences of working with whistleblowers and other stakeholders.

1. Is the Act operating effectively?

The Act provides a framework for workers to speak up when they witness wrongdoing and has proved to be of assistance in providing disclosure options and remedies in the event of adverse treatment following the making of a disclosure.

It was intended that the Act would provide comprehensive protection to workers who disclose wrongdoing. However, there remain some potential gaps in protection which should now be addressed, as follows.

2. What appear to be the main challenges in the operation of the Act? In your view are there any unintended consequences from the operation of the Act which are not consistent with the objectives of the legislation?

There are a number of challenges in the operation of the Act. Some are set out in the answers to subsequent questions hereafter. Additional challenges are set out here:

In connection with employment

Workers may disclose 'relevant information' under the Act. Section 5(2)(b) of the Act provides that one of the conditions of 'relevant information' is that it must come to the 'attention of the worker in connection with the worker's employment'.

The correct interpretation of this phrase would include, for example, information that comes to a worker's attention not just during the performance of his or her day-to-day duties but also during (for example) any work-related conversation in the office canteen or kitchen or away from the workplace.

However, we are not aware of any caselaw on this point. It is also not clear whether the phrase prevents workers who are also trade union representatives making protected disclosures in relation to information which comes to their attention in that capacity. This is an issue that has been brought to the attention of the Transparency Legal Advice Centre.

To avoid any risk of the wording being interpreted unduly narrowly, it should be removed altogether. It is worth noting that no such language is used in the United Kingdom's Public Interest Disclosure Act 1998. Alternatively, the Act should be amended to include a non-exhaustive list of examples covered by the phrase.

Duty to detect wrongdoing

Section 5(5) of the Act excludes from the definition of 'relevant wrongdoing' any matter 'which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer'.

Section 5(5) can make it difficult for workers such as compliance officers or auditors to report wrongdoing under the Act, particularly where it is not clear what constitutes an 'act' or 'omission' on the part of the employer and whether it is necessary, for example, for senior officers of the organisation to have knowledge of the alleged wrongdoing. It is recommended that section 5(5) should be amended so that workers such as compliance officers and law enforcement agents can avail of the protections of the Act where they face adverse treatment from their own employer for disclosing or investigating a relevant wrongdoing notwithstanding their duty to do so.

Continuous penalisation

The Act contains a six-month time limit for issuing a claim for penalisation, which can be extended in exceptional circumstances.

Workers who have suffered penalisation as a result of having made protected disclosures often do so on an ongoing basis and often for longer than six months prior to their complaint to the Workplace Relations Commission (WRC). Where there is penalisation over a period of time which can be viewed as a series of similar acts, the time-limit runs from the last incident of penalisation. As

long as the claim is taken within six months of the last incident, it does not matter that the period of penalisation began more than six months before the claim was initiated. This reflects the approach taken in cases such as *Mr John Arthur v London Eastern Railway Limited*.[1] It is recommended therefore that the Act should be amended to make it clear that, where there is a period of such continuous or ongoing penalisation, the time-limit runs from the date of the last incident. This is similar to the approach taken in discrimination cases.

Restricted access to the employment law system

The Act covers 'workers' rather than simply employees. However, under the legislation only employees are able to seek remedies for whistleblower retaliation through the employment law system, including the WRC. Other types of workers must take a claim for damages through the courts, which can be more expensive and time consuming. This is in contrast with the UK, where redress for all workers (as defined) is through the employment tribunal system. Steps should be taken to include all workers within the employment law system for the purposes of this Act.

Unduly onerous burden of proof

It can be difficult for a worker to prove that a particular measure was taken by an employer as a result of the worker having made a protected disclosure. Where adverse measures have been taken which appear to be penalisation for having made a protected disclosure, the burden of proof should be on the employer to prove otherwise. This would be similar to the approach adopted in discrimination and sexual harassment cases (see section 85A of the Employment Equality Act 1998 and section 38A of the Equal Status Act 2000). Whistleblower retaliation can be characterised as discrimination on the basis that it is adverse treatment arising from the worker's protected characteristic of having made a protected disclosure.

Definition of Protected Disclosure

Consideration should also be given to broadening the definition of protected disclosure in Section 5(1). This would afford the appropriate protections to those that can show they intended or were believed or suspected by their employer or the person causing detriment to have made a protected disclosure. It is not unusual for workers to ask for advice from co-workers or managers in the course of considering or preparing to make a protected disclosure, without sharing relevant information as defined in Section 5(3). Likewise, it is common for workers to indicate that they intend to make protected disclosures or ask questions that divulge knowledge or a reason to believe that wrongdoing may be taking place. This scenario appears to have been anticipated and partly addressed in section 7 (24B.-1) of the Communications Regulation (Amendment) Act 2007.[2]

Trade Secrets Directive

Concerns were raised during the passage of the European Union's Trade Secrets Directive that it would lead to companies taking legal action against whistleblowers for revealing 'trade secrets.'[3] Following a campaign by European NGOs, an exception was inserted in relation to the revealing of

[1] [2006] EWCA Civ 1358

[2] http://www.irishstatutebook.ie/eli/2007/act/22/enacted/en/pdf

[3] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016L0943

misconduct, wrongdoing or illegal activity, provided that the discloser is acting for the propose of protecting the general public interest.

A deliberate decision was taken to exclude any 'public interest' test from the Act, on the basis that this could be an unnecessary technical hurdle for whistleblowers. In implementing the Trade Secrets Directive before the deadline of June 2018, the Government should ensure that no such test is reintroduced and it is made clear that all protected disclosures under the PDA are deemed to be in accordance with the Directive and Ireland's implementing legislation.[4]

Disclosures Recipient

The Disclosures Recipient has recently been appointed. Although this information can be found at www.per.gov.ie/wp-content/uploads/Protected-Disclosures.pdf, it can be hard to find and should be more widely publicised.

Protection for non-workers

Consideration should be given to extending whistleblower protection to witnesses of wrongdoing in contexts other than the workplace, such as members of clubs and associations, and anyone subject to a mandatory reporting obligation (e.g. those subject to the reporting requirement of section 19 of the Criminal Justice Act 2011, which applies to any individual who possesses information which may be of material assistance in the prevention or investigation of a criminal offence).

3. Do you have any views on the protections contained in the Act (sections 11 to 16)? Are the protections sufficient to encourage potential disclosures to speak up about wrongdoings or are further safeguards warranted?

Section 12

It would be beneficial to include a provision for an injunction to be awarded by the Circuit Court for threatened penalisation, as well as a provision permitting the WRC to award interim relief, which could, for example, provide financial relief for a worker whose working hours have been reduced, pending final determination of his or her claim.

The provision to compensate workers that have been dismissed for having made protected disclosures with a sum equivalent to 260 weeks' salary for whistleblowers is likely to be inadequate in a number of circumstances. This is particularly so for those workers in financial or professional services. Numerous documented cases have emerged in Ireland and overseas where workers in the banking/financial sector or professions such as audit and compliance have lost employment and have never been able to secure employment of equivalent status. In the absence of financial rewards for disclosures, workers in the banking sector in particular, are unlikely to incentivised to make protected disclosures if they stand to recover the equivalent of five years' salary or less. The Safety, Health, and Welfare at Work Act 2005, Section 28 (3) c provides that the Rights Commissioner may require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances. This should be regarded as the model provision for an amendment to Section 12 (1) 3 c.

[4] Article 3(2) of the Directive provides that the disclosure of a trade secret shall be deemed to be lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law. It should be made clear that protected disclosures meet this condition.

Section 13

It would also be beneficial to include a provision for interim relief for detriment caused, such as an interim award for damages pending the final determination. It would also be useful to have a statutory right to seek an injunction from the Circuit Court where there is a threat of detriment.

Section 14

Although the Act contains a wide civil immunity provision to protect whistleblowers from being sued, they remain subject to defamation proceedings. It is open to a worker to seek to rely on a defence of 'qualified privilege' in such cases but instructing a solicitor to put forward the defence can be expensive and there is no guarantee that the worker will ultimately be protected. Consideration should be given to amending the Act to repeal the exclusion for defamation.

Section 15

Similarly, while section 15 of the Act aims to protect whistleblowers from criminal liability, GRECO has pointed out that, notwithstanding this provision, would-be whistleblowers may be reluctant to speak out when there are severe criminal sanctions in place for the disclosure of confidential information.[5]

GRECO has asked the government to clarify the scope of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 in this regard 'so as to ensure that the protections and encouragement for whistleblowers contained in the Protected Disclosures Act 2014 are fully understood and implemented'.[6] TI Ireland supports this approach in all circumstances where criminal sanctions are in place for the disclosure of confidential information. TI Ireland further recommends that the Office of the Director of Public Prosecutions issues guidelines clarifying the process it will take to ensure that the Act does not apply in particular case before bringing prosecutions for the disclosure of any information.

Section 16

It is not clear how section 16 works in relation to internal disclosures to an employer. The term 'person' can refer to an individual or a legal entity such as a company. Is the 'person to whom a protected disclosure is made' properly interpreted as the employer organisation as a whole or to the particular individual to whom the disclosure was made? It is submitted that the proper interpretation is the former. This is supported by the subsequent reference in section 16 to 'or any person to whom a protected disclosure is referred in the performance of that person's duties' but should be made clear in the Act by amending 'person to whom a protected disclosure is made' to 'individual to whom a protected disclosure is made'. Whistleblowers are frequently concerned that details of their identity will be unnecessarily disclosed widely amongst their managers and colleagues.

[5] See GRECO Secretariat, Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation report Ireland, 2014)

[6] Ibid.

4. Are there any definitions contained in the interpretation section (section 3) that it would be useful to reconsider, amend, replace, clarify etc.? For example, is the definition of "worker" too broad or too narrow or does it strike the right balance?

The Act does not explicitly apply to voluntary workers. Volunteers do not have the certainty of knowing that they are protected if they speak up in the workplace. TI Ireland is aware that volunteers are well placed to expose wrongdoing, particularly in the charitable sector. Volunteer whistleblowers have said that they feel particularly vulnerable given the threat of legal action – and the potential reputational damage arising from 'dismissal'. While labour law provisions such as unfair dismissal may not be appropriate in such cases, the legislation should at least provide volunteers with the other protections contained within the Act including the right to confidentiality; the ability to sue for damages for detriment suffered as a result of speaking up; and immunity against criminal and civil liability.

Some organisations have sought to deal with this issue by stating that their whistleblowing policies cover volunteers. While the intentions of these organisations are to be encouraged, extending policies does not have the effect of expanding the application of the Act. Encouraging those who may not be covered by legislation to nonetheless speak up under a policy can cause confusion and potentially exposes volunteers to risks such as adverse litigation from third parties.

Separately, those on work experience 'by an educational establishment on a course provided by the establishment' are excluded from the protection of the Act. While we are not aware of Irish caselaw on the meaning of this carve-out, similar wording in the UK was accepted as excluding placements organised by institutions such as universities. In 2015, it was acknowledged in that jurisdiction that 'whilst students are on placement they are exposed daily to real situations where they may witness incidents concerning public and patient safety'.[7] Amending legislation was therefore introduced that year to expand the definition of 'worker' under the Public Interest Disclosure Act 1998 to include student nurses and midwives.[8]

A similar amendment should be made to the Act. However, as the above rationale can be applied to other types of placement (such as in mediation services and social work), the Act should be explicitly extended to cover all students on placement, regardless of their discipline.

Finally, it would be useful to explicitly include non-executive directors (who are usually not employees) within the definition.

5. Do the eight categories provided for in section 5(3) of the Act capture all of the matters that should be captured in that definition? If not, are the categories (or wording contained in the categories) be clarified by way of further definition?

<u>Soft law</u>

The list in section 5(3) may not always cover soft law mechanisms such as professional codes or ethical guidelines, upon which the public, customers and employers often rely to protect themselves from risks and harmful practices. These practices include:

- The mismanagement of or failure to disclose conflicts of interest by providers of professional services;

[7] Sir Robert Francis QC, "Freedom to speak up: an independent review into creating an open and honest reporting culture in the NHS," February 2015, available at http://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf

[8] The Protected Disclosures (Extension of Meaning of Worker) Order 2015

- improper staff recruitment (including, for example, the appointment of family and friends who are not properly qualified for the role);
- the cover up of such activities.

TI Ireland recommends that the list of relevant wrongdoings in the Act should be expanded to explicitly include the above. As with the position with volunteers (as set out above), some employers have attempted to deal with the gap in the legislation by extending their policies to cover such wrongdoing. This can lead to a confusing and potentially risky situation in circumstances where a worker may only have the protection of their employer's policy and not the full cover of the Act. A legislative amendment to the list of "relevant wrongdoing" that can be disclosed under the legislation is the appropriate way of addressing this issue.

Health and safety

TI Ireland recommends that a new subsection should be inserted into section 5(3) to read as follows:

'For the purposes of subsection 3(d), a matter is not a relevant wrongdoing where the individual as referred to within subsection 3(d) is the worker and his or her health or safety has been, is being or is likely to be endangered by his or her employer'.

This could serve to avoid confusion around whether bullying complaints can be made as protected disclosures. It is TI Ireland's understanding that the legislative intention was for such claims to be dealt with under pre-existing employment law procedures rather than under the Act. The suggested amendment would give effect to this intention and also help ensure that it would remain open for a worker to seek to include within a protected disclosure issues of systematic bullying affecting colleagues rather than only him/herself.

Grossly negligent/gross mismanagement

The inclusion of the word 'gross' implies a high bar but there are practical difficulties in advising on whether particular conduct crosses such a hurdle. It would be useful to include within the Act a non-exhaustive list of such negligence or mismanagement.

6. The Act does not contain any requirement that the disclosure is made in good faith or in the public interest as it was felt that this could act as a significant disincentive to potential disclosers coming forward in the first instance. However, should there be some threshold of seriousness applied in respect of wrongdoing, in order to reduce the disproportionate use of investigative resources? Could this potentially affect one of the aims of the legislation – to encourage workers to disclose relevant wrongdoings?

TI Ireland recommends that there should not be a threshold of 'seriousness' applied in respect of wrongdoing. Taking such a step is wholly unnecessary, as there is no obligation on recipients of protected disclosure to undertake investigations. If the recipient of a protected disclosure believes that opening an investigation would be a disproportionate use of resources, they are not under any duty under the legislation to proceed with such an investigation.

Adding such a threshold would be another hurdle for those seeking to speak up and would mean that there would be little or no certainty that their disclosure would be protected under the Act, particularly as 'seriousness' can be assessed differently among reasonable individuals. It could be difficult for organisations such as TLAC to give clear and reliable legal advice to an individual speaking up as to whether the wrongdoing which they wish to bring to light meets a 'seriousness'

test. Amending the Act in this way would therefore be likely to have a chilling effect on whistleblowing, contrary to the aims of the legislation.

7. Are the evidential thresholds in the stepped disclosure regime (section 6 to 10) as reflected in the Act about right to encourage persons to disclose to the employer (internally) first where appropriate?

While TI Ireland agrees with the general principle of requiring workers to meet higher requirements to report externally , it recommends re-examining the conditions for reporting in 'other cases'. Although it is generally preferable that workers disclose to an employer so that wrongdoing can be addressed as quickly as possible, there are circumstances where a worker will need to report outside their organisation. The conditions in section 10 are overly burdensome and difficult to rely upon. For example, when making a disclosure under section 10 of the Act a worker can have no certainty that a court or tribunal would agree that their disclosure is 'reasonable in all the circumstances'. It is submitted that this requirement should be removed.

Prescribed persons

It can be difficult to advise clients on the practical difference between having a reasonable belief of relevant wrongdoing (as required in all protected disclosures) and also having a reasonable belief that the relevant information is substantially true. Where a client has a reasonable belief that the information that they are disclosing tends to show relevant wrongdoing, it follows that they will invariably also believe that what they are disclosing is true.

8. Are there any persons with regulatory or other functions who have not been prescribed for the purposes of the receipt of disclosures (section 7 and related statutory instruments) and whom in your view should be prescribed? If your answer is yes please advise whom and why?

TI Ireland recommends that the list of prescribed persons should be expanded to include:

1. An Garda Síochána (AGS) – AGS may be the only appropriate prescribed person where the worker is disclosing information about the commission of a crime;
2. The Charities Regulatory Authority (CRA) – although reports may be made under the Charities Act 2009 to the CRA, in line with the legislative intention that the Act should be a comprehensive, pan-sectoral piece of legislation, it should also be included as a prescribed person to allow workers of charities to make protected disclosures under the Act to the appropriate regulatory body. Often, there is no other appropriate prescribed person in this context;
3. The Law Society of Ireland, Solicitors Disciplinary Tribunal, Law Library and Barristers' Professional Conduct Tribunal – to allow workers employed in the legal profession to make protected disclosures to their regulatory body.

In addition, TI Ireland has received feedback from regulators through its Integrity at Work programme that they would like the Department to issue guidance for prescribed persons, including minimum standards on what is expected of them.

9. Does the obligation to protect the identity of the discloser contained in section 16 represent a fair balance between the rights of the discloser and the need to follow up on the disclosure? Could this be improved and, if so, how? State your reasons for this view.

It is difficult to determine the effectiveness of section 16 given the current dearth of caselaw in respect of its implementation. It would be premature to recommend any amendment to section 16 in the absence of such evidence. However, some employers have told TI Ireland that they are finding it difficult to understand their obligations under the provision. It would therefore be important to provide further guidance to those employers struggling to interpret the law and their conflicting duties to uphold the natural rights of the respondent where a protected disclosure is made.

10. Should the Act require recipients to act on disclosures (for example, by providing and obligation to assess or investigate) or to communicate with the person making the disclosure?

Research shows that one of the reasons a worker might choose not to blow the whistle is a belief on the part of the worker that doing so would be futile.[9]

TI Ireland recommends that the Act is amended to include obligations on prescribed persons to:

i. consider whether an investigation is warranted and to communicate this decision to the worker; and
ii. inform the worker of the outcome of any investigation following the making of a protected disclosure. This would be similar to, for example, section 24A(4) of the Communications Regulation Act 2002, which obliges the Commission for Communications Regulation to notify a person who has made an appropriate disclosure of the outcome of any investigation into the disclosure, so far as practicable and in accordance with the law.

11. Should it be mandatory for businesses/firms with employees over a certain number (e.g. 100 employees) to have a Code of Practice/internal procedures for the handling of protected disclosures?

Section 21(1) of the Act obliges every public body to establish and maintain procedures for the making of protected disclosures by workers. However, there is no such obligation on other types of employers. The Integrity at Work Survey undertaken by TI Ireland and Behaviour & Attitudes in 2016 shows that only 34% of private sector employers have procedures in place, in contrast to an estimated 94% of public sector employers.[10] An absence of procedures can mean that workers are unclear about how to make a report and whom to approach and may also subject private sector workers to a greater risk of retaliation than public sector workers. It may also mean that wrongdoing is less likely to be detected or prevented in private sector and charitable organisations.

The French Parliament enacted whistleblowing legislation in late 2016 which compels employers with more than 50 staff to have protected disclosure procedures in place. Likewise, all publicly-traded US companies have been obliged to have whistleblowing procedures since 2002. The

[9] See Buckley et al, Section, 'Whistleblowing – the case of a financial services company', Corporate ownership and control, 7 (2010), 275-83; West, Bottomley and Vandekerckhove, 'The inside story: a study of the experiences of 1000 whistleblowers', London, Public Concern at Work and Greenwich University, 2013

[10] See https://transparency.ie/news_events/first-national-survey-whistleblowing-points-positive-attitudes-need-action-employers and Survey conducted by Public Affairs Ireland as part of its conference on Protected Disclosures, 29 June 2017, https://www.pai.ie/2017/07/careful-secrecy-whistleblowing-catalyst-cultural-change/ July 2017

requirements are seen to be in the interests of investors and the wider public. Moreover, there is little evidence to suggest that the requirements pose a disproportionate burden on employers there.

It is therefore recommended that section 21 of the Act should be amended to oblige all employers in Ireland with more than 50 staff to establish and maintain procedures for the making of and dealing with protected disclosures.

12. Should such businesses/firms (e.g. with over 100 employees) be required to report on protected disclosures in their annual reports and accounts – similar to the obligation on public bodies?

TI Ireland believes that a requirement on businesses/firms with over 50 employees to report on protected disclosures in their annual reports and accounts, in a similar manner to public bodies, is worth consideration. The publication of such information could be done in such a way as to identify categories of risks to the public interest, the level of promotion by employers of the legislation and the level of use of the legislation by workers.

13. Do you have any views on how the Protected Disclosures Act 2014 interacts with the other protections for disclosures contained in sectoral legislation? Are there certain issues that need to be clarified in respect of the protections and obligations contained in the 2014 Act and those in sectoral legislation? If there are, how would this be best achieved?

Prior to the Act, whistleblowing legislation was enacted on a piecemeal basis. The result was that some workers were protected, depending on where they worked but with different levels of protection in different industries.[11] This was confusing and unfair.

The Act was intended to address this situation with one, comprehensive law covering workers in all parts of the Irish economy. However, it also left in place the previous legislation. It is understood that this was to guard against repealing legislation which may contain stronger protections than those set out in the Act.

As a consequence, workers in sectors such as health and financial services are faced with two or more frameworks for making a disclosure, with different reporting criteria and protections, and may be unsure as to which regime will be applied to their report. It is therefore recommended that:

- a comprehensive review is undertaken of sectoral protections;
- any sectoral protections that are stronger than those in the Act be included within that legislation for the benefit of all workers; and
- the sectoral legislation is repealed.

[11] Transparency International Ireland, "An Alternative to Silence - Whistleblower Protection in Ireland," January 2010, available at https://transparency.ie/sites/default/files/2010_Alternative_to_Silence_Ireland_v1.pdf