Minister Michael McGrath TD
Minister for Public Expenditure and Reform

Cc:
Members of the Oireachtas Joint Committee on Finance, Public Expenditure and Reform

By email

20 April 2022

Re. Protected Disclosures (Amendment) Bill 2022

Dear Minister,

I write on behalf of Transparency International (TI) Ireland to welcome the progress made in drafting, and your engagement on the text of the Protected Disclosures (Amendment) Bill 2022. I should also use this opportunity to highlight significant concerns TI Ireland has about the potential consequences for Irish whistleblowers and employers if the text is enacted in its current form.

As you are aware, the EU Whistleblowing Directive is largely inspired by the experience of Member States that already have strong safeguards in place – most notably Ireland. Indeed, in 2017 TI Ireland was invited by the European Commission to discuss what form a Directive should take based on our experience.

We were encouraged by your agreement to strengthen existing standards, and your commitment to ensure horizontal transposition and harmonise enhanced safeguards to disclosures of breaches of national as well as EU law. Throughout negotiations on the Directive, civil society was also assured that a non-regression clause would ensure that existing protections would not be weakened.

This non-regression clause as set out in Article 25.2 of the Directive makes it clear that the implementation of the Directive 'shall under no circumstances constitute grounds for a reduction in the level of protection already afforded by Member States in the areas covered by this Directive'.

However, we believe that in transposing the Directive in the manner that is currently proposed in the Bill, it is likely that the Bill will both directly and indirectly weaken existing protections for Irish whistleblowers in violation of Article 25.2. We therefore believe that this poses an increased risk of legal challenge and associated costs in the Irish Courts as well as the European Court of Justice.

The Bill will weaken existing protections in the following ways:

1. By removing the right to make protected disclosures directly to a Minister (Section 8)
2. By explicitly exempting relevant organisations to accept anonymous disclosures (section 5A(1))
3. By seeking to remove wrongdoings involving interpersonal grievances from the ambit of the Act (Section 5(5A))
4. By introducing criminal penalties for 'knowingly false' reports (Section 14A(e))

1. Removal of the right to make protected disclosures directly to a Minister (Section 8)

Section 8 of the Protected Disclosures Act 2014 states that:

A disclosure is made in the manner specified in this section if-

(a) the worker is or was employed in a public body, and

(b) the disclosure is made to a Minister of the Government on whom any function relating to the public body is conferred or imposed by or under any enactment.

The standard for the Act's protections under Section 8 'is reasonable belief'. Section 8(2)(c) proposes to require public servants to report to their employer in most circumstances, thereby removing the automatic legal right of public servants to make a protected disclosure to a Minister. In doing so, it also removes existing legal protections from public servants against any prosecution, penalisation or detriment when making a disclosure directly to a Minister.

TI Ireland engages directly with whistleblowers through its Speak Up Helpline and with employers and recipients through its Integrity at Work programme. It is aware of the difficulties and frustrations of both whistleblowers and recipients in public bodies with the operation of Section 8 in the current legislation.

These arise, in part, from the potential for duplication of effort and time taken to assess and investigate disclosures that ought to have been addressed by the public body rather than the Department.

Nonetheless, whistleblowers will continue to report directly to Government Ministers irrespective of what amendments are made or any guidance that is issued by public bodies. This is in part because of established practice and precedent arising from the 2014 Act. Moreover, in some instances, the Minister might be considered to be the employer of a public service employee – particularly where that employee has been seconded from a Government department.

These frustrations will not be overcome by removing the legal right from public service whistleblowers to report directly to a Minister and by requiring them to report to their public service employer in the first instance. Indeed, the additional tests set out for reports to Ministers

will increase the likelihood that employees of public bodies will make disclosures directly to TDs and others.

We are sure that the loss of existing protections is an unintended consequence of this amendment and that you would wish to see that those public servants who make disclosures directly to Ministers retain their existing legal rights.

TI Ireland therefore recommends that section 8(2) be amended to make it clear that a worker who is or was employed in a public body but who has not made a disclosure in compliance with section 8(2)(c) shall benefit from the protections if they comply with section 8(2)(a) and 8(2)(b) and elsewhere in the Act.

In this way, Ministers may decide not to accept a disclosure if the tests set out in section 8(2)(c) have not been complied with, without removing existing protections for public service workers.

We also recommend that section 8(2)(b) should be amended so to retain the current evidental threshold set out in section 5 of the 2014 Act of 'reasonable belief' that relevant information 'tends to show one or more relevant wrongdoings' rather than the current proposed threshold in section 8(2)(b) that would require a public service worker to reasonably believe that 'information disclosed in the report, and any allegation contained it, are true'.

Section 8(3)(a) will also likely prove to be problematic. It states that 'The relevant Minister shall, without having considered the report or the information or any allegation contained therein, as soon as practicable but in any case not later than 10 days after receipt of a report, transmit the report to the [Protected Disclosures] Commissioner.'

A number of TI Ireland public-service stakeholders have advised that Section 8(3)(a) will be inoperable. Some type of initial screening/assessment will still have to be carried out by the Department recipient before passing to the Commissioner. This is in large part due to the fact that many if not most protected disclosures are not labelled as such by workers. Indeed, the Supreme Court[i] has noted that the Act does not require whistleblowers to do so and also notes that protected disclosures may sometimes be indistinguishable from grievances without undertaking an initial assessment of evidence.

This being the case, and notwithstanding the proposed amendment under section 8(3)(a), there may still be a legal responsibility for a recipient acting on behalf of a Minister to assess or immediately act on a disclosure where, for instance, the disclosure relates to a risk to the welfare of children or the health and safety of the public.

Furthermore, it is highly probable that without the capacity to undertake an initial assessment at Departmental level, the Commissioner may be unduly burdened with reports that do not meet the definition of a protected disclosure and that might have been dealt with swiftly by the responsible Department. In such cases, delays will be exacerbated by the circuitous route implied by the amendment.

While recognising the difficulties encountered with the operation of section 8 of the 2014 Act, TI Ireland recommends that section 8(3)(a) be amended so as to allow Departmental recipients to assess and/or commission an investigation into a disclosure or to transmit the report directly to the Commissioner where appropriate. In this way, the administrative burden for assessing disclosures will not be borne by a single agency and thus help avoid the risk of undue delay.

Alternatively, you may consider deleting sections 8(1), 8(2) or 8(3) in their entirety or adopting the wording set out in TI Ireland's submission on the General Scheme of the Bill to the Joint Committee on Finance, Public Expenditure and Reform on 16 July 2021.[ii]

2. By explicitly exempting relevant organisations to accept anonymous disclosures (section 5A(1))

The 2014 Act is silent on the management of both confidential and anonymous disclosures and allows for recipients to exercise sound judgement in deciding on how or whether to respond. There will be circumstances where a recipient ought to acknowledge and act on the disclosure of such information where there is adequate documentary or material evidence shared with a recipient to determine the likelihood of a relevant wrongdoing. It is also worth considering the Department of Public Expenditure and Reform's statutory guidance on Protected Disclosures which states:

> *'12.1 A public body's Procedures should draw attention to the distinction between an anonymous disclosure (where identity is withheld by the discloser) and confidential disclosures (where identity is protected by the recipient). Anonymous disclosures made by workers are not excluded from the protection of the 2014 Act. Public bodies should give a commitment that they will be acted upon to the extent that this is possible, while recognising that they may be restricted in their ability to investigate the manner in the absence of the knowledge of the identity of the discloser.'*

However, section 5A(1) of the Act as amended will explicitly exempt relevant organisations from their obligations to accept/follow up on disclosures made anonymously. It notes that recipients may do so if they consider it 'appropriate', but this undermines the purpose of the 2014 Act which, by its silence on anonymous disclosures, allows for action to be taken in response to all disclosures – including anonymous disclosures - where possible or required by law.

We believe that this amendment will deny the existing rights of Irish workers to make protected disclosures anonymously with the reasonable expectation that the disclosure will be acted upon where it contains information tending to show a relevant wrongdoing.

There is no provision in the Directive that requires Member States to exempt relevant organisations from accepting or following up on an anonymous disclosure. Anonymity has been cited by respondents to whistleblowing surveys, including TI Ireland's Integrity at Work Survey in 2016 as the most important factor in assuring them that they could safely raise workplace concerns.[iii]

The second most commonly cited factor in deciding to speak up was whether the worker 'worked for someone or an organisation that would act on [their] report'.[iv] The link between these two factors is clear. The importance of providing for a variety of confidential and anonymous disclosure channels, combined with a requirement to act on useful and verifiable information shared through these channels, has been recognised as essential features of any functioning whistleblowing management system.[v]

Indeed, Article 9.1(e) of the Directive provides for: 'diligent follow-up, where provided for in national law, as regards anonymous reporting;' Moreover, the provision of anonymous disclosure channels has been a requirement for many Irish or Irish-based firms and professionals operating in the international financial services sector with the passage of the Sarbanes Oxley Act in 2002. The US Securities and Exchange Commission actively encourages tips of regulatory breaches and fraud, irrespective of whether they are made confidentially or anonymously. It reports that enforcement actions arising from such tips have led to more than US$3.5 billion in financial remedies since 2011.[vi]

The circumstances of each case will be different and where the recipient of a disclosure can determine that the person making a disclosure is likely to be a reporting person as defined in the Act, the information contained in the disclosure is a relevant wrongdoing, and the information is actionable, then the same requirements placed on the recipient to follow up on the report should apply in cases where the identity of the discloser is unknown.

Likewise, where the anonymous discloser has provided contact details (such as an anonymised email address or mobile phone number) there is no reason why the recipient of a disclosure cannot acknowledge the receipt of a disclosure and follow up within a given timeframe of no more than three months on whether or what action is being taken in response to the disclosure. There will still be a requirement to take action in response to anonymous disclosures where the information points to a serious economic crime, a threat to public safety or the wellbeing and safety of children.

What is more, the amendment as proposed will serve as a disincentive to speaking up by increasing the likelihood that no action will be taken in response to a disclosure unless the whistleblower identifies themselves to the recipient.

For these reasons, TI Ireland recommends that section 5A(1) be amended to the following:

'Without prejudice to the provisions of any other enactment relating to anonymous reporting of wrongdoing, nothing in this Act shall oblige any person to acknowledge or follow-up on anonymous reports made in the manner specified in section 6 unless:

(a) a person considers it appropriate to do so

and/or

(b) the information contained therein tends to show a relevant wrongdoing

and/or

(c) where required, the worker is willing to cooperate with the person to whom the report is transmitted, in relation to the performance by that person of the functions conferred on that person by or under this Act.'

3. By seeking to remove wrongdoings involving interpersonal grievances from the ambit of the Act (Section 5(5A))

Section 5(5A) of the Amendment Bill 2022 attempts to exempt matters concerning interpersonal grievances affecting a reporting person from the definition of a disclosable wrongdoing. The 2014 Act has attempted to achieve similar ends at section 5(2)b by exempting breaches of legal obligations arising under the reporting person's contract of employment from being disclosed under the Act.

Taken on its own, section 5(2)b suggests that concerns which are personal to the reporting person falls outside the scope of the Act. Recent Supreme Court judgments have outlined the challenge in attempting to draw clear distinctions between disclosable wrongdoings and these private concerns.[vii] Many obligations arising under a reporting person's contract of employment have a statutory basis. For example, obligations relating to pay would be outlined in a worker's contract of employment while there are corresponding legal obligations in the Payment of Wages Act 1991.

Although section 5(5A) seeks to draw this distinction more clearly, in effect it may make it more difficult to assess whether a disclosure of wrongdoing is protected. In practice, many disclosures made without the benefit of legal advice will contain elements that are interpersonal in nature. In many instances, the circumstances giving rise to the making of a protected disclosure will involve interpersonal concerns that are inextricable from the information about wrongdoing itself.

This may increase the risk to reporting persons who make disclosures including information relating to interpersonal disputes. Correspondingly, it may also lead to disclosures containing insufficient actionable information to be made, where the reporting person erred on the side of caution and removed relevant information from their disclosure to ensure it did not fall afoul of this exemption.

TI Ireland therefore recommends that section 5(5A) be deleted.

4. By introducing criminal penalties for 'knowingly false' reports (Section 14A(e))

Section 14A(e) of the amendment Bill will provide for penalties where a person 'makes a report containing any information that the reporting person knows to be false'. An offence is punishable on conviction on indictment, with 'a fine not exceeding €100,000 or to imprisonment for a term not exceeding 2 years, or both'. While the inclusion of criminal penalties for knowingly false reports does not by itself weaken existing protections, the likely and unintended

consequence of providing for additional criminal penalties in the Bill will be to have a chilling effect on workers who will fear making a false disclosure.

Since the enactment of the 2014 Act, TI Ireland has advised on numerous employer policies and procedures on protected disclosures. It is not uncommon to find employers using language or providing guidance in policies that is not provided for in the law or that misinterprets it. The use of terms such as 'good faith', 'vexatious' or 'frivolous' are frequently used in employer policies to circumscribe the rights of workers in making protected disclosures even though they do not appear anywhere in the 2014 Act. Indeed, TI Ireland has found that 63% of private sector and 36% of public and semi-state employers used the term 'good faith' in their protected disclosures policies in spite of there being no reference to the term in the 2014 Act.[viii]

Likewise, the provision for criminal penalties for knowingly false disclosures will also be likely misinterpreted or misrepresented by employers. Employers who are inclined to discourage whistleblowing will advise workers that 'false reports' are punishable with criminal penalties. Given there are no penalties for publishing false or misleading information on the rights of workers, it is likely that a significant number of employers will continue to do so and will seek to interpret or misrepresent Section 14A(e) in a way to discourage whistleblowing by drawing undue attention to the risk of making 'false disclosures'.

More substantively, the criminalisation of sharing 'any information' that a reporting person 'knows to be false', sets an extremely low threshold for prosecution. In providing advice to whistleblowers, TI Ireland and its partner the Transparency Legal Advice Centre frequently advise on the disclosure of multiple pieces of information contained in a protected disclosure. As with any witness to wrongdoing, whistleblowers can sometimes misremember events, embellish details, construct false narratives or make false allegations based on factual information which by constitute false information. There might be no intent on the whistleblower's part to mislead a recipient of information, however, a third party might form the conclusion that they ought to have known that a piece of information was untrue and make a criminal complaint. In such circumstances, the whistleblower could be liable to prosecution.

Disclosers already face the risk of disciplinary action, dismissal, defamation proceedings, as well as criminal prosecution for wasting Garda time under section 12 of the Criminal Law Act 1976, while penalties for knowingly false statements before the Labour Court or Workplace Relations Commission (WRC) are provided for under section 12(5) of the 2014 Act. Moreover, the vast majority (92%) of cases before the WRC are unsuccessful and workers must meet their own costs in taking these cases.[ix] Meanwhile, most workers do not have the financial means to take an action before the High Court to avail of their rights under section 13 of the Act. Given the scales are already tipped in the favour of employers to the detriment of workers and that effective and dissuasive penalties already exist for the making of false reports, there is no compelling need for the introduction of criminal penalties for false reporting in the Protected Disclosures Act.

TI Ireland therefore recommends that section 14A(e) of the Amendment Bill be deleted.

Conclusion

TI Ireland has made additional recommendations aimed at enhancing protections while ensuring that the Act serves the purpose for which it was initially intended, and the EU Directive is transposed as required. These are available in our submission on the General Scheme of the Bill which presented to the Joint Committee on Finance, Public Expenditure and Reform in July 2021.

Although we would like to see every opportunity taken to improve existing safeguards during transposition of the Directive, we appreciate that this might not have been achievable at this juncture. We are sure you share our we belief that it is vitally important that the level of protection already afforded by the 2014 is not reduced during transposition. We would therefore, ask you to consider the amendments set out above as the Bill moves to Report Stage in Dáil Éireann.

Yours sincerely,

John Devitt
Chief Executive

Endnotes

[i] Baranya v Rosderra Irish Meats [2021] IESC 77
[ii] See Recommendation 6, Submission to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach on the General Scheme of the Protected Disclosures Amendment Bill 2021, p.11 https://www.transparency.ie/resources/submissions/2021-submission-general-scheme-protected-disclosures-amendment-bill
[iii] See https://www.transparency.ie/sites/default/files/18.01_speak_up_2017_final.pdf, p.39
[iv] Supra n.i
[v] See Institute of Certified and Chartered Accountants Guidance on Whistleblowing Systems
[vi] See U.S. Securities and Exchange Commission https://www.sec.gov/page/whistleblower-100million
[vii] Supra n.i
[viii] See National Integrity Index series whistleblowing indicators at https://www.transparency.ie/resources/national-integrity-index
[ix] See Speak Up Report 2020, p.25 https://transparency.ie/sites/default/files/20.12_speakup2020.pdf