Regulatory Impact Analysis

Transposition of the EU Whistleblowing Directive

1. Summary of Regulatory Impact Analysis (RIA)

Department/Office: Department of Public Expenditure and Reform.	**Title of Legislation**: Protected Disclosures (Amendment) Bill
Stage: Publication of Bill	**Date**: 13 January 2022

Related Publications:

- Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.
- The Protected Disclosures Act 2014.

Available to view or download at:

- Directive - https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937
- Protected Disclosures Act - http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/print

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What are the policy objectives being pursued?

- The transposition into Irish law of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law ("the Whistleblowing Directive") by 17 December 2021.
- Meet the commitment in the Programme for Government to "use the opportunity of reforms to European wide whistleblowing provisions to review, update and reform our whistleblowing legislation to ensure it remains as effective as possible".

What policy options have been considered?

- **Option 1:** Do Nothing/No Policy Change
- **Option 2:** Transpose the Directive via Statutory Instrument under the European Communities Act 1972.
- **Option 3:** Transpose using primary legislation to amend the Protected Disclosures Act 2014.

Preferred Option:

- **Option 3 –** Transpose using primary legislation to amend the Protected Disclosures Act 2014.

Transposition Options			
Option	**Costs**	**Benefits**	**Impacts**
1. Do Nothing/No Policy Change	No direct costs EU fines and court action very likely	No change required for employers/ employees	Ireland will not be compliant with its legal obligation to transpose the Directive and may be subject to enforcement action. Persons within the personal scope of the Directive would be in a disadvantaged position to receive whistleblower protection in Ireland when compared to compliant member states.
2. Transpose the Directive via Statutory Instrument under the European Communities Act 1972.	Additional direct costs would be minimal. There may be some additional secondary costs depending on decisions made re: Member State supports which are required by the Directive. There is a risk of enforcement action including fines if EU takes view this approach to transposition has been ineffective.	Subject to there being no major objection from the Oireachtas, enactment by secondary legislation is shorter and more straightforward than using Primary Legislation. This would also allow more time for legislative drafting.	Would result in "double-banking" – i.e. national and EU law operating in parallel. Complex and confusing legal framework arising could dissuade whistleblowers and add to implementation costs for industry and government. Risk of enforcement action if EU takes view this approach to transposition has been ineffective.
3. Transpose using primary legislation to amend the Protected Disclosures Act 2014.	Secondary costs for this option may result from the possible designation of the Ombudsman as "authority of last resort". There may also be a need to review the current departmental funding to Transparency International Ireland for the maintenance and expansion of their independent	Eliminates a potential "double-banking" problem as national and EU legal frameworks will be fully aligned. There may be opportunity to refine overall legal framework taking into account the findings of the 2018 Statutory Review of the Protected Disclosures Act.	More protracted legislative process as Bill will have to pass Houses of the Oireachtas. Shorter window to complete legislative drafting. Whistleblowers in Ireland will be subject to a single, simplified framework of protections when reporting on either national or EU matters.

	Speak Up helpline and related Legal Advice Centre.	The advantageous provisions of both the Directive and the Protected Disclosures Act can be enacted, maintaining Ireland's reputation for high standards in protecting whistleblowers.	Expected compliance burden in the short- to medium-term due to increased complexity and changes to reporting and feedback obligations on employers.

2. Description of Policy Context and Objectives

2.1 Brief Policy Context

a. EU Whistleblowing Directive

Directive 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of EU law ("the Whistleblowing Directive") was adopted on 23 October 2019. Member States, including Ireland, are required to transpose the Directive by 17 December 2021.

The purpose of the Directive is to enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law.

The Directive provides for designated internal and external workplace channels for reporting wrongdoing, a number of protections to be applied during and after investigations, reporting and feedback requirements as well as penalties for non-compliance and remedies for those who are penalised for reporting.

b. Protected Disclosures Act 2014

Ireland is one of ten EU countries that have enacted comprehensive statutory protections for whistleblowers in the form of the Protected Disclosures Act 2014 (PDA).

The PDA provides for a number of reporting channels, protections for persons who report wrongdoing and remedies for those who are penalised. The Act also addresses a number of special cases and miscellaneous matters such as disclosures concerning law enforcement, national security, defence and international relations and annual reporting by public bodies.

A Statutory Review of the PDA was published in July 2018. The review found that the impact of the Act has been broadly positive to date but did raise a number of implementation and procedural issues in the public sector.

c. Impact of the EU Whistleblowing Directive on the Protected Disclosures Act

The Directive is similar in many respects to the PDA and it is clear that the Irish legislation has been influential on the approach the EU has taken in this area. Successful implementation of the Directive will further enhance the already strong protections in place for whistleblowers in Ireland and provide greater clarity as regards the duties and obligations applying to recipients of disclosures from whistleblowers.

Key areas of difference between the Directive and the PDA, which will have to be addressed during the transposition process, include:

- **Material scope**: The very broad definition of "wrongdoing" under the PDA already encompasses most of the categories of wrongdoing within the material scope of the Directive. However, for the avoidance of any doubt, any transposing measures will have to explicitly reference the EU laws within the scope of the Directive as being "relevant wrongdoings" within the meaning of the PDA.

- **Personal scope**: The Directive aims to provide protections for a very broad range of reporting persons, extending beyond the scope of the PDA, which focuses on workers as traditional employees, into persons with non-standard employment relationships, such as volunteers and shareholders**.**

- **Reporting channels**: The channels for reporting in the Directive are very similar to the PDA, in that they allow for: internal reporting to the employer; external reporting to a prescribed person; and public disclosure. However, the conditions for external reporting and public disclosure are slightly different to what is provided for under the PDA. It should also be noted that there is no equivalent provision in the Directive for reporting to Government Ministers as provided for by Section 8 of the PDA.

- **Operation of reporting channels**: The Directive imposes specific obligations on employers and prescribed persons who receive reports of wrongdoing, predominantly related to having designated formal channels for receipt of reports, obligations to act upon those reports and requirements for providing feedback to whistleblowers. The PDA does not currently impose any legal obligations on recipients to act upon receipt of a protected disclosure. Additionally, the obligation in the PDA to have formal procedures for handling protected disclosures applies only to public bodies.

- **Protections**: Similar to the PDA, the Directive provides that Member States must provide protection from retributive actions by the employer, and any civil or criminal liability arising from reporting wrongdoing. The precise form of these protections is not specified – however, Article 23 of the Directive requires that there should be "effective, proportionate and dissuasive penalties" for persons who breach or frustrate the provisions and purpose of the Directive.

2.2 Statement of Policy Objectives

- **Long Term Objective**: to use the opportunity of the transposition of the Directive to review, update and reform national whistleblower protection laws to ensure they remain as effective as possible.

- **Immediate Objective**: to align Ireland's whistleblowing framework with the common minimum standards of the Directive and thus maintain Ireland's reputation for high standards of whistleblower protection as well as to avoid or mitigate any infringement proceedings arising from non-transposition.

3. Identification and Description of Transposition Options

3.1 Option 1 - Do Nothing/No Policy Change

This option would result in a failure to comply with our EU obligations and would in all likelihood result in prosecution by the European Commission through the Court of Justice of the European Union leading ultimately to the imposition of sanctions, such as daily fines, as well as leaving the State vulnerable to legal proceedings by affected parties.

Nationally, while protections for whistleblowers would remain in place under the Protected Disclosures Act, these protections would not align fully with protections in other EU Member States.

Further, the opportunity to amend the Act to address certain matters raised during the 2018 Statutory Review would be missed.

Option 1 is **not recommended** on this basis.

3.2 Option 2 – Regulation under the European Communities Act 1972

The European Communities Act 1972 (as amended) provides that Government Ministers may adopt Regulations to implement EU law and that those Regulations have the effect as if they were Acts of the Oireachtas. Where existing primary legislation needs to be amended to conform to an EU law, a

Regulation under the 1972 Act can amend that primary legislation. Most EU Directives are transposed by way of Regulations made under the 1972 Act.

The main advantage of this approach is that the process of enacting a Regulation is simpler than the legislative process involved in enacting primary legislation – when drafted, the Regulation is signed by the Minister and laid before the Houses of the Oireachtas. It then becomes law within 21 days unless annulled by either the Dáil or Seanad. Parliamentary scrutiny is provided in the first instance by the European Parliament itself (which approves all EU legislation) and secondly by the requirement under the European Union (Scrutiny) Act 2002 to lay all proposals for EU legislation before the Oireachtas (the draft proposal for the Whistleblowing Directive and an Information Note was laid on 22 May 2018).

Regulations made under the 1972 Act cannot be used to make changes to the law that go beyond those required by the Directive that is being transposed under the Act. This means that if the Whistleblowing Directive was transposed by way of a Regulation, it would not be possible to replace or repeal the PDA in its entirety, since the PDA has a much wider material scope than the Directive, which is limited to reporting on breaches of EU law. The outcome of transposing using the 1972 Act, therefore, would be that Ireland would have two competing legislative instruments – the PDA and the Regulation implementing the Directive – operating in parallel.

This phenomenon, where EU law covers similar ground to existing domestic law and the two regimes have not been coherently merged during transposition, is sometimes referred to as “double-banking”. In general, double-banking should be avoided as it makes the law more complex and difficult to use. In particular, it can have a significant impact on the stakeholders concerned when a legal dispute is involved.

In this instance, having the PDA and the Directive operating in parallel will place a burden on all stakeholders – whistleblowers, employers, competent authorities, the WRC and the courts – to understand the distinction between wrongdoings that are breaches of EU law (covered by the Directive) and other wrongdoings (covered by the PDA) because different rules will apply depending on the wrongdoing that is reported. Specifically:

- For whistleblowers, in the first instance, different rules will apply in respect of the conditions that must be met in order to use a particular reporting channel – e.g. a whistleblower making a disclosure to a prescribed person under the PDA must reasonably believe that the information they are reporting is “substantially true”. This requirement does not exist under the Directive. Confusion as to which regime applies and fear that following the wrong set of rules might leave them unprotected from penalisation could act as a disincentive for whistleblowers to report wrongdoing.

  Whistleblowers will also have different rights in terms of access to advice and assistance when reporting wrongdoing and in respect of the right to have their report followed up and to be provided with feedback.

  The wider personal scope of the Directive will also impact on whistleblowers if there were two parallel regimes. Shareholders, board members, volunteers, unpaid trainees and job applicants can only report on matters within the scope of the Directive. There is no provision for them in the PDA. Again, confusion among these categories of persons as to when they can and cannot report wrongdoing may act as a disincentive to report. It could also be argued that it is unfair to have different rules applying to different categories of persons.

- For employers and competent authorities, the need to understand the different rules applying to the Directive and the PDA will impose additional costs on them in terms of training staff on both regimes and in seeking advice as to what regime applies and what obligations they are subject to when they receive reports (e.g. the obligation to follow up and provide feedback only applies to reports within the scope of the Directive). These additional costs may impact on national competitiveness if business has to implement a dual regime in Ireland but other Member States have chosen to adopt a single uniform approach to implementation.

- For the WRC and the courts, the uncertainty for whistleblowers and employers as to which regime applies and any differences of opinion between them in this regard may ultimately be referred to them to decide. Such disputes regarding which set of rules applies may lead to an increase in the

number of cases sent for adjudication, which would be a drain on resources as well as being costly and stressful for both employers and whistleblowers.

Finally, it should be noted that prior to the enactment of the PDA, the approach to whistleblower protection in Ireland was to provide for it on a sector-by-sector basis, with some 17 different pieces of legislation enacted by the Oireachtas between 1998 and 2013. *Inter alia*, the intent of the Oireachtas in enacting PDA was to eliminate what at the time was seen as an unsatisfactory patchwork of sector-specific provisions that were confusing in nature and which failed to provide clarity in the law relating to whistleblower protection.

Option 2 is **not recommended** on the basis of the points set out above.

3.3 Option 3 – Primary Legislation

As the discussion of the previous options has shown, the key challenge in transposing the Whistleblowing Directive is in reconciling it with the PDA, which already covers similar ground. The PDA on its own is not fully compatible with the Directive, so legislation is required to give effect to it in Ireland. Legislating by way of a Regulation under the European Communities Act 1972 is sub-optimal because the Directive and the PDA would have to operate in parallel, resulting in a fragmented and confusing legal framework for whistleblower protection. The only option remaining, therefore, is transposition by primary legislation – i.e. an Act of the Oireachtas.

The principal advantage of this approach is that the legislation would not be constrained to remain within the bounds of what is provided for in the Directive in the way it would be if done by Regulation under the 1972 Act. This means that it would be possible to fully align the PDA in its entirety with the Directive – in particular by amending the PDA to:

- Place shareholders, volunteers etc. fully within the scope of the PDA, so that they can report not only on wrongdoings within the scope of the Directive but also on the full range of wrongdoings provided for under the PDA;

- Align the conditions for reporting through the various channels provided for in the PDA with the directive – e.g. remove the “substantially true” test for reporting to a competent authority required under section 7 of the PDA;

- Simplify the obligations applying to employers and competent authorities by requiring them to acknowledge, follow up and provide feedback in respect of all protected disclosures regardless of whether or not they are within the scope of the Directive; and

- Clarify where the Ministerial reporting channel – which is provided for in the PDA but has no equivalent provision in the Directive – sits with regard to the reports of wrongdoing within the scope of the Directive.

The outcome of adopting this approach would be that Ireland would retain the single uniform legal framework for protecting whistleblowers that it currently enjoys and would avoid the regulatory complexities and burdens identified in Option 2.

There would also be an opportunity to re-examine some of the issues highlighted in the Statutory Review of the PDA, published in July 2018, to see if these could be addressed by this legislation. Note, however, that the Directive has a non-regression clause at Article 25(2) that prevents Member States that already have whistleblower protection laws from reducing the level of protection they already offer to whistleblowers in these laws.

The principal disadvantage of primary legislation is that it takes much longer to clear the various stages of the legislative process in the Oireachtas. Accordingly, the Bill to give effect to the transposition of the Directive and align the PDA with the Directive would have to be drafted and published in a significantly shorter timeframe than would be required if a Regulation under the 1972 European Communities Act was employed.

Option 3 is recommended on the basis of the points set out above.

4. Implementation of Member State options

The Directive contains a number of discretionary provisions which are to be applied by Member States in accordance with their own national decision making procedures.

A public consultation on these provisions was undertaken to establish stakeholder preferences regarding these discretionary matters with some 24 submissions received. It is important to note that the public consultation focused only on those specific discretionary measures as the existing legislative and policy situation is tied to both the current Protected Disclosures Act, which cannot be regressed in scope, as well as the mandatory provisions of the Directive on which targeted expert consultations have been undertaken.

4.1 Anonymous Reporting

The PDA does not explicitly refer to the receipt of anonymous disclosures; such disclosures may be received and acted upon however there is no requirement for recipients to do so. Article 6(3) of the Directive requires that anonymous whistleblowers be protected from retaliation but it is up to Member States as to whether they should expressly require anonymous reports be acted upon. Three options in this regard are available:

Option	Analysis	Recommendation
Do nothing/no policy change	Creates ambiguity as to whether protections apply to anonymous whistleblowers. May not be compliant with the Directive	Not recommended as may not be compliant with the Directive.
Make explicit provision within the Act that anonymous whistleblowers are protected and allow for anonymous disclosures if appropriate.	Complies with Directive in explicitly providing protection for anonymous whistleblowers while also highlighting that anonymous disclosures can be accepted if deemed appropriate. Also advised that anonymous reporting is given requisite focus in statutory guidance.	**Recommended for internal reporting to employer.**
Impose obligation on organisations to received and follow up on anonymous reports.	On basis of submissions received, , it is felt best to leave this as a discretionary matter for individual organisations as regards internal reporting to the employer. As regards external reporting to competent authorities, given that Article 11.6 requires competent authorities to transmit reports outside of their area of competence to a more appropriate authority, it seems reasonable to set a common policy as to how these bodies deal with anonymous disclosures.	**Recommended for external reporting to competent authorities unless prohibited elsewhere in law.**

4.2 Establishment of internal reporting channels

The Directive requires that entities with 50 or more employees must establish internal channels for reporting wrongdoing. The Directive also provides for a number of options for Member States as regards what rules should apply to entities with fewer than 50 employees:

Option	Analysis	Recommendation
Subject to a risk assessment and notification to the EU, obligations to establish internal channels can be extended to entities with fewer than 50 employees.	Blanket imposition of this option would impose compliance costs on large swathes of the economy and would be unworkable in many situations (e.g. micro businesses with a handful of employees). Some submissions identified certain sectors where imposition of this option may be beneficial, however.	Provide that the Minister can, by order, designate certain entities or classes of entities with fewer than 50 employees must have internal channels, subject to a risk assessment and public consultation with notification to the EU.
Provide for less prescriptive obligations for internal reporting in entities with fewer than 50 employees.	PDA already provides workers can report to their employer with no threshold as regards size. Directive is ambiguous as to whether workers in entities with fewer than 50 employees are protected when reporting internally if there are no formal channels in place. Consensus in submissions that internal reporting should always be an option for all workers.	Uphold key principle in PDA and Directive that workers should report internally in the first instance and ensure no ambiguity as regards protections exists in entities with no formal internal channels.
Exempt public bodies with fewer than 50 employees from obligation to establish formal internal channels.	Under the PDA, all public bodies regardless of size must have formal internal channels. No significant negative impacts of this requirement have been identified. Consensus in submissions that no change necessary.	Maintain current requirement that all public bodies regardless of size must have formal internal reporting channels.
Provide that local authorities may share internal reporting channels.	Although a number of submissions suggested there may be efficiencies, the LGMA has informed the Department that the sector is satisfied that the current position where local authorities operate their channels on a standalone basis is operating well and there is no demand to share channels.	Maintain current requirement that each local authority shall operate their internal reporting channels on a standalone basis.

4.3 Designation of competent authorities to receive external reports

The Directive requires that workers be able to report concerns to an appropriate "competent authority" with the requisite powers and independence to be able to follow up effectively on the reports they receive. Member States can either designate a single competent authority or multiple competent authorities to carry out this function. Member States must ensure that it is possible for workers to report on all matters within the material scope of the Directive to a competent authority – there must be no gaps.

Under the PDA, a worker can report to a "prescribed person" designated by the Minister for Public Expenditure & Reform. The list of prescribed persons was revised in 2020 and there are currently 110 prescribed persons designated to receive protected disclosures under the PDA. Since Member States can decide to either designate a single competent authority or multiple competent authorities, there is no barrier, in principle, to Ireland retaining the current prescribed persons model.

In practice, however, identifying a competent authority for all matters within the scope of the Directive has proved challenging. It was never the intention that the prescribed persons system would have to cover all of the matters that fall within the very broad set of categories of wrongdoing covered by the PDA[1]:

Category of wrongdoing	**Assessment**
Breaches of the 138 EU Regulations and Directives listed in the Annex to the Directive in the areas of procurement; financial services; health & safety; environmental protection; and data protection.	Competent authorities have been identified for most of the EU laws listed in the Annex. Several of these are not currently prescribed persons. In many cases this can be resolved by amending the prescribed persons order but in some cases – e.g. where a Government Minister or Department is currently the designated authority, there is a question as to whether they can fulfil the requirements of the Directive as regards independence. In some cases this could be resolved by reassigning these roles (which may require legislative changes) but there is a risk of gaps emerging.
Breaches affecting the financial interests of the EU.	This can be assigned to the C&AG and Revenue.
Breaches of the internal market, including competition and state aid rules as well as corporate tax avoidance measures that breach internal market rules.	While some areas of this category can be assigned to existing authorities, such as the Competition and Consumer Protection Commission and Revenue, this category covers a very broad and not always well defined area. It is not clear how the no gaps requirement of the Directive can be fulfilled.

One possible way of covering these gaps would be to designate a "competent authority of last resort" that could receive disclosures and refer them on where an appropriate authority can be identified or, where no suitable authority can be found, follow-up directly.

In this regard, the approach to designating competent authorities in the following countries was examined:

- **Latvia**: Like Ireland, Latvia designates multiple competent authorities (over 160) but State Chancellery (Prime Minister's office) has role in directing/referring disclosures, providing support

[1] The policy intent in the drafting of the PDA was that if internal reporting channels failed to function and there was no appropriate prescribed person to report to then workers would still be protected if they reported to another third party under section 10 of the Act. Notwithstanding this, the vast majority of serious wrongdoings are covered by the prescribed persons system.

and advice to employers and whistleblowers and overseeing implementation of their whistleblowing legislation. The State Chancellery does not get directly involved in following up on disclosures.

- **Netherlands**: The Netherlands has a dedicated standalone National Whistleblowing Authority (*Huis Voor Klokkenluiders*), which receives disclosures and refers them to appropriate authorities or investigates directly itself if appropriate. It also provides advice and support for employers and whistleblowers and adjudicates on penalisation cases. The effectiveness of the Authority is mixed; consideration is being given to separating the investigatory function from the Authority due to conflicts.
- **Australia**: Whistleblowers in the public sector report to the Commonwealth Ombudsman, who can refer reports to appropriate authorities or investigate directly. The Ombudsman also provides support and advice to whistleblowers and employers.
- **Belgium**: Whistleblowers in the public sector can report to the Ombudsman, who can refer reports to appropriate authorities. The Ombudsman has a role in mediating and adjudicating on complaints of penalisation.
- **France**: Like Ireland, France allows for reporting to multiple competent authorities. The Ombudsman (Défenseur des Droits) advises whistleblowers on which authority to report to and adjudicates on retaliation.
- **Korea**: Like the Netherlands, the Republic of Korea has a dedicated Whistleblowing Authority, which refers reports to appropriate authorities. It has no statutory authority to directly investigate reports. It also carries out prevention and awareness training in the areas of anti-corruption and whistleblowing.
- **United Kingdom**: Like Ireland, the UK designates multiple prescribed persons and does not have a central coordinating authority (although there is a dedicated whistleblowing agency covering the NHS). The All Party Parliamentary Committee on Whistleblowing has published a number of reports over the past 12 months recommending the establishment of an Office of the Whistleblower to receive and refer reports; provide support and advice; and replace the Employment Appeals Tribunals as adjudicatory body for complaints of penalisation. Two private members bills have been initiated to establish this Office; it is not clear if these will have Government support.

The following options arise in this regard:

Option	**Analysis**	**Recommendation**
Do nothing	Not clear that existing prescribed persons system can cover all areas within scope of the Directive. Risk of infringement proceedings is gaps emerge. No legislative change needed.	Not recommended
Establish an Office of the Protected Disclosures Commissioner in a suitable existing public authority, such as the Ombudsman.	Would comply with the Directive. Can leverage existing capacity and experience and deliver within existing resources and ensures a level of specialisation within this office. Adds new bureaucratic layer to system. Whistleblowing may not be seen as priority function by designated body. Body may at an agreed point in time, become “de facto” information centre, supplanting	**Recommended**

Option	Analysis	Recommendation
	TII Speak Up Helpline and Legal Advice Centre. Requires legislation.	
Establish a dedicated standalone Office of the Protected Disclosures Commissioner.	Would comply with the Directive. Independent, single-focus body. Would have to build capacity and experience from ground up. Could not be delivered within existing resources. Mixed experience in other countries with dedicated whistleblowing bodies. Body may become "de facto" information centre, supplanting TII Speak Up Helpline and Legal Advice Centre. Requires legislation	Not recommended

4.4 Operation of external reporting channels

The following Member States options as regards the operation of external reports to competent authorities were considered:

Option	Analysis	Recommendation
Competent authorities can close reports that are minor or repetitive and can prioritise reports during periods of high influxes of reports.	Clear consensus in submissions that providing that competent authorities should be able to close and prioritise reports to ensure resources are focussed on most serious areas with greatest public interest, subject to appropriate controls.	These provisions should be incorporated into the transposition.

4.5 Measures of support

The Directive provides that Member States should put in place appropriate supports for persons who make reports. These include the provision of independent advice, support from competent authorities and legal aid. This can also include financial support. The Directive also notes that this can be provided as appropriate by an information centre or independent authority.

The public consultation queried what supports should be offered and how should they be delivered. A number of submissions reference the current Speak Up Helpline and Legal Advice Centre operated by Transparency International Ireland as effective and appropriate support for whistleblowers. There was also some discussion about a potential single whistleblowing authority taking on a role of supporting whistleblowers through legal advice as well as financial and wellbeing supports, such as psychological support.

One submission suggested that the availability of the WRC system in place in Ireland is a significant support which is already in place and that in conjunction with the TII services referenced above that there is little need to expand on the supports offered.

The question of the most appropriate measures of support and the means of providing them will be further considered during the implementation process following transposition. Funding for TII's Speak-Up Helpline and Legal Advice Centre was increased by 30% to €285,000 in Budget 2022 in recognition of the additional demands the new regime will place on the service. The funding arrangement will remain under review as the full impact of the implementation of the Directive becomes known.

4.6 Penalties

Article 23 of the Directive requires that Member States put in place "effective, proportionate and dissuasive" penalties for certain breaches of the Directive. The responses received in respect of this issue via the consultation were varied; however most suggested a stepped regime which took account of the seriousness of any individual breach of the legislation and included proposals that a mix of administrative, civil and criminal penalties should be considered.

Option	**Analysis**	**Recommendation**
Do nothing	Although the PDA already provides comprehensive redress mechanisms, it is clear that the Directive requires specific penalties for certain breaches of the Directive in addition to the provision of redress.	Not recommended as would not be in compliance with the Directive.
Provide for criminal penalties for breaches of the Directive.	Previous judgements of the CJEU on the matter of imposition of penalties suggests that Member States should not introduce penalties for breaches of EU law that are less than those contained in national laws for equivalent offences. Although there are no criminal penalties in the PDA, other sector-specific whistleblower protection laws in Ireland have included criminal penalties for breaches similar to those set out in the Directive.	Create criminal penalties based on equivalent offences already in place in Irish law. These penalties are in the amended Bill in section 14(A) (1)-(6)

5. Policy impacts.

5.1 General policy impacts

This section will briefly assess the impact of a successfully transposition Directive on key regulatory markers.

National competitiveness	This Directive will be applied in a pan-European fashion across all Member States. While there will be minor differences in specific application of some procedural provisions of the Directive, the Directive will provide for common minimum standards for employers to follow. Therefore the impact on National Competitiveness should be minimal.
The socially excluded and vulnerable groups	No specific impact in this area identified.

The environment	Both the Directive and the PDA contain similar provisions for reporting on environmental concerns. There should be no significant impact as a result.
Whether there is a significant policy change in an economic market, including consumer and competition impacts	The Directive contains provisions explicitly aimed at protecting the integrity of the internal market, as such the impact here should be an increased confidence in the integrity of the market and its various facets, including consumer protection and competition law.
The rights of citizens	There will be additional access to certain protections for persons who fall under the personal scope of the Directive, with regard to their ability to be protected from retaliation for reporting wrongdoing as well as seeking remedies and/or relief for any retaliation that is alleged.
Compliance Burden	There will be a short to medium term compliance burden on employers and other persons who receive protected disclosures due to the increased obligations for investigating and providing feedback on outcomes of those reports which are set down by the Directive. This impact may be alleviated somewhat by a derogation on certain SME organisations which provides for an extended implementation deadline of December 2023 (+2 years).
North-South and East-West Relations	No specific impact in this area identified.

5.2 Specific policy impacts

a. Ministerial reporting channel

Section 8 of the PDA provides that a worker in a public body may make a protected disclosure to a relevant Minister of the Government. There is no direct equivalent provision in the Directive. Consideration is, therefore, required as to how this channel can operate in light of the Directive. The minimum standard for the operation of all reporting channels under the Directive is that they must provide for acknowledgment, follow-up and feedback in respect of the disclosures received. In addition, the following issues with the operation of the Ministerial channel have been raised in the 2018 Statutory Review of the PDA and in the Third Interim Report of the Disclosures Tribunal (Charleton Report):

- Persons making simultaneous disclosures through multiple channels: internal, external and Ministerial leading to lack of clarity as to what action it is appropriate for a Minister to take if another party is already in the process of following up on a disclosure;
- Lack of clarity/legal certainty as to what action Ministers are expected to take on foot of receiving a protected disclosure; and
- Uncertainty as to whether Ministers can refer disclosures to appropriate third parties for action on account of the duty of confidentiality imposed under section 16 of the Act.

Options for the future operation of the Ministerial reporting channel are as follows:

Options		**Impact**	**Recommendation**
I.	Do nothing.	May not comply with the Directive since does not provide explicitly for acknowledgement, follow-up and feedback, and might result in infringement proceedings.	Not recommended
II.	Repeal section 8 of the 2014 Act to remove the Ministerial reporting channel.	Would simplify an already complex legal framework and eliminate difficulties with operating this	Not recommended

Options		Impact	Recommendation
		channel as well as ensuring closer harmony with the implementation of the Directive in other Member States. Reduces the options for whistleblowers to make reports (although a public disclosure to the Minister would remain possible).	
III.	Amend section 8 of the 2014 Act to align with the Directive and address the existing issues.	Would comply with the Directive and address existing issues with this channel.	**Recommended** This channel will also be supported by the creation of the Protected Disclosures Commissioner in the Office of the Ombudsman.

b. Special channels for reporting on matters concerning law enforcement, national security, defence, international relations and intelligence

Sections 17 and 18 of the PDA provide for special procedures for reporting of matters relating to law enforcement, national security, defence, international relations and intelligence. These lie outside of the scope of the Directive. Accordingly, it is recommended that there be **no change** in the arrangements for reporting under these headings.

c. Reporting on taxpayer information

Under section 851A of the Taxes Consolidation Act 1997 (TCA) it is an offence to disclose any information obtained by the Revenue Commissioners or a service provider engaged by Revenue for tax purposes. Section 10(2)(b) of the PDA provides that disclosure of taxpayer information for the purposes of making a protected disclosure outside of the Revenue Commissioners can only be made to the Comptroller and Auditor General.

The material scope of the Directive, as set out in Article 2(1)(b), includes matters relating to breaches affecting the financial interests of the Union. This will include areas where the tax rules are overseen by the EU, including VAT and customs and excise. Furthermore, Article 2(1)(c) concerns, *inter alia*, breaches of State Aid rules, including "breaches of the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law".

Under Article 15 of the Directive, there can be no restrictions on the public disclosure of matters within the material scope of the Directive, including the tax and duty matters that are referred to in Article 2. Accordingly, **transposition will require amendments to the rules in the PDA and the TCA concerning the disclosure of taxpayer information within the scope of the Directive**.

d. Role of the WRC and the Labour Court

Under the PDA, all persons within the scope of protection of the Act have the right, at section 13 of the Act, to sue in court for damages if they suffer retaliation as a result of a protected disclosure. Most persons within the scope of the PDA also have the option, under sections 11 and 12 of the Act, to seek redress from penalisation at the WRC and the Labour Court. The overwhelming majority of complaints concerning penalisation of workers who have made protected disclosures are dealt with in the WRC and the Labour Court. These industrial relations mechanisms are beneficial to both workers and employers as they are generally faster and lower cost than the courts.

Transposition of the Directive will require significant expansion of the personal scope of the PDA, far beyond what would typically be considered an employment relationship. The following table compares the personal scope of the Directive with the PDA:

Category of persons within the personal scope of the Directive	**Protected by the PDA?**	**Available Redress System**	
		WRC/LC	**Courts**
Employees	Yes	Yes	Yes
Self-employed contractors	Yes	No	Yes
Shareholders	No	No	No
Board members	No	No	No
Volunteers and unpaid trainees	No	No	No
Paid trainees	Yes	Yes	Yes
Employees of contractors, sub-contractors and suppliers	Yes	Yes	Yes
Job applicants	No	No	No
Facilitators[2]	Yes	No	Yes
Natural and legal persons connected with the reporting person.	Yes	No	Yes

There does not seem to be any compelling reason to change the existing redress system already available to those categories of persons who are already protected by the PDA.

It should be relatively straightforward to expand the right to sue for damages in court to all persons within the expanded scope of the Directive. The question arises, however, as to whether it might also be appropriate to grant access to the WRC and Labour Court to some or all of the new categories of persons to be added to the scope of the PDA, highlighted in red in the table above.

Category	**Analysis**	**Grant access to WRC?**
Volunteers and unpaid trainees	Although not employees in the strict legal sense, they could be considered to be a part of "workforce" of an organisation. Granting access to the WRC and Labour Court would ensure equity of protection across the workforce. Volunteers and unpaid trainees may not have the means to take a court case.	Yes
Board members	Executive board members are already covered by the PDA since they are also employees. Non-executive members may not be strictly considered to be part of the "workforce" of an organisation and the forms of penalisation such persons may	No

[2] Defined in the Directive as legal or natural persons who assist a person in making a report. While not explicitly provided for in the PDA, they would most likely already qualify for protection under the PDA as persons connected with the reporting person.

	suffer are likely to lie outside of the type of complaints that would be within the competence of the WRC to consider.	
Job applicants	There is a precedent in this regard since job applicants can make complaints to the WRC if they believe they have been discriminated against under the Employment Equality Acts.	Yes
Shareholders	Could not by any stretch be considered part of the "workforce" of an organisation, unless also employees of the organisation, in which case they would be already be protected. Minority shareholders already enjoy rights and protections under the Companies Acts, which are ordinarily exercised in the courts. If abuse of these rights occurred as a consequence of a protected disclosure, the courts would seem to be the most appropriate forum to address such matters.	No
Facilitators and other third parties	Would not generally be considered part of the "workforce" of an organisation. Current position is that such persons have no access to the WRC and must sue in court. Consideration also needs to be given to the fact that this category applies to legal as well as natural persons. While respondents at WRC cases are usually legal persons, it would be unprecedented for legal persons to be appellants at the WRC. No compelling argument for changing this position.	No

A number of potential risks need to be taken into account in considering expanding the role of the WRC and the Labour Court in this regard:

Risk	Possible Mitigation
Mission creep	The WRC and the Labour Court exist primarily to support the workplace relations and employment rights framework in Ireland. The proposed additional categories of persons sit firmly outside this remit. It could be argued that expanding access alters the remit of the WRC and Labour Court beyond what was intended when they were established. The recent judgement of the Supreme Court in *Zalewski v Adjudication Officer* as regards the Constitutionality of the WRC suggests care should be taken in expanding its remit. On the other hand, the WRC already has responsibility for adjudicating complaints under the Equal Status Acts, which include complaints from the general public, so there is a precedent for expanding the WRC's role beyond ordinary employment law matters. Appeals to WRC adjudications under the Equal Status Acts are dealt with by the District Courts rather than the Labour Court, however.
Encroachment on general employment law	Volunteers, unpaid trainees and non-executive board members sit firmly outside of general employment law. There may be a risk that granting access to the WRC and the Labour Court could become a first step in granting general employment rights to these persons. Since the merits or otherwise of granting such rights is outside of the scope of the transposition of the Directive, the transposition must avoid inadvertently granting them.
Determination of redress	The WRC and Labour Court makes determinations of redress in protected disclosures cases based on the complainant's pay (capped at 5 years' salary). The question arises as to how redress can be determined for unpaid volunteers, trainees and board members. One approach might be to set a defined cap on compensation for unpaid complainants – e.g. a cap of €13,000 applies to job applicants under the Employment Equality Acts. Non-financial forms of redress could also be considered (e.g. publication of a corrective statement, such as provided under Section

	82 of the Consumer Protection Act 2007) for these and all other categories of complainants. Consideration also needs to be given to the impact of awards of redress on employers, in particular volunteer-involving, non-profit organisations, which may have limited financial means and where the trustees are directly exposed to these liabilities.
Resourcing implications	Another factor which needs to be considered is whether expanding access to the WRC and the Labour Court would result in a substantial rise in the numbers of complaints to these organisations and what impact that might have for resources. This is hard to quantify: unpaid workers are not financially dependent on their employer; it is hard to be certain if this would make them more likely or less likely to take a case. Notwithstanding this, protected disclosures complaints account for just 0.1% of complaints made to the WRC, so it would require a very significant increase in the numbers of complaints before there would be a major impact on the capacity of the WRC.

6. Consultation

On the 8th of June 2020 the Department launched a public consultation seeking views on the use of Member State options – i.e. those matters contained within the Directive in respect of which Member States can or must make a choice as regards implementation. 24 submissions, from a broad cross-section of stakeholders, were received in relation to the consultation and reviewed which were then published on the Department's website.

The consultation addressed a number of then outstanding policy decisions on matters contained within the Directive, including anonymous reporting requirements, derogations on implementation deadlines for SME organisations and the application of penalties.

The submissions were analysed against each of the 10 questions posed in the consultation document to provide an overview of the general stakeholder preferences on each matter of Member State discretion. Additional queries, suggestions and requests were also taken into account and incorporated into the ongoing policy refinement exercises undertaken as part of the wider transposition process.

As set out in section 4, a number of policy decisions have been informed by the responses received during the consultation.

7. Enforcement and compliance

Some 4,000 organisations in Ireland will be subject to the requirements to establish internal reporting channels and procedures.

The experience with the PDA is that the compliance rate with the current requirements in this regard in the public sector is very high and this is expected to remain the case with the Directive. The requirement to compile annual returns for the EU on the numbers of disclosures made should also assist in checking public sector compliance.

As regards the private and not for profit organisations within the scope of the requirement of the Directive to establish internal channels, the Directive creates a strong incentive for employers to establish internal channels, since if they are not in place, workers will be able to report externally in the first instance. Furthermore, it is highly likely that the WRC and the Courts will take into account whether an employer had the required channels and procedures in place in making a determination in any case of penalisation. Nevertheless, the duty of sincere cooperation places an obligation on Member States to monitor and enforce compliance in this area. In this regard, it is considered that the remit of the Workplace Relations Commission Inspectorate be expanded to allow it to monitor and enforce compliance with this requirement.

Protection from retaliation for having made a protected disclosure will continue to be the responsibility of the WRC, the Labour Court and the Courts as already provided for in the PDA.

See section 4.6 for consideration of the approach to creating penalties for breaches of the Directive.

8. Review

Under the terms of the Directive, the European Commission (EC) has committed that it shall, by 17 December 2025, taking into account its report submitted pursuant to paragraph 1 and the Member States' statistics submitted pursuant to paragraph 2, submit a report to the European Parliament and to the Council assessing the impact of national law transposing this Directive. The report shall evaluate the way in which this Directive has functioned and consider the need for additional measures, including, where appropriate, amendments with a view to extending the scope of this Directive to further Union acts or areas, in particular the improvement of the working environment to protect workers' health and safety and working conditions.

In addition to the evaluation referred to in the first subparagraph, the report shall evaluate how Member States made use of existing cooperation mechanisms as part of their obligations to follow up on reports regarding breaches falling within the scope of this Directive and more generally how they cooperate in cases of breaches with a cross-border dimension.

This review process will be further to what is a standard legislative review process undertaken by the Oireachtas when progressing a piece of proposed primary legislation.