Consultation on the transposition of Directive (EU) 2019/1937 of the European Parliament and the Council on the protection of persons who report breaches of Union law (EU Whistleblowing Directive)

Template answer sheet

Purpose of this consultation

The Department of Public Expenditure and Reform invites submissions to a public consultation on the transposition of Directive (EU) 2019/1937 of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union law (commonly referred to as the "EU Whistleblowing Directive").[1]

This Directive, which must be transposed by **17 December 2021**, aims to set a common minimum standard across EU Member States for the protection of persons who report information about threats or harm to the public interest obtained in the context of their work-related activities.

This consultation is 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. Interested parties are asked to bear in mind that, except for the exercise of these options, Member States, including Ireland, are obliged to implement the Directive.

Submissions

Submissions are invited on the transposition of the Directive in Irish law. In particular, answers to the questions raised in this consultation document are sought. A separate response template is provided. Completing the template will assist in achieving a consistent approach in responses returned and facilitate collation of responses.

Respondents are requested to make their submissions by email to:-

Email: PDconsultation@per.gov.ie

The closing date for receipt of submissions is **17:00, Friday, 10 July 2020**. Please clearly mark your submission in the subject line of your email as "Consultation on the Transposition of the EU Whistleblowing Directive".

The Department regrets that on account of the measures it has had to put in place in respect of the Covid-19 pandemic it cannot receive hardcopy submissions by post.

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937&from=EN

Data Protection and Freedom of Information

Please note that, in the interests of transparency, the Department intends to publish the content of all submissions received in response to this consultation and the identity of the party making the submission, including their name and the organisation they are affiliated to (if any). Any submission containing commercially sensitive or private or confidential material should therefore clearly identify that portion of the submission which contains such information and specify the reasons for its sensitivity.

All personal information contained in the submissions received under this consultation will be collected, processed and stored in accordance with the Data Protection Acts and the General Data Protection Regulation (GDPR).

All submissions will also be subject to the Freedom of Information Act 2014 and may be released or published on foot of third party applications or otherwise.

For further information on how the Department will use the personal data collected in the course of this consultation, please refer to the Privacy Notice, which is a separate document published at the same time as this consultation document.

Who I am:

My name is [redacted]

I spoke to Mr Swan, without giving my name, about making a submission.

I am happy to have my information shared as part of the consultation process but am requesting that it is not published afterwards or my identity disclosed publicly.

The consultation process has invited feedback on the Protected Disclosures Act 2014 along with views on the EU Directive. I am not making this submission as a member of an organization. The context for my submission is that I reported an omission and wrongdoing in respect of vulnerable people before the implementation of the PDA 2014. I was an employee [redacted] There was a requirement to report critical incidents relating to , wrongdoing etc at that time. It will be on the bases of my experience that I will address some of the questions that are asked below.

In referring to my experience however what I wish to draw attention to is issues like

- That it may not be safe to report internally

- The status of internal procedures within the workplace and not being able to rely on them

- unions or the legal profession not requiring employers to follow procedures or adhere to legislation

- The influence and power of collegiality in organisations, especially large organisations, in determining the path that will be followed in respect of issues arising involving employees

- The vulnerability of front line workers – I write from the perspective of an allied health professional

- The power of employers to influence the status of those professionals who are required to register to practice their profession following the making of a disclosure

- The difficulty of accessing information and fair procedures

- The absence of independence and impartiality in accessing information and access to fair procedures i.e. from unions and the legal profession

- The financial cost

- The personal cost of making disclosures:

I know that this consultation is not about individual cases but the reality on the ground must inform what will work for reporting persons.

I had a duty of care of behalf of the HSE to protect vulnerable people. In that context I reported an omission, on the part of my department, whereby a vulnerable person subsequently sustained a serious injury. I made this report to my manager. This triggered three allegations against me. One related to my professional practice. There had been no adverse incident in relation to my practice.

A senior manager commenced a procedure referred to as ' an Information Gathering Process' in relation to the allegations and advised that I would be told of the outcome and any further action to be taken against me. I asked that the disciplinary procedure be followed (because of an earlier incident where an allegation had been made against me and dealt with in a procedural vacuum). I was told that what I was asking would not happen. The Information Gathering Process commenced. I cooperated fully. I heard no more.

I received anonymous correspondence some time later from my employer (I do not know to date who sent the correspondence) setting out the terms of reference for an external review of my professional practice. The terms of reference contained no allegation against me, no information on the case I had to answer. Having sought advice on the matter I advised the senior manager referred to above that I would not take part in another procedure without knowing the outcome of the first.

Shortly after this I reported wrongdoing in respect of a vulnerable client whereby a senior manager made a false allegation against them which I knew to be untrue. I had advised the family of the vulnerable person that it was not true. The family sought a meeting with management at which I would be present. I wrote a detailed report on the matter for management at the family's request.

Before the above meeting could take place the 'external review of my professional practice' took place . It did not adhere to its terms of reference. It found that my practice was not safe.

Anonymous correspondence led to my suspension from work in a procedural vacuum. I remained suspended for eight years during which time two further protracted reviews of my professional practice took place. The final review was referred to as Stage 4 of the Disciplinary Procedure. This final 'procedure' resulted in my dismissal.

About ten months before the 'Disciplinary Hearing' the case came before the Labour Court under the Industrial Relations Act 1946.The Labour Court stated that because my employer never investigated the original allegations against me there was no complaint against me: no evidence against me: and that the process being followed by [redacted] was not the disciplinary procedure. But that it should be concluded.

At each Review I put the information in relation to the omission and wrongdoing before the investigators. All held senior positions within my profession. This information was never referred to in any Reports. (This demonstrates the influence of collegiality).

This same information was also before [redacted] at the 'Disciplinary Hearing' which was recorded by a stenographer and at the 'Dismissal Appeal' . At the 'dismissal appeal' I was asked by the chair, a member of the legal profession, 'why did you not just put your hands up and admit to problems with your work?'

The Protected Disclosures Act 2014 had been enacted seven months at the time of the 'Discipline Hearing'.

Throughout these years up until the time of the attendance at the Labour Court mentioned above I had legal representation.

When I was suspended from work the only intelligent question I could ask was 'Did my employer follow correct procedure in suspending me?' I was told by one of the legal team to forget about procedures.

It was six years later before I was directed by the legal team to make an application to the Rights Commissioner under the Industrial Relations Act 1946. I was denied the opportunity to try to return to work pending my employer investigating the original allegations using the disciplinary procedure.

Following my dismissal from work I made a complaint of unfair dismissal (Unfair Dismissal Act 1977 – 2015) on grounds including having made a protected disclosure. The above Act was amended to include the ground of having made a protected disclosure following the introduction

of the PDA 2014. The Act applied to my case as my dismissal had occurred following the introduction of the Act I was representing myself at this point. The adjudication officer stated that his remit was only to consider Stage 4 of the 'Disciplinary Procedure'. The information relating to the omission and wrongdoing was not considered.

I appealed this decision to the Labour Court. The Labour Court stated at the commencement of its proceedings that it was not the forum for protected disclosures. At the end of the proceedings I was asked by one of the Labour Court members 'what actions did you take to try and prevent your dismissal?' (echoing the question from the chair of the dismissal appeal).

I went to the High Court on a point of law issue i.e. that the Labour Court misdirected itself by saying it was not the forum for protected disclosures. I was unsuccessful. The point of law issue was not actually addressed.

While the above events were ongoing I was required to apply to register for the purpose of being able to practice my profession. I was suspended from work at the time that I made my application. I was open about my circumstances.

No decision was made about my application to register until I had been dismissed from work. The information in relation to the omission and wrongdoing was before the registration board. I was found not to be a Fit and Proper person to register. It relied on the Reports of [redacted] that had been unfavourable to me and that had excluded information on the omission and wrongdoing, in making its decision. My responses to the reports were also before the registration board but were not considered. In the course of this process an allegation was made against me by the registration board that I was in breach of legislation which turned out not to be the case.

The CEO of the registration body is a named person to receive information in relation to protected disclosures.

Matters are ongoing in relation to my appeal against the decision of the registration board.

It is against this background that I wish to make a submission to this consultation

I

Question 1

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

On the bases of my own experience as set out above and which arose as an employee of [redacted] I would like to see Ireland avail of the option of accepting anonymous reports and that these would be followed up.

No employee should be left as vulnerable as I was. Having procedures alone in place does not guarantee that they will be followed. Nor can the power of collegiality be ignored.

Nor should the difficulties of ensuring confidentiality be overlooked. Word spreads by innuendo.

Professionals who are required to register are vulnerable to having their status on a register affected by any detrimental action taken by an employer having made a protected disclosure. Anonymity will protect against this.

Bearing in mind incidents that have come to public attention over the years such as care in residential setting e.g. Aras Attracta etc anonymous reporting and or having a single competent authority may be the only way to make reporting safe and therefore possible.

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.

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.

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

Question 5

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

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.

Arising from my own experience I would favour a single competent authority to receive reports in respect of the health sector – not just the HSE but all bodies providing a service to the health sector.

Past Reports demonstrate how difficult it is to report concerns and be heard along with the consequence for staff for reporting concerns. This should not be ignored.

The 'ombudsman' system seems to work. A competent authority modeled on this should be possible.

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.

What would appeal to be important in reporting back the outcome of an investigation is ensuring the protection of the reporting individual from retaliation of any kind which the Act guarantees.

However there is the possibility of a finding of a report being vexatious.

Clear procedures are important for the reporting person and the employer

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.

Re para. 3

It might be important to identify types of minor breaches within different sectors as well as serious breaches so that employees have an understanding in the first instance of what should be of concern to them in the course of their work.

Re para 5

There should be some communication with the reporting person that the matter will be dealt with, eventually.

I do not think that any report should be closed without giving it some consideration

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.

I had legal representation for eight years but was not well advised. In an earlier incident, prior to the events I set out by way of introduction, I involved my union. The latter did not support me and did not require my employer to follow their own procedures. I did not know my rights. I assumed that my union or the legal profession would address any issues arising in my employment without prejudice. This did not happen.

There is a need therefore for a single and clearly identified independent administrative authority to support reporting persons. Where the reporting person is dismissed from work they should be entitled to legal aid

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.

Where there are serious breaches naming and fines against organisations/companies

Annual reports providing information

Investigations and inquiries do no change the culture of an organization and that is where problems lie. Culture can be deeply embedded