Submission 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)

I write on behalf of Transparency International (TI) Ireland to offer its submission 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).

It responds to ten questions posed by the Department of Public Expenditure and Reform in respect of possible options for transposition and includes a number of additional recommendations to address existing shortcomings in the Protected Disclosures Act 2014.

The submission largely draws from both TI Ireland's and the Transparency Legal Advice Centre's (TLAC) analysis and experience of working with disclosers since 2010. Please let us know if you should like any further information or clarification on any of the recommendations that follow.

Yours faithfully,

Chief Executive
Transparency International Ireland

July 2020

Question 1

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

Yes – with particular consideration to the circumstances. The Directive does not define the term *anonymous,* but it should be distinguished from the term *confidential* and be taken to mean that the identity of the discloser is not shared with the recipient or anyone connected to an investigation.

There may be circumstances where, for instance, the identity of the discloser is shared with a solicitor and where the solicitor acts on their behalf without revealing the identity of the discloser other than to confirm that they have undertaken the necessary identity checks. In such cases, the discloser should be treated as would normally be the case.

Although it is silent on the question of anonymity, the Protected Disclosures Act 2014 (the Act) already contains protections for workers without requiring that they be identified before enjoying the rights set out in the Act so long as they make a disclosure in a manner consistent with the Act - though it is understood that the discloser would have to be identified if they were to exercise those rights.

Anonymous disclosure is also a means by which many disclosers can raise concerns safely and can encourage the sharing of important information that might not be shared unless the identity of the discloser is not withheld until such time as it is necessary.

It is understood that it can be more difficult to investigate an anonymous disclosure than others. However, anonymous disclosure should not be viewed as antithetical to confidential disclosure or to the effective investigation of a relevant wrongdoing, especially where the disclosure contains enough information by itself to pursue an assessment and/or investigation.

Given that 33% of respondents to TI Ireland's Integrity at Work Survey 2016 state that a key influencing factor in making a disclosure would be where they could do so anonymously in the first instance, the preclusion of such reports would likely deny employers and the State the opportunity to communicate with disclosers who are only prepared to do so in the event that they can withhold their identity when making initial contact with a recipient.[1]

In practical terms, it should be possible to correspond with an anonymous discloser if they have provided contact details such as an anonymised email address or mobile phone number and are willing to communicate further. If the recipient/assessor/investigator determines that the identity of the discloser is required for the purposes of conducting an investigation or to meet an existing legal obligation, then this should be communicated with the discloser and they should be given the opportunity to disclose identifying information in confidence. Furthermore, where trust is established between the anonymous discloser and the recipient/assessor, the discloser may be more likely to divulge identifying information in the course of the assessment and/or investigation.

Furthermore, the Directive poses no obligation on employers or competent authorities to take any specific course of action in response to a disclosure.[2] However, the requirement to acknowledge a

[1] Speak Up Report 2017, p.39 https://www.transparency.ie/sites/default/files/17.12.13_speak_up_report_ie_final.pdf.

[2] Article 9.1 of the Directive provides for an obligation to acknowledge the receipt of a disclosure within seven days and to follow up 'diligently' but does not define the term.

protected disclosure, if assessed as a potential protected disclosure, should be extended to anyone irrespective of whether they are identified or identifiable from their disclosure.

In addition, any disclosure made as set out in the Act should continue to be treated as a protected disclosure, irrespective of whether the discloser is identified until such time as it becomes impractical or unreasonable to do so. This would apply to disclosures where an anonymous discloser is able to convey enough information to show a reasonable belief in a relevant wrongdoing; or where the identity of the discloser is subsequently revealed or they volunteer to reveal their identity, upon which obligations arising from section 16 of the Act should apply.

The decision to share information on the outcome of any action taken in response to the disclosure with a discloser who chooses to withhold their identity may rest with the employer or competent authority. However, effort should be made to communicate where possible and within the given timeframes set out in the Directive. This might include a confirmation that the organisation has taken appropriate action, whether an investigation is ongoing, or that it considers the matter closed (see also Question 7).

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

Yes, this provision should apply to all sectors.

Employees of smaller entities, including charities, social enterprises and not-for-profit organisations should be made aware of their rights, responsibilities, existing reporting channels, and sources of advice and support in making protected disclosures. While public information campaigns will play an important role in raising awareness, these will be no substitute for the presence and implementation of policies and procedures in the workplace.

Currently, lower adoption rates of policies and procedures in the Irish private sector compared with the public sector counterparts can also be observed. For instance, only 10% of private sector employers said that they had a whistleblowing policy in place as of November 2016.[3] This contrasts with the 68% of local authorities that had published policies and procedures as of December 2019. This, we would suggest, has much to do with the absence of any requirement under the Act for organisations other than public-service bodies to establish procedures.

If the number of employees fluctuates within a small firm, compliance with the legislation becomes even more difficult or less likely, and leaves workers vulnerable to greater legal risk. All organisations, with more than one employee should therefore have internal reporting channels and procedures and these should apply to all sectors.

All employers are currently obliged to have undertaken Health and Safety risk assessments and procedures in place to prevent bullying under the Safety, Health and Welfare at Work Act 2005. Standard policies are available for adaptation from the Health and Safety Authority.

[3] Speak Up Report 2017, p.42 https://www.transparency.ie/sites/default/files/17.12.13_speak_up_report_ie_final.pdf.

Similarly, the Code of Practice on Protected Disclosures Act 2014 includes a model protected disclosures policy which can be adapted by employers at minimal expense.[4] The cost of adapting such policies for all employers should not be any higher than those associated with implementing mandatory health and safety procedures.

According to a 2017 European Commission funded study on the economic costs and benefits of implementing such procedures, the economic benefits of implementing such procedures (including the passage of legislation) in Ireland have outweighed the financial costs by a factor of between 1.4 to 1 and 2.3 to 1. This only accounts for the savings in respect of potential abuses in our public contracting system.[5]

Existing not-for-profit supports such as the TI Ireland Speak Up Helpline and Transparency Legal Advice Centre (TLAC) also provide free advice to workers from organisations of all sizes and from all sectors, while the Integrity at Work initiative keeps the cost of supports to employers to a minimum through tiered membership fees and government grant support.

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

No. Consideration should be given to requiring all employers with more than one member of staff to meet the same obligations set out under the Directive. Article 9 is not overly prescriptive on the type of channels to be established other than for the requirement that they:

- allow disclosers to make disclosers in writing and orally;
- 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;
- Provide for the acknowledgment of receipt of the report to the reporting person within seven days of that receipt;
- Provide 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 diligent follow-up by the designated person or department referred to above;
- Provide a reasonable timeframe to give 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;
- provision of clear and easily accessible information regarding the procedures for reporting externally to competent authorities.

The Act does not set a threshold on the size of employer that is subject to its provisions. Given that all employers are bound by the Act and cannot contract out of their obligations under the Act, it is

[4] https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/cop12/
[5] https://op.europa.eu/en/publication-detail/-/publication/8d5955bd-9378-11e7-b92d-01aa75ed71a1/language-en

essential that they are able to act on disclosures appropriately. This implies that they are able to conduct a preliminary assessment of any disclosure, take whatever action is considered necessary, and prevent the penalisation of a worker.

Obliging all employers to establish procedures would provide for a greater degree of legal and procedural certainty for workers and help mitigate legal, financial and reputational risks for all employers.

Implementing such procedures should not pose disproportionate costs on employers if guidance is made available on the design of these procedures and the necessary supports are freely available to all workers making disclosures, as provided for under Article 20.

It would not be unreasonable to expect any employer/recipient to acknowledge receipt of a disclosure within seven days of receipt or to provide feedback to the discloser on action taken (if any) within the three-month timeframe set out in Article 9.1(f).

All employers would be required to provide a password protected email address and/or phone number that allows workers to make a disclosure to a person designated by the employer, including another employee, Board member or trustee of the organisation.

In the event that the designated recipient is not considered impartial, the discloser should be made aware of alternative recipients including relevant external bodies.

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. Public sector bodies, irrespective of how many employees are employed by them, are currently required to establish and maintain procedures for the making of protected disclosures by workers under section 21 of the Act.[6] The non-regression clause contained in Article 25.2 of the Directive obliges Member States not to do anything that will constitute grounds for a reduction in the level of protection already afforded by Member States.

Question 5

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

Section 21 of the Act requires that local authorities, like other public bodies, establish and maintain procedures for the making of protected disclosures by workers. The Chief Executives of each local authority is also a prescribed person for the reporting of breaches of the Local Government Act 2001. In addition, protected disclosures may also be made by workers employed or contracted to a local authority directly to the Minister for Housing, Local Government and Heritage. This will remain unaffected by virtue of Article 25.2 of the Directive.

Workers in local authorities, as in other public bodies, should continue to be allowed to report to any appropriate person (and made in a manner consistent with the provisions of the Act). This might

[6] http://www.irishstatutebook.ie/eli/2014/act/14/section/21/enacted/en/html#sec21

include, inter alia, the Chief Executive, members of management, ethics/compliance officers, audit as well as members of the local authority. Additionally, local authorities should more proactively communicate their role as prescribed persons/competent authorities and advertise the role of relevant oversight agencies and other prescribed persons in receiving disclosures of relevant wrongdoing.

The Directive is also non-prescriptive on the types of channels to be established or the form they may take. However, it should be noted that new evidence from the UK suggests that dedicated hotlines are not used as frequently as they are intended and workers are more inclined to report to any person who is able to take action in response to the relevant wrongdoing (such as a line manager, Chief Executive or a compliance/ethics officer). According to Protect's *Silence in the City 2* report, no-one raised their concerns with a hotline in the first instance and only 1% did so in the second instance.[7]

The communication of information internally should remain unencumbered by the establishment of any hotline, which should be considered as just one of a number of channels through which information can be shared. Disclosers should be free to raise concerns in writing, by email, text message, secure messaging applications, phone or in person. Additional measures such as those provided for under the Office of Government Procurement Framework to assess and investigate protected disclosures in public bodies, and supports such as those provided by TI Ireland/TLAC will remain available for employers and workers seeking to respond to concerns under the Act.

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 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

Prescribed bodies should continue to receive and act on protected disclosures where appropriate. Under Article 11 Member States shall designate the authorities competent to receive, give feedback or follow up on the reports and shall provide them with adequate resources.

The obligations laid out under Article 11 do not appear to be overly onerous on prescribed persons. In most cases, prescribed persons already have autonomous reporting channels as required under Article 11.2. There should be few reasons why any prescribed body should also not be able to acknowledge a concern within seven days of a disclosure. There is no definition of the term 'diligently' as set out under Article 11.2c but current guidelines published by DPER on internal procedures for public bodies outline the principles for assessment and investigation of disclosures. This guidance might be expanded upon and should suffice to help employers and competent authorities meet the obligations set out in Article 11.2c.

In addition, the list of such persons should be updated annually and a complete and publicly available list with contact details published to allow for easy public access.

[7] https://protect-advice.org.uk/silence-in-the-city-2/

The design of external reporting channels set out in Article 12 should also not pose any additional financial or administrative burden on prescribed bodies where they already have secure IT systems (such as password protected email accounts), servers and phone lines.

There is limited evidence available on the effectiveness of unitary versus multi-agency bodies - currently, Ireland has adopted a multi-agency approach. However, evidence from the Netherlands suggests that over-burdening a single agency with responsibility for advice, investigation and oversight, can lead to resource constraints, undue delays in taking action, and unmet expectations which, in turn, can erode public trust in the agency.[8]

The approach in France mirrors that of Ireland where the French House of Whistleblowers is operated with the support of 17 NGOs and trade unions. It offers access to free legal advice, psychological counselling, as well as advocacy and financial support where necessary.[9] In Ireland, its equivalent is operated by TI Ireland and TLAC with the support of the Congress of Trade Unions, the Wheel, Chambers Ireland, Government bodies and members of TI Ireland's Integrity at Work programme.

Although TI Ireland is establishing a Case Review Service to provide feedback to disclosers and employers participating in the Integrity at Work programme on the response to their case, it will have no statutory effect.

Consideration might therefore be given to establishing a statutory authority that might review cases of penalisation or inaction by employers and monitor and report on the effectiveness of competent authorities. The authority would not receive disclosures in the first instance, but rather receive complaints about penalisation or failures to comply with the Act. The authority could also be given powers to investigate and if necessary, to levy administrative fines. The level of fines to be levied, would be proportionate to the seriousness of the complaint levelled against the employer and take into account the annual turnover of the employer.

In its absence, consideration might be lent to compelling prescribed persons and public bodies to report to the Department of Public Expenditure and Reform each year with statistics on the number of protected disclosures made, reports of penalisation, and measures taken in response to them, with the Department publishing an analysis of these measures each year so as to monitor the effectiveness of the legislation. The Department could also provide a template to public bodies to provide for comprehensive and uniform reporting of this information.

[8] https://rm.coe.int/the-protection-of-whistleblowers-challenges-and-opportunities-for-loca/16809312bd
[9] https://mlalerte.org/

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

Consistent with both Article 11 2(e) and Paragraph 66 of the Recitals, competent authorities should give 'feedback to the reporting persons about the action envisaged or taken as follow-up (for instance, referral to another authority, closure based on lack of sufficient evidence or other grounds or launch of an investigation and possibly its findings and/or measures taken to address the issue raised), as well as about the grounds justifying the follow-up'.

The Department might consider including additional guidance to competent authorities/prescribed persons on communicating the final outcome of investigations. Such guidance could include advice and/or templates on communicating the following information (where appropriate) before, during and after an investigation has been completed:

- the process and/or terms of reference by which assessments, investigations and appeals will be conducted;
- rights of respondents and fair procedures;
- the likely timeframe for investigations and/or reasons for not providing a set timeframe;
- the discloser's rights vis-à-vis confidentiality and penalisation;
- further disclosure options and right of appeal the process by which the investigation has been conducted and/or its outcome;
- the outcome of investigations into each wrongdoing investigated;
- reasons for closure of an investigation into any aspect of the alleged wrongdoing;
- lessons learned or recommendations arising from the investigation;

Any communication on the outcome of an investigation would have to be done so in a way that does not contain or redact information that compromises the legal rights of respondents or third parties or any other legal obligations such as those arising from possible breaches of financial regulation or national security. Where such information is withheld from a discloser, it would be helpful to explain the legal basis upon which it is being withheld.

A potential model for feedback in certain cases includes the NHS National Guardian's Office Case Review System TI which publishes key findings and recommendations made to NHS trusts arising from public interest disclosures.[10] TI Ireland is finalising the terms of reference for its Integrity at Work Case Review Service which could also serve as a means of providing feedback to the discloser on the investigation process as well as the outcome of a case. Further information on the procedure can be provided upon request.

Separately, Ireland and TLAC have also been made aware of cases where disclosers to the Central Bank of Ireland (CBI) have been frustrated with its inability to share information on regulatory action taken in response to disclosures. This is understood to be based on the CBI's requirement to comply with section 33AK of the Central Bank Act 1942 and related EU Directives prohibiting the public disclosure of information on regulatory action. Recital 66 of the Directive reinforces this requirement. Nonetheless, the CBI should be encouraged to share enough information with the discloser (as set out above) without specifying the action to be taken against the regulated entity.

[10] https://www.nationalguardian.org.uk/case-reviews/

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

It is not clear that any prioritisation is required other than to address those concerns that are assessed to pose an imminent risk to the public interest. Where there are repeated disclosures of information to the same recipient, the recipient may decide that action has already been taken and communicate this with the discloser. However, the discloser should be provided with the right of appeal, both to the recipient and where this is unsuccessful, in the case of a public body, to the appropriate Minister; or to the governing body of any other legal entity or an entity designated with authority by that body to undertake a review of the appeal.

It should also be noted that by virtue of the non-regression clause contained in Article 25.2, the rights to make a disclosure and any legal obligations to act on certain types of wrongdoing, should not be affected by transposition of the Directive. This is irrespective of whether a competent authority deems a disclosure to be too minor to take action. The disclosure should still be acknowledged and where there is no public interest in investigating a matter, based on an assessment of the disclosure, that decision should be communicated with the discloser. This decision should also be open to appeal in a manner set out above and by following the measures set out under Question 7.

As with recipients, assessors and investigators, those communicating the outcome and decisions on the prioritisation of reports should be trained and operate according to guidelines on determining risk and case management.

Question 9

What measures of support should Ireland provide for reporting persons? What mechanisms might be used to provide such support? Who should provide that support? Please provide reasons for your answer

Ireland appears to meet most of its obligations under Article 20.1 (a) and (c) by providing:

- easy and free access to comprehensive and independent information and advice on procedures and remedies available, on protection against retaliation, and on the rights of the person concerned (via the TI Ireland Helpline/Website, TLAC and Integrity at Work programme)

and

- access to free legal advice, counselling and legal assistance in the making of protected disclosures (via TLAC, upon assessment by the TI Ireland Helpline)

TI Ireland intends to provide access to free psychological support to disclosers through a counselling support network in 2021. However, it is unlikely that free counselling will be made available without additional financial resources to meeting some of the professional costs of providing this support.

In addition, it is likely that further demands will be placed on the TI Ireland Helpline, TLAC and Integrity at Work programme arising from the transposition of the Directive which require additional investment of resources.

TI Ireland has suggested that financial assistance could also be provided by using fines imposed and/or revenues generated arising from investigations into protected disclosures to fund free legal aid and/or to recover legal costs where it can be determined that they likely made a protected

disclosure as set out in the Act.[11] Article 20 1 (b) suggests that competent authorities provide 'effective assistance' before any relevant authority involved in their protection against retaliation, including 'certification of the fact that they qualify for protection under this Directive'. In cases where there is any doubt about whether a protected disclosure had been made, the competent authority, could provide evidence to a court, tribunal and/or employer to this effect.

In addition to direct financial assistance, the cap on awards arising from actions taken under sections 11 and 12 should be removed. As noted in our submission on the Act in 2017, 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 for certain categories of worker. 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.

In addition to financial support, it would also 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.

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

Civil remedies for penalisation and detriment are already contained under the Act under s.11, 12 and 13, while a breach of s.16 can be actionable by the discloser.

Section 3 of the Act might be amended to include: the hindering or attempt to hinder reporting; vexatious proceedings against a discloser; and a breach of duty to maintain confidentiality as defined in section 16.

Criminal penalties might be considered for attempts to hinder or penalise any person in the making of a disclosure of a criminal offence. However, penalties already exist under s.21 of the Criminal Justice Act 2011 which have yet to be used since its enactment. Likewise, we are not aware of any cases being brought under s.41 of the Criminal Justice Act 1999 against any person seeking to threaten a discloser (a witness or potential witness as defined) reporting a criminal offence. Where

[11] https://transparency.ie/sites/default/files/15.03.31_speak_up_final.pdf

such penalties exist in other jurisdictions, such as in Australia, they have yet to lead to a conviction since their enactment in 1994.[12]

It is unlikely that any criminal penalties provided for with the amendment of the 2014 Act will be enforced and it is possible that providing for such penalties will create a false sense of security on the part of prospective disclosers, and create distrust in Ireland's protected disclosures regime where they are not enforced.

Nevertheless, a more targeted approach that allows for competent authorities such as the CBI to impose administrative penalties on those that cause harm or allow harm to disclosers making disclosures to it or within regulated entities should be considered. For example, since 2016 the UK Financial Conduct Authority (FCA) has required that certain regulated entities establish and comply with new whistleblower protection rules as part of the Senior Managers Regime. In 2018, the FCA and Prudential Regulatory Authority fined Barclays' Chief Executive £642,430 for breaking these rules.[13] As of 2019, a further four investigations were underway for FCA whistleblowing breaches.[14]

Conversely, the provision of specific penalties for false disclosures – even if they only have salutary effect - might serve as a deterrent against the making of protected disclosures out of fear of prosecution. Penalties for knowingly false statements already exist in the Act under section 12(5). Furthermore, the making of a disclosure, other than where the discloser has a reasonable belief that the disclosure shows or tends to show wrongdoing also denies the discloser the other protections provided for under the Act. Depending on the nature of the false disclosure, disclosers face disciplinary action, dismissal, defamation action, as well as criminal prosecution for wasting Garda time under section 12 of the Criminal Law Act 1976.

[12] Criminal penalties for penalisation of a whistleblower were introduced under s20(1) of the New South Wales Public Interest Disclosures Act 1994 https://www.legislation.nsw.gov.au/#/view/act/1994/92/part3/sec20 and the Australian Federal Public Interest Disclosure Act 2013 https://www.legislation.gov.au/Details/C2019C00026

[13] https://www.theguardian.com/business/2018/may/11/barclays-jes-staley-fined-whistleblower-fca

[14] https://blogs.thomsonreuters.com/answerson/fca-whistleblowing-champions/

Additional Recommendations

Additional challenges are set out here and the following recommendations are largely drawn from TI Ireland's submission to the 2017 Public Consultation on the Protected Disclosures Act:[15]

1. In connection with employment

TI Ireland has previously recommended the revision of Section 5(2)(b) of the Act which provides that 'relevant information' must come to the 'attention of the worker in connection with the worker's employment'. This is an issue that has been brought to the attention of TLAC since 2016 and has posed a needless evidential burden for workers. To avoid any risk of the wording being interpreted unduly narrowly, it should be removed altogether.[16]

Alternatively, and to comply with Articles 4.1, 5.9 and 5.11 of the Directive, it should or amended to read that relevant information must come to the 'attention of the reporting person in a work-related context'.

2. 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 senior executives, board members, compliance officers or auditors to avail of protections under the Act, particularly where it is not clear what constitutes an 'act' or 'omission' on the part of the employer. It is recommended that section 5(5) should be amended so that all reporting persons as defined in the Directive can avail of the protections of the Act where they face adverse treatment from their own employer for reporting or disclosing a relevant wrongdoing notwithstanding their duty to do so.

3. 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.[17] 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, which would include the date of dismissal.

[15] See https://www.transparency.ie/resources/submissions/submission-protected-disclosures-act-review
[16] It is worth noting that no such language is used in the United Kingdom's Public Interest Disclosure Act 1998.
[17] [2006] EWCA Civ 1358

4. 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 therefore be taken to include all workers within the employment law system for the purposes of this Act and transposition of the Directive.

5. Reversing the burden of proof

Where adverse measures have been taken which appear to be penalisation for having made a protected disclosure, the burden of proof should rest with the employer to prove otherwise. This would bring Ireland into compliance with Article 21.5 of the Directive and be consistent with 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.

6. 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, or to share a concern about a relevant wrongdoing without sharing relevant information as defined in Section 5(3).[18] 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.

7. Trade Secrets

Section 5.7(a) of the Act should be repealed and S.I. No. 188 of 2018 amended to allow for the transposition of Article 21.7 of the Directive. This provides that the only test a reporting person must meet in availing of legal protections is that they had reasonable grounds to believe that the reporting or public disclosure [or a trade secret] was necessary for revealing a breach [as defined in the Directive].[19]

[18] For instance in a Concierge V a Hotel (ADJ-00023901) of 5 February 2020, the WRC only recognised a written protected disclosure made in May 2019, after the complainant had resigned, and doubted whether complaints or concerns related to the same wrongdoing made in January that year amounted to protected disclosures because they did not provide 'detailed particulars' of the alleged wrongdoing.

[19] TI Ireland raised concerns in July 2018 over the potential chilling effect that Ireland's transposition of the Trade Secrets Directive could have on prospective whistleblowers. See https://www.transparency.ie/news_events/irish-whistleblowers-could-face-criminal-prosecution-reporting-white-collar-crimes-and

8. Defamation

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 and which would transpose Article 21.7 by protecting reporting persons against incurring 'liability of any kind as a result of reports or public disclosures under this Directive'.

9. Soft law

The list of relevant wrongdoings in section 5(3) of the Act 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;
- 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 and/or repeated misconduct.

TI Ireland recommends that the list of relevant wrongdoings in the Act should be expanded to explicitly to include the above.

Alternatively, the list of relevant wrongdoings could be expanded to include to define a breach of a professional code of conduct or any code of conduct to which the worker is contractually bound and where it is in the public interest to disclose it.

As with the position with volunteers, 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 confusion and pose additional legal risks to workers in circumstances where the worker may only have the protection of their employer's policy and not the full cover of the Act.

10. Evidential thresholds for external and public disclosure (section 6 to 10)

The conditions in section 10 of the Act 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 can also 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.

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 (either to a competent authority, or to their public representatives or the media).

The Directive acknowledges this but neither Article 10 nor Article 15 requires that a discloser demonstrates that they had a reasonable belief that the relevant information is 'substantially true'

when making a report to a competent authority, or that a public disclosure is ‘reasonable in all the circumstances’. The primary evidential threshold is that the discloser had a ‘reasonable belief’ in making the disclosure. It is therefore advised that the requirements under section 9 and 10 of Act be amended accordingly.