

**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)**

Submission by:

Meghan Van Portfliet PhD: Associate Member Whitaker Institute- NUI Galway

Lauren Kierans, PhD, BL: Assistant Professor of Law, Maynooth

Kate Kenny, PhD: Professor of Business and Society, NUI Galway University

Vigjilence Abazi, PhD: Assistant Professor of EU Law, Maastricht University

John Cullen, PhD: Associate Professor, Maynooth School of Business/Associate Dean, Faculty of Social Sciences, Maynooth University

Contents

Question 1	2
Question 2	6
Question 3	9
Question 4	10
Question 5	11
Question 6	12
Question 7	19
Question 8	21
Question 9	22
Question 10	24
Additional Points on how PDA can be improved to meet and exceed the Whistleblowers Directive:	26

Question 1

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

Answer:

Yes.

Allowing anonymous disclosures is best practice for many influential institutions and bodies that work in this area. Currently, 16 OECD countries allow for anonymous reporting in the public sector. Academic research has also shown how anonymous reporting is beneficial to both whistleblowers and organisations, despite some challenges that it entails.

1. Allowing anonymous whistleblowing is supported by the European Parliament (European Parliament, 2017), and influential international organisations and bodies.

The European Parliament Resolution firmly supports anonymous reporting and provides as follows:

- a. “believes that the option to report anonymously could encourage whistleblowers to share information which they would not share otherwise;
- b. Stresses, in that regard, that clearly regulated means of reporting anonymously, to the national or European independent body responsible for collecting reports, verifying their credibility, following up on the response given and providing guidance to whistle-blowers, including in the digital environment, should be introduced, setting out exactly the cases in which the means of reporting anonymously apply;
- c. Stresses that the identity of the whistle-blower and any information allowing his or her identification should not be revealed without his or her consent
- d. Considers that any breach of anonymity should be subject to sanctions”.

Influential organisations and bodies that support anonymous reporting include the OECD (OECD, 2019), Transparency International (Transparency International, 2013), and the UK Department for Business, Energy and Industrial Strategy (Department for Business, Energy and Industrial Strategy, 2015)

2. Extensive research within organisations confirms that facilitating, accepting and following up anonymous reports is essential for a number of reasons.

- a. **Trust Building and Anonymous Disclosures:** We are aware that anonymous reporting may lead to challenges in so far as it can make follow-up, investigation, and assessing the veracity of reports more difficult than when the name of the person making the disclosure is available to the recipient (Kenny et al., 2019a). As Whistleblowing is an activity that depends on an individual’s personal cultural values (Nayir and Herzig 2012), it is essential that the diversity that exists in any organisation should be taken into account when providing the

broadest possible range of the options for employees to disclose wrongdoing or illegality. Research shows, however, that these challenges can be overcome when there is a culture of trust in the organisation (Kenny et al, 2019a). Speak-up systems (internal reporting procedures) are a way to build trust in an organisation (Kenny, et al, 2019a). When implementing a speak-up system, employees will have varying levels of trust, depending on the culture of the organisation, and some may not feel confident that they can speak up safely (Vandekerckhove and Rummyantseva, 2014). Allowing employees to disclose anonymously is a good first step to building this trust, as long as the disclosure is followed up on, and actions taken in response to the disclosure are communicated effectively.

- b. **Anonymous Disclosures are Essential for Whistleblower Protection in Certain Cases:** In some cases, whistleblowers are in grievous danger of being targeted for retaliation should their name be released, and that even normal provisions for confidentiality do not offer robust protections. Prominent whistleblowers in Ireland have experienced this kind of retaliation. In such cases whistleblowers must be afforded an anonymous option. Without this option, disclosure may not happen, and serious wrongdoing will remain, or the whistleblower will suffer. Fear of retaliation is one of the top two reasons individuals do not come forward (Brown, 2008; Protect, 2020; Transparency International Ireland, 2017) and in cases such as those described above, such fear would be alleviated by the provision of anonymous reporting. According to the Irish Integrity at Work survey, 33% of employees surveyed (n=878) said that a key influencing factor for reporting wrongdoing in the workplace is if they could report anonymously (Transparency International Ireland, 2017: 39). Additional research has found that employees are more protected when they remain anonymous (Martin, 2020). Yet another study conducted over eighteen-months between 2016 and 2018 confirms these findings. It involved interviews with fifty-eight whistleblowers who had left their role as a result of speaking out and seventeen experts, along with quantitative data from a survey of ninety-two such whistleblowers (Kenny et al., 2019b). The focus was on whistleblowers who had experienced a change in employment role as a result of speaking out; the veracity of respondents had been checked with whistleblower advocacy organisations with which the researchers collaborated on the project. Two implications are clear:
- c. **Internal retaliation:** Of the whistleblowers who had lost their job as a result of their disclosure that were surveyed in a very recent study, 63% whistleblowers had been dismissed, 28% had resigned while 62% had been demoted or given more menial roles (Kenny et al., 2019b). Other research studies confirm that this can be a common form of whistleblower retaliation (Devine and Maassarani, 2011; Martin and Rifkin 2004) causing anxiety, frustration and depleted earning capacity after prospects of career development within the organisation are curtailed. In these cases, this suffering may have been alleviated had anonymous channels been available.
- d. **External retaliation and Blacklisting:** Of the seventy-seven (84 percent of total) respondents in Kenny et al's (2019b) study who answered whether they had been blacklisted in the industry, 63.6 percent reported they had been

formally blacklisted (they had encountered written proof), 20.8 percent had been informally blacklisted (had verbal proof), and 28.6 percent had not been blacklisted. Blacklisting can affect whistleblowers post-disclosure, making it extremely difficult or impossible to get a job in the same or a different sector (Devine and Maassarani 2011; Mesmer-Magnus and Viswesveran 2005). External retaliation and blacklisting occurs across all industries and happens both formally and informally. Formally, there may be actual lists of banned workers, while informal blacklisting occurs by word of mouth – passing information so that whistleblowers are not invited for an interview. This means that people cannot work in the area for which they have been trained, despite in some cases having been at the peak of their careers and well-regarded by colleagues and managers. Provision of anonymous disclosure channels offers a vital way in which this can be avoided.

Moreover, for reasons set out in Q2, effective disclosure channels save money, time and reputation for organisations. Extending these to anonymous disclosures enhances the ability of organisations, and relatedly Ireland public and private sectors' long-term sustainability, to benefit from these advantages.

Finally, we note that section 301 of the US Sarbanes-Oxley Act 2002 ('SOX') requires companies listed in the US and their subsidiaries to establish protocols for anonymous reporting (there are approximately 700 US owned firms operating in Ireland that employ about 150,000 people). By providing for anonymous disclosures in legislation this will reduce any confusion and ensure that Irish and migrant workers enjoy the same rights as those subject to SOX to make an anonymous disclosure.

Sources:

Brown, A.J. (ed) (2008) *Whistleblowing in the Australian Public Sector: Enhancing the theory and practice of internal witness management in public sector organisations*. ANUPress: Canberra.

Department for Business, Energy and Industrial Strategy (2015), *Whistleblowing Guidance for Employers and Code of Practice*. 20 March. Available at: <https://www.gov.uk/government/publications/whistleblowing-guidance-and-code-of-practice-for-employers> [1 July 2020].

Devine, T. and Maassarani, T. (2011) *The Corporate Whistleblower's Survival Guide*. San Francisco: Berrett-Koehler. European Parliament (2017) "Resolution of 24 October 2017 on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies (2016/2224(INI))". Available at: https://www.europarl.europa.eu/doceo/document/TA-8-2017-0402_EN.html [1 July 2020].

Kenny, K., Vandekerckhove, W. and Fotaki, M. (2019a). *The Whistleblowing Guide: Speak-Up Arrangements, Challenges and Best Practices*. Wiley: Chichester.

Kenny, K., Fotaki, M. and Bushnell, A. (2019b) “Post Disclosure Survival Strategies: Transforming Whistleblower Experiences”. NUI Galway: Galway. Available at: <https://www.whistleblowingimpact.org/wp-content/uploads/2019/06/19-Costs-of-Whistleblowing-ESRC-report.pdf> [1 July 2020].

Martin, B. (2020) *Official Channels*. Irene Publishing: Sparsnäs, Sweden.

Martin, B. and Rifkin, W. (2004) “The dynamics of employee dissent: whistleblowers and organisational jiu-jitsu”. *Public Organisation Review: A Global Journal* 4(3), 221-238.

Mesmer-Magnus, J. and Visvesvaran, C. (2005) “Whistleblowing in organisations: An examination of correlates of whistleblowing intentions, actions, and retaliation”. *Journal of Business Ethics*, 62(3): pp. 277–297. Nayir, D.Z. and Herzig, C. (2012) 'Value Orientations as Determinants of Preference for External and Anonymous Whistleblowing', *Journal of Business Ethics*, 107(2), 197-213, available: <http://dx.doi.org/10.1007/s10551-011-1033-4>.

OECD (2019) “ANNEX: G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers” in *G20 Anti-Corruption Action Plan Protection of Whistleblowers*. Available at: <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf> [1 July 2020].

Protect (2020) “Silence in the City 2”. Available at: <https://protect-advice.org.uk/silence-in-the-city-2/> [1 July 2020].

Transparency International (2013) “International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest”. Available at: <https://www.transparency.it/wp-content/uploads/2013/12/International-Principles-for-Whistleblower-Legislation.pdf> [1 July 2020].

Vandekerckhove, W. and Rummyantseva, N. (2014). *Freedom to Speak Up Qualitative Research*. London: University of Greenwich

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.

Answer:

Yes. All organisations in all sectors should be required to establish internal reporting channels and procedures.

We firmly believe that internal reporting channels should be required for all organisations regardless of size or sector. We elaborate on the reasons for including all sizes and sectors below, and it is worth noting the indisputable fact that whistleblowing saves organisations money. A recent study of over 5,000 firms shows that 40 percent of companies surveyed suffered from serious economic crimes that averaged over \$3 million each in losses (ACFE, 2018). Whistleblowers exposed 43 percent of these crimes, which means that whistleblowing was more effective than all the other measures (corporate security, internal audits and law enforcement) combined. Workers who voice their concern can help prevent the dysfunctional behaviour that leads to financial and reputational losses by firms both large and small (ACFE, 2018).

There are particular reasons why all 1. Sectors and 2. Sizes of organisations should be mandated to implement internal reporting channels.

SECTOR: One of the main reasons why the EU passed the Whistleblowers Directive was to ensure consistent protection of whistleblowers across member states. Similarly, Ireland passed the Protected Disclosures Act (2014) to reduce confusion and provide one comprehensive law (Transparency International Ireland, 2017). Transparency International Ireland (2017) has noted that some sectoral legislation was left in place to guard against repealing legislation which may contain stronger protections than those set out in the Act, but has also indicated that this leaves people in those sectors confused as to which legislation applies to them and has called for this to be rectified (p. 35). In line with this, we believe that having consistent standards for all organisations, regardless of size or sector will go further to ensure that all employees are aware of the protection they are entitled to, and appropriate steps are in place for them to make disclosures. The PDA (2014) protects all employees, regardless of organisation size, or sector (with very few exceptions for issues related to national security), and we believe that in order to have the best chance of accessing this protection, there should be clear policies and guidelines in place.

SIZE: Additionally, the provision of internal reporting channels is crucial in enabling the exposure of economic crimes that impact organisations (Kenny et al, 2019a). Firms under 50 staff must not be denied the opportunity to address the wrongdoing that whistleblowers perceive and disclose. They must be supported in enabling the benefits of the ‘early warning system’ represented by internal reporting channels to prevent or mitigate problems, to avoid loss in time, money and effort, and to mitigate the risk of embarking on protracted and unnecessary legal battles that ensue from wrongdoing that remains uncorrected.

This is specifically the case in Ireland. The strength of the Irish economy is highly dependent on small, medium sized enterprises, and the Economic and Social Research Institute have recently commented that this level of reliance on smaller domestic businesses has increased during the COVID-19 pandemic (FitzGerald 2020). Firms 1-10 staff (micro enterprises)

employ 28% of people engaged in the private sector, and make up 92% of all enterprises. Micro enterprises contribute 18.7% of gross value added (GVA) to Irish economy. Firms 10-49 staff (small enterprises) employ 225 of ppl in the sector and represent 6.4% of all enterprises. Small enterprises contribute 10% of GVA to our economy (Central Statistics Office, 2015). Given this significant presence in the Irish economy, it is absolutely vital that this group be required to establish reporting channels, for their own long-term sustainability and for that of the Irish economy.

Research and international expertise is clear that the requirement for internal reporting channels should apply regardless of the number of staff. Staff levels can fluctuate over time and so numerical thresholds are problematic. Moreover, having procedures in place benefits the organisation by preparing them to receive disclosures, and having procedures in place can help ensure that issues are solved effectively, and before disclosures need to be made external to the organisation. Small organisations are required to have policies on health and safety, data protection, equality and so forth, so it is natural that they should be required to have a policy on whistleblowing as well. This is not as burdensome as it may sound. For example, the Workplace Relations Commission provides a model policy (see https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/cop12/) that can be adapted to suit small businesses across all sectors, so it should not be a burden on SMEs to write and implement this. We note that this template has already been adopted by many organisations. There is also ample support and advice on this area that can be obtained from, for example, TI Ireland's Integrity at Work Program, which has helped organisations of all sizes write and implement policies since 2017.

Research also shows that having procedures in place positively affects organisations' bottom line, regardless of size. Stubben and Welch (2020) "find that a 10% increase in [whistleblowing] reports is associated with a 2.0% decrease in the dollar amount of government fines received and a 1.0% decrease in legal settlement amounts in subsequent years" (p. 477).

Sources:

ACFE (2018). "Report to the Nations: 2018 Global Study on Fraud and Abuse". Available at: <https://www.acfe.com/report-to-the-nations/2018/> [1 July 2020].

Central Statistics Office (2015) "Business In Ireland 2015: Small and Medium Enterprises". Available at: <https://www.cso.ie/en/releasesandpublications/ep/p-bii/bii2015/sme/> [1 July 2020].

FitzGerald, J. (2020) Understanding recent trends in the Irish economy, Dublin: Economic & Social Research Institute.

Stubben, S.R. and Welch, K.T. (2020) "Evidence on the Use and Efficacy of Internal Whistleblowing Systems". *Journal of Accounting Research* 58(2):473-518.

Transparency International Ireland (2017) "Speak Up Report 2017". Available at: https://www.transparency.ie/sites/default/files/18.01_speak_up_2017_final.pdf

Vandekerckhove, W., & Phillips, A. (2019). "Whistleblowing as a Protracted Process: A Study of UK Whistleblower Journeys". *Journal of Business Ethics*. 159(1): 201-219.

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.

Answer:

No. All organisations in all sectors should have the same requirements to establish internal reporting channels and procedures, regardless of organisation size.

Please see our response to Q2 above. Requirements should be standardized for all organisations, regardless of size or sector to reduce confusion and provide the best chance of those speaking up accessing the protections.

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

Answer:

No. In addition to the arguments outlined in Q2, we note that the PDA (2014) requires all public bodies to have procedures in place, so allowing exemptions for them would represent a decrease in protection, which is explicitly forbidden by the non-regression clause contained in Article 25.2 of the Whistleblowers Directive.

Question 5

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

Answer:

Implementing a single shared source for local authorities is not necessary. Local authorities, like all public bodies, are required to have whistleblowing policies and procedures under section 21 of the PDA (2014). In 2019, 21 of the 31 local authorities (68%) had published their procedures online (Transparency International Ireland, 2019), indicating that there is wide compliance with the PDA (2014) and that the resources needed are not overly burdensome. While some local authorities are small, and may pose challenges to reporting, all members of local authorities are able to disclose to prescribed persons as well, if they meet certain criteria.

We recommend that training be provided to local authorities so that line managers are aware of their responsibilities to whistleblowers under the PDA (2014), and that potential whistleblowers are aware of the other channels they have (e.g. prescribed persons) to report to, and also the requirements that must be met if they wish to disclose to an external source.

Transparency International Ireland (2019) “National Integrity Index 2019: Local Authorities”. Available at: <https://www.transparency.ie/resources/national-integrity-index/report-2019> [10 July 2020].

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 to 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.

Answer:

Ireland should continue with the current approach to designating competent authorities as prescribed persons under the Protected Disclosures Act 2014, but the system needs to be overhauled. The intention underpinning the prescribed persons' system under the 2014 Act is that it provides a mechanism for the wrongdoing disclosed by a worker to be addressed and for whistleblowers to be protected by providing alternative safe disclosure channels if required. The system operates when a worker chooses to make their disclosure to a prescribed person in circumstances where they are unable or unwilling to make their disclosure to their employer. In that regard, the worker expects that the prescribed person will be the solution to their concern by investigating it and holding the employer to account, thus vindicating the disclosure made by the worker. In order for a disclosures system to be effective, not only must whistleblowers be protected, but also recipients of disclosures must act on the information disclosed to them in order to remedy the wrongdoing. The explanatory memorandum to the draft EU Commission Directive on whistleblowing highlights that 'Lack of confidence in the usefulness of reporting is one of the main factors discouraging potential whistleblowers' (European Commission, 2016).

However, various studies in the UK have identified that there is an expectation gap in relation to the worker's expectations of prescribed persons' powers (Department for Business, Innovation & Skills, 2014). This expectation gap is echoed in Ireland. For example, in its submission to the DPER Statutory Review by the prescribed person, the Pensions Authority, it stated that:

The Authority's experience has been that those making disclosures often believe that the Authority is compelled to investigate the matter by virtue of the fact that it has been made pursuant to the PD Act, notwithstanding the fact that following a thorough assessment of the issues highlighted, no reasonable grounds to suspect wrongdoing exists ... the PD Act does not alter the remit or functions of any statutory body nor does it negate the body's legal obligations in respect of exercising fair procedures and due process when deciding whether to initiate an investigation. Explaining this to whistleblowers can be difficult and therefore clarity should be provided in the

legislation in order to avoid any ambiguity and to manage expectations ((Department for Business, Innovation & Skills, 2014).

Further, the submission made by the prescribed person, the Teaching Council, to the DPER Statutory Review also highlights the expectation gap, where it stated ‘In the case of an external disclosure received by the Director of the Council as a Prescribed Person, the capacity to investigate may be limited or non-existent. (Department for Business, Innovation & Skills, 2014). Furthermore, in response to the survey of prescribed persons in research conducted by Kierans (2019), one prescribed person stated ‘The big weaknesses in the Act are the lack of formal investigative processes. There are limited powers under our establishing legislation to investigate the type of complaint I am prescribed to receive. It is hard to envisage a type of protected disclosure that I could actually investigate as envisaged under the 2014 Act.’

In order to remedy this expectation gap in the UK, a statutory obligation was introduced for prescribed persons to report annually on the disclosures received by them. There is a similar obligation on prescribed persons in Ireland, in addition to a requirement to establish and maintain procedures. The purpose of the annual reports is to improve the confidence of workers with the prescribed persons’ system by making it more transparent. It is also intended to drive up standards across the prescribed persons’ system. However, from the data obtained in research conducted by Kierans (2019), a number of concerns were identified with the obligations to publish annual reports and Procedures.

Firstly, only 21% of the ninety-two prescribed persons included in the assessment had complied fully with their obligation to prepare and publish their annual reports. Secondly, only 20% of all persons prescribed had procedures publicly available for disclosures in their capacity as a prescribed person, whilst 9% had information, other than procedures, on their website. This means that only 29% of prescribed persons had information publicly available for whistleblowers who wished to make a disclosure to a prescribed person. This data can be contrasted with responses to the survey of prescribed persons, where 84% of the prescribed persons who responded stated that they had specific procedures for receiving disclosures as a prescribed persons and 58% confirmed that there was information on their website which tells external persons how to make a disclosure to it. When contrasting the findings from the website search and the survey responses, there was a higher rate of prescribed persons indicating in the survey that they have prescribed persons’ procedures than what was located during the research. Also, from the survey responses, there is evidence that there are more prescribed persons indicating that they have procedures than those indicating that they have information on their websites. This means that there is an issue as regards the accessibility and availability of information/procedures.

Difficulties for prescribed persons in complying with the obligation to establish procedures were emphasised by the Teaching Council in the DPER Statutory Review where it stated that ‘The implementation of the Act both in terms of developing internal and external Protected Disclosure policies has been challenging and costly’ ((Department for Business, Innovation & Skills, 2014). The responses to the survey indicated that prescribed persons were not given additional funding to assist them with the additional costs that the role of a prescribed person

may incur. In that regard, 83% prescribed persons stated that they had not been given additional funding, whilst 17% did not know if they had been given additional funding.

If there is no information made publicly available to workers regarding disclosures to prescribed persons, then the result of this is that the prescribed person is unlikely to receive disclosures. According to the data from the case law analysis undertaken by Kierans (2019), a protected disclosure had not been made to a prescribed person in the first instance, and of those cases where a disclosure was subsequently made externally, it was made to a prescribed person in five cases. Further, there was also evidence from the data from the annual reports reviewed by Kierans (2019) and from the survey results of a low rate of disclosures being made to prescribed persons. Thirty-five per cent of prescribed persons who had published annual reports had received protected disclosures, whilst 37% of survey respondents indicated that they had received protected disclosures. Of those who had received protected disclosures, the majority of prescribed persons, (71% of survey respondents and 65% of the annual reports) received disclosures in the lower bracket of disclosures, ie between '1-4' disclosures.

The low rate of prescribed persons making their procedures/information on their role publicly available necessitates the introduction of a statutory obligation on prescribed persons to make information publicly available. The statutory obligations on the Central Bank to publish information on reporting mechanisms in a separate, easily identifiable, and accessible section of its website (Irish Statute Book, 2016) could be replicated in the 2014 Act and imposed on prescribed persons. This recommendation for amendment to the 2014 Act is further substantiated in light of the proposal under art 13 of the EU Commission Directive on whistleblowing for Member States to ensure that competent authorities publish information regarding the receipt of reports and their follow-up in a separate, easily identifiable, and accessible section of their website. Further, it may be appropriate to impose a sanction on prescribed persons who do not comply with their obligations to publish procedures. In its submission to the DPER Statutory Review, Fianna Fáil suggested that the procedures established and maintained by public bodies are subject to an audit and review by DPER and that DPER should provide recommendations as to how the procedures can be improved. Further, Fianna Fáil suggested that there should be some sort of penalty imposed on public bodies that have not set up clear procedures (Department of Public Expenditure and Reform, 2018).

However, in requiring prescribed persons to publish information/procedures on their websites, there needs to be appropriate guidance as to what must be published. As identified in Kierans' (2019) research, the prescribed persons who had procedures publicly available had included only 17% of the issues in the DPER Guidance that should be included in their procedures. This low compliance rate is not only detrimental to the making of disclosures by workers to it as a prescribed person, but it also means that prescribed persons are not leading by example to the organisations over which they have authority (Department for Business, Energy and Industrial Strategy, 2017). The difficulty experienced by prescribed persons in developing procedures was highlighted by the Teaching Council in the DPER Statutory Review, where it submitted that:

[T]he role and powers of the Director of the Teaching Council as a Prescribed Person have been difficult to define. This creates difficulty when trying to provide published guidance for persons who may be contemplating making a disclosure. The issues that arose were: a. Who or what cohorts of workers are meant to be comprehended for the Director's role as a Prescribed Person? b. What powers of investigation does the Director have, apart from the procedures under Part 5 (Fitness to Teach) of the Teaching Council Act which apply only to registered teachers, if a disclosure is received? (Department of Public Expenditure and Reform, 2018).

It is recommended that prescribed persons be issued with their own specific guidance for dealing with disclosures as prescribed persons. This guidance would cover the scope, role, and powers of prescribed persons; what should be included in their prescribed persons' procedures; how the procedures should be made publicly available; and how to comply with their annual reporting obligations, including advice in relation to reporting on disclosures in their capacity as an employer, a prescribed person, and section 10 disclosures. Also, prescribed persons' guidance needs to be supplemented with specific prescribed persons' training. According to Kierans' (2019) survey responses, 53% of the prescribed persons indicated that they had received training on protected disclosures. Nevertheless, of the five prescribed persons who made comments on what they would like to add about their role as a prescribed person, three stated that there should be training for prescribed persons, thus underscoring the concern of prescribed persons in relation to this issue.

Despite the recommendations made above in relation to the obligations on prescribed persons regarding annual reporting and publishing procedures, as well as the recommendations for providing specific guidance and training for prescribed persons, if the list of prescribed persons is not kept up to date, the prescribed persons' system will not be effective. In order to attract the protections under the 2014 Act, a worker must make their disclosures to the correct prescribed persons under section 7. As identified in Kierans' (2019) research, ten prescribed persons have either been dissolved, had a change of name, have merged, or had their functions transferred to another organisation. In addition, the research identified a number of omissions from the list of prescribed persons. The omissions of certain appropriate organisations as prescribed persons has a number of ramifications. Firstly, a disclosure to a non-prescribed regulator is considered to be a section 10 disclosure under the 2014 Act, thus requiring the worker to satisfy a number of additional conditions in order to attract the protections under the 2014 Act. Secondly, the rate of disclosures to regulators who are not prescribed reduces if they are not provided with the formal status of a prescribed person, which attracts the protections under the 2014 Act (Savage and Hyde, 2015). Thirdly, as recognised by Savage and Hyde (2015), by prescribing some regulators and not others, this creates a hierarchy of both regulators and public interest concerns. As Savage and Hyde (2015) explain "Those regulators who are prescribed may be considered to be more important than those who are not. The concerns that prescribed regulators may receive may be deemed more important than those received by regulators who do not have prescribed status" (p. 416).

It is also essential that the powers of the prescribed persons are reviewed by the government in order to ensure that they are adequate to investigate and remedy the wrongdoing. **It is recommended that in conjunction with updating the list that the practice adopted in the UK of requiring the UK BEIS to maintain a list of prescribed persons online and updating it promptly following any changes made by statutory instruments, as well as reviewing the list on an annual basis, should be replicated in Ireland.** In that vein, that **an authority be established to oversee the prescribed persons' system.**

The functions of such an authority could include the following:

1. Ensuring that prescribed persons are establishing and maintaining procedures.
2. Examining prescribed persons' Procedures to ascertain that they are clear and easy to understand.
3. Making sure that information on procedures and information on the role of the prescribed person is made publicly available.
4. Monitoring prescribed persons' responses to disclosures received by them.
5. Establishing that prescribed persons have the correct powers to carry out their functions in relation to disclosures made to them pursuant to section 7 of the 2014 Act.
6. Ensuring that prescribed persons publish their protected disclosures' annual reports, as well as examining the content of the annual reports.
7. Certifying that the prescribed persons' SI is up-to-date in terms of the prescribed person itself and the description of matters in respect of which it is prescribed, as well as maintaining this list online.
8. Providing specific advice to prescribed persons, when requested, in respect of their role under the 2014 Act.
9. Publishing guidance to assist prescribed persons' in carrying out their functions in respect of protected disclosures.
10. Providing training to prescribed persons in relation to the receipt, investigation, and remediation of the wrongdoing (Phillips and Lewis, 2013).
11. Receiving complaints in relation to the prescribed person in carrying out its role under the 2014 Act.
12. Reviewing any decision/finding/order made by prescribed persons in respect of an investigation of a relevant wrongdoing under the 2014 Act, ie a decision not to investigate; a finding that a relevant wrongdoing/no relevant wrongdoing had occurred; or any order made in respect of remedial action to be taken in relation to the relevant wrongdoing.

13. Promoting the role of prescribed persons as a disclosure channel for workers under the 2014 Act.
14. Imposing penalties on prescribed persons who are not complying with their statutory obligations.
15. Ensuring that prescribed persons' have adequate financial and staff resources
16. Reporting annually to DPER on the prescribed persons' system, including making recommendations for improvements to the system.

In addition to the establishment of this oversight authority, it is recommended that the UK Employment Tribunal ('ET') referral system be adopted in Ireland by the WRC. This referral system gives the ET the power to send copies of protected disclosures claims to regulators with the consent of the claimant (The Employment Tribunals (Constitution and Rules of Procedure) Regulations, 2013)

Additional research has looked at the institutional support given to whistleblowers, including legal support, psycho-social support, advice, prevention, corrective action, protection, investigation of retaliation, and investigation of wrongdoing in several countries with varying degrees of whistleblower protection as of 2018 (Loyens and Vandekerckhove, 2018). This study found that an approach which had abundant engagement and assistance from knowledgeable NGOs offered the best support to whistleblowers (See pp. 8-9). We note that many of these supports are currently available through sources like Transparency International Ireland, Transparency Legal Advice Center, among others. More on this support, which is offered through the Dutch model, is addressed in our answer to Question 9.

Sources:

Department for Business, Innovation & Skills (UK) (2014) "Whistleblowing framework: call for evidence". Consultation Outcome. 25 June. Available at: <https://www.gov.uk/government/consultations/whistleblowing-framework-call-for-evidence> [9 July 2020].

Department of Public Expenditure and Reform (IE) (2018) "Statutory Review of the Protected Disclosures Act 2014". Available at: <https://www.gov.ie/pdf/?file=https://assets.gov.ie/3750/051218105136-8df038b13a654f8d8408495c167444e9.pdf#page=1> [9 July 2020].

Department for Business, Energy and Industrial Strategy (2017) "Whistleblowing: Prescribed Persons Guidance". Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604935/whistleblowing-prescribed-persons-guidance.pdf [9 July 2020].

Employment Tribunals (Constitution and Rules of Procedure) Regulations (2013) “SI 2013/1237, reg 14”. Available at: <http://www.legislation.gov.uk/ukxi/2013/1237/schedule/1/made>. [9 July 2020].

European Commission (2018) “Directive of the European Parliament and the Council: Explanatory Memorandum”. April 23. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0218> [9 July 2020].

Irish Statute Book (2016) “S.I. No. 349/2016 - European Union (Market Abuse) Regulations 2016”. Available at: <http://www.irishstatutebook.ie/eli/2016/si/349/made/en/print> [9 July 2020].

Kierans, L. (2019) PhD Thesis, 'An Empirical Study of the Irish Protected Disclosures Act 2014', Middlesex University.

Loyens, K. and Vandekerckhove, W. (2018) “Whistleblowing from an International Perspective: A Comparative Analysis of Institutional Arrangements”. *Administrative Sciences*, 8(3): 1-16.

Phillis, A. and Lewis, D. (2013) “Whistleblowing to Regulators: Are prescribed persons fit for purpose?”. Middlesex University. Available at: <https://minhalexander.files.wordpress.com/2018/08/whistleblowing-to-regulators-are-prescribed-persons-fit-for-purpose-david-lewis-2013.pdf> [9 July 2020].

Savage, A. and Hyde, R (2015) “The response to whistleblowing by regulators: a practical perspective”. *Legal Studies* 35 (3): 408-427.

Transparency International Ireland (2017) “Speak Up Report 2017”. Available at: https://www.transparency.ie/sites/default/files/18.01_speak_up_2017_final.pdf

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.

Answer:

Organisations should provide continuous updates and a substantial final report to the individual whistleblower, subject to some limitations, as explained below.

The absence of robust and continuous feedback processes leads to serious consequences both for organisations and for the whistleblower. Research has shown that best practice in implementing speak up systems is to effectively communicate *throughout* the process (Kenny, et al, 2019a). By providing continuous feedback, the whistleblower is assured that the organisation is taking their concern seriously, and this builds trust in the organisation, which in turn fosters an environment where future disclosures are made (Kenny, et al 2019a). Additional studies have shown that the most prevalent reason that employees do *not* speak up about wrongdoing is the fear that nothing will be done (Transparency International Ireland, 2017). Therefore, communication is necessary at every step of the process.

Studies indicate that the final outcome should therefore be communicated directly to the whistleblower, either by the recipient of the disclosure, the investigator of the disclosure, or by senior management of the company. In the case of anonymous disclosures, efforts should be vested to make actions taken, including the outcome of the investigation, widely known to the entire organisation (Kenny, et al, 2019a). The outcome should also be reported publicly (in an anonymous format in order to protect the wrongdoer) in annual reports (Kenny et al., 2019a).

Taking this research into consideration as well as the recommendation of Transparency International Ireland, the leading expert on whistleblowing in Ireland, we therefore recommend that recipients of disclosures be required to submit to the whistleblower, in writing and within 7 days, that their disclosure has been acknowledged.

We do acknowledge that communicating feedback on the outcome of an investigation may not be appropriate if it relates to an individual. An individual has the right to privacy as an unenumerated right under the Irish Constitution. This right to privacy is also an explicit right under Article 8 of the European Convention of Human Rights ('ECHR') as well as relevant EU law, including the Charter of Fundamental Rights and the General Data Protection Regulation. Nevertheless, data protection and privacy are not absolute rights and limitations to these rights in certain circumstances is foreseen in the above-mentioned legislation. Furthermore, if the organisation informs the whistleblower of the outcome and this outcome is not upheld on appeal brought by the alleged wrongdoer, the organisation may be open to a cause of action in defamation under the Defamation Act 2009. Thus, we adopt the position that feedback should be framed in such a way that the rights of the person against whom the disclosure is made are not jeopardised by the organisation, but that the whistleblower is informed that the matter has been remedied.

Sources:

Kenny, K., Vandekerckhove, W. and Fotaki, M. (2019a). *The Whistleblowing Guide: Speak-Up Arrangements, Challenges and Best Practices*. Wiley: Chichester.

Transparency International Ireland (2017) “Speak Up Report 2017”. Available at: https://www.transparency.ie/sites/default/files/18.01_speak_up_2017_final.pdf

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.

Answer:

Yes, with some stipulations.

With regards to closing reports deemed to be minor and repetitive reports which do not contain any new meaningful information- It is best practice that organisations welcome all reports of wrongdoing, and respond to each in a timely, clear, transparent way (Kenny, et al, 2019a). The Whistleblowers Directive, as well as the PDA (2014) both require that only a “reasonable belief” be held in order for a disclosure to be protected, and in order to encourage individuals to come forward and to avoid a chilling effect, organisations should consider and respond to all concerns that are raised. In the case the report is minor, best practice indicates that the organisation should respond to the whistleblower, communicating why an investigation will not take place, and what steps the organisation will take to correct the issue, or why it is not an issue in the eyes of the organisation (Kenny, et al, 2019a). If this communication has taken place, we believe the authorities may close the report, but that they should still report it publicly in their annual report.

With regards to repetitive disclosures - research indicates that this can happen when the organisation is not perceived to be responding to the issue (Kenny, et al, 2019a). Receiving multiple reports of the same wrongdoing should indicate to the organisation that 1. The issue is important and visible to employees, and 2. They need to communicate what actions are being taken to investigate and/or rectify the issue. There can be challenges to this- anonymous reports, legal constraints on sharing information, or the invisibility of the response can all be barriers to perceived organisational responsiveness (Kenny, et al, 2019a), so the organisation must work to overcome these and increase communication. Examples of how to do this are provided by Kenny et al (2019a) and include communicating widely, building and maintaining trust, and reporting outcomes of investigations publicly. We believe that if proper communication is provided to every whistleblower detailing 1. The awareness of the issue due to other reports, 2. What actions are being taken to investigate and/or resolve the issue, and 3. A reasonable timescale for when investigations and/or actions will happen, that repetitive reports can be closed out, but should be reported in the annual report.

Sources:

Kenny, K., Vandekerckhove, W. and Fotaki, M. (2019a). *The Whistleblowing Guide: Speak-Up Arrangements, Challenges and Best Practices*. Wiley: Chichester.

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. A list of supports that should be provided, along with the mechanisms that could be used to provide them, and suggestions for who should provide it are provided below.

Answer:

Kenny et al. (2019b) carried out research between 2016-2018 that provides a comprehensive view of the cost of whistleblowing- financially, emotionally, and physically for whistleblowers who have had to leave their role because of speaking out. Whistleblowers spend extraordinary amounts of time, money and energy on their cases, and they lack many supports. Recommendations from this study are clear and urgent, and based on this information Ireland should provide the following supports:

- Provide assistance with the financial costs incurred as a direct result of speaking up.
 - A fund to compensate whistleblowers can be established “with monies gathered from fines levied at organisations found guilty of crimes related to whistleblower disclosures” (Kenny et al, 2019b: 27)
 - More structured interim relief will help keep whistleblowers financially afloat while they wait for their court case
 - Having access to affordable legal assistance will help reduce the financial burden on whistleblowers.
- Deliver support to reduce the impacts of whistleblowing
 - Pro bono counselling should be available, including tele-health options
- Provide support for appropriate and targeted career rehabilitation schemes.
- Make available assistance for engaging with media, legal and political supporters.
- Develop an international network for whistleblowers.
- Drive social and attitudinal change around whistleblowing.

Many of these recommendations are echoed by Transparency International Ireland (2017) who call for removing the cap on compensation (p. 35), providing legal advice to whistleblowers (p. 44), and raising awareness of the legislation and changing public attitudes (p. 44).

Loyens and Vandekerckhove (2018) also provide insight into supports that are useful in other countries. These include: having a body that investigates reports of wrongdoing, as well as one that investigates reports of retaliation, provision of psycho-social support, availability of advice, availability of legal support, prevention of wrongdoing, corrective action, and legal protections. Transparency International Ireland (2017) also call for specific actions to reduce corruption, which in turn reduce the need for whistleblowing (p. 44-45).

As to who can provide these supports, Transparency International Ireland and the Transparency Legal Advice Center provide many services that are valuable and necessary to support whistleblowers. They provide advice, both legal and general advice (for example on what supports are available, what media to contact, what additional legal supports are available etc), they advocate for whistleblowers and whistleblowing through public events, media releases and working directly with organisations through their Integrity at Work program, they connect whistleblowers to each other for support, and they work to identify and stop corruption in

Ireland. The Transparency Legal Advice Center provides legal advice, but has limited resources, with the result that there is a long waiting list for their services. DPER currently provides limited funding to TII and TLAC, but if this is the main source of support for whistleblowers, more funding should be allocated to these services to account for the potential increase in demand after the Whistleblowers Directive is transposed. Some additional income is generated from the Integrity at Work program, but as more organisations sign up, more support is needed, and therefore more funding is needed as well. We believe that DPER should increase funding to TII, to allow them to expand and offer more support services that are so vital for whistleblowers.

Additionally, support needs to be provided to organisations, in the form of education, training and preventative action. The Integrity at Work program offered by Transparency International Ireland provides this, but requires funding if it is to be scaled up, as more resources will be required to provide support to a large number of organisations, with potential need for specialization based on organisational size

Sources:

Kenny, K., Fotaki, M. and Bushnell, A. (2019b) “Post Disclosure Survival Strategies: Transforming Whistleblower Experiences”. NUI Galway: Galway. Available at: <https://www.whistleblowingimpact.org/wp-content/uploads/2019/06/19-Costs-of-Whistleblowing-ESRC-report.pdf>

Loyens, K. and Vandekerckhove, W. (2018) “Whistleblowing from an International Perspective: A Comparative Analysis of Institutional Arrangements”. *Administrative Sciences*, 8(3): 1-16.

Transparency International Ireland (2017) “Speak Up Report 2017”. Available at: https://www.transparency.ie/sites/default/files/18.01_speak_up_2017_final.pdf

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.

Answer:

We note that there are already penalties in Irish law that are relevant to whistleblowing disclosures. For example, the PDA (2014) provides penalties for knowingly false statements on the part of the discloser (whistleblower) under section 12(5). If a disclosure is false and made maliciously, disclosers (whistleblowers) potentially face disciplinary action, dismissal, defamation action (note that if it is not maliciously made, workers have qualified privilege under the Defamation Act of 2009) as well as criminal prosecution for wasting Garda time under section 12 of the Criminal Law Act 1976. Additionally, Irish statutory law already provides for criminal sanctions to be imposed on employers for penalising/threatening penalisation against employees who make disclosures. For example, s 21(2) of the Criminal Justice Act 2011 provides that an employer is guilty of an offence if they penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee, for (a) making a disclosure or for giving evidence in relation to such disclosure in any proceedings relating to a relevant offence, or (b) for giving notice of his or her intention to do so. This offence carries a penalty on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or both, or on conviction on indictment to a fine or imprisonment for a term not exceeding 2 years or both.

There are four areas where the Irish government may consider penalties under Article 23 of the Whistleblowers Directive: Retaliation against whistleblowers, hindering reporting, breaching confidentiality, and issuing false proceedings. We provide our thoughts and other information that we think is relevant to each area below.

Retaliation: The US Whistleblower Protection Act (1989) has two automatic charges for accountability in any finding of retaliation – first offence a proposed two-day suspension; second offence proposed termination. The Australian PIDA (2013) has criminal sanctions for victimisation: for an individual it is two years imprisonment and/or 240 penalty units for a company: 2400 penalty units. Failure by a public company or large proprietary company to comply with the requirement to have in place a whistleblower policy is also an offence. It is noted that although there are criminal sanctions in the Australian law, there have been few attempted prosecutions and no successful convictions in Australia, so the law is mostly symbolic and communicative. The UK, which made retaliation against a whistleblower illegal with the introduction of PIDA in 1998 has also had very little enforcement of this. These laws work better when there are other compliance and civil/employment liabilities, which provide more outcome-focussed legal obligations which are also easier to establish using civil or administrative burdens of proof etc, and result in remedies. We believe it is important for whistleblowers to be able to have some redress in the case of retaliation, and we think violations of the legislation should trigger consistent due process rights, and that it is best if the challenge is part of the same case. An approach that has been recommended by the Government Accountability Project in the US is to give the judge authority to impose discipline as part of relief.

Hindering reporting: The Australian law has penalties for failure to have a whistleblowing policy in place: for an individual: 60 penalty units, for a company: 600 penalty units. Other administrative and civil sanctions may be appropriate.

Confidentiality breach: The imposition of criminal liability for revealing identifying information of the whistleblower exists in some jurisdictions internationally. For example, under section 20 of the Australian Public Interest Disclosure Act (2013), it is a criminal offence to disclose information obtained by a person in their capacity as a public official and that information is likely to enable the identification of the whistleblower as a person who has made a public interest disclosure, subject to certain exceptions. The offence carries a penalty of imprisonment for six months and/or 30 penalty units. Further, under the French whistleblowing law, Sapin II, article 9(II), a breach of confidentiality attracts two years' imprisonment and a €30,000 fine. It may be appropriate to give regulators authority to fine organisations under their remit in addition to having other disciplinary and compensatory penalties

Issuing false proceedings (on the part of the organisation): Administrative and civil sanctions may be appropriate to deter organisations from engaging in this.

We note that there have been some issues with criminal sanctions in Australia. The presence of the criminal offence has meant that when detrimental conduct is alleged, authorities look for criminal conduct, and if they find none, the case is closed. This has in cases meant that compensation provisions did not end up getting applied (because no criminal conduct was identifiable) - so there are issues to overcome in having criminal sanctions. It is also important to note that having penalties that are not enforced is very problematic as this can create a false sense of security on the part of prospective whistleblowers, and if they are not protected as much as they think they are this will create distrust in the legislation.

To make the penalties 'effective, proportionate and dissuasive' the following should be taken into account:

Penalties would ensure the element of effectiveness to the extent in which they address the wrongdoing against the whistleblower. In the case of retaliation where the whistleblower's job is terminated, an effective penalty would be to restore the position of the individual and provide compensation for the incurred harm. Penalties would be proportionate to the extent that they address the severity of the harm. In line with the suggested categories above, penalties for retaliation would be proportionate to the extent that they provide criminal sanctions in addition to civil and administrative remedies.

Monetary penalties for organisations that do not comply with the law may also be used. This could be seen as a general compliance penalty rather than specific penalties that we outline above. We also note that there needs to be coherence of the penalties provided in this law with the existing national penalties system. Where other national laws foresee more stringent penalties, those should apply.

Additional Points on how PDA can be improved to meet and exceed the Whistleblowers

Directive:

Time-limits for penalisation claims

It is recommended that the 2014 Act is amended to reflect the position in the UK where s 48(3)(a) of the Employment Rights Act 1996 provides that where there may be a series of similar acts or failures, the time period for presenting a complaint begins on the date of the last act or failure. Section 48(4)(a) of the 1996 Act goes on to clarify that ‘where an act extends over a period, the ‘date of the act’ means the last day of that period.’ As the law currently stands in Ireland, this absence in the 2014 Act of a provision such as s 48(3)(a) of the 1996 Act, means that a worker could be subjected to a series of acts or omissions that affect the worker to the worker’s detriment, but they may not be able to successfully claim for all or part of that penalisation because it occurred outside of the six-month period before the claim is filed. This limitation clearly can result in an injustice to the worker by depriving them of the protections under the 2014 Act and allows for the employer to evade liability.

Burden of proof in penalisation and detriment claims

Article 21(5) of the EU Whistleblowers Directive provides that

In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds.

It is imperative that s5(8) of the Protected Disclosures Act 2014 is not diluted and continues to provide that in any proceedings involving an issue as to whether a disclosure is a protected disclosure, that it is presumed to be so, until the contrary is proved. Further, it is argued that the burden of proof in relation to the reason for the detriment and penalisation suffered by the worker is shifted from the worker to the person against whom the claim is brought.

Cap on compensation

In relation to the issue of the cap on compensation for a penalisation claim, this is arguably an unnecessary limitation of the Protected Disclosures Act 2014. If a person suffers a loss, then they should be compensated for that loss, irrespective of how much it is. The amount of compensation awarded should place the worker in the position they were in before the penalisation occurred. It is recommended that the approach adopted in the UK not to impose a cap on the amount of compensation awarded should be implemented in Ireland. The level of awards in Ireland to date is significantly lower than those that have been awarded in the UK. In explaining the rationale of the uncapped compensation in the UK, the then Secretary of State for Trade and Industry, Stephen Byers, stated that ‘There are many cases in which public

interest was important, and the House must send out a clear message underlining how seriously we regard that issue. To say that compensation will be unlimited is the best possible demonstration of the importance we attach to that matter.’ This rationale in relation to the public interest, as well as the purpose of the 2014 Act to protect whistleblowers, should underscore the adoption of uncapped compensation in Ireland. In addition, the implementation of uncapped compensation would underscore the fact that many whistleblowers are blacklisted and cannot secure the same or similar employment after they blow the whistle and thus suffer a greater loss than five years’ gross remuneration. Uncapped compensation would also take account of the fact that some acts of penalisation are egregious and therefore employers should be sufficiently punished for such acts, whilst other employers should be deterred from taking such action against whistleblowers. Further, uncapped compensation would reflect the fact that many whistleblowers suffer severe personal injury, most notably in the form of psychiatric injury, as well as injury to feelings. This would also ensure that Ireland is complying with art 21(8) of the EU Whistleblowers Directive, which provides that, ‘Member States shall take the necessary measures to ensure that remedies and full compensation are provided for damage suffered by persons referred to in Article 4 in accordance with national law.’

Calculation of compensation

This issue in relation to compensation also concerns the different types of damages that can be awarded under the 2014 Act and this issue needs to be addressed in Ireland. In the UK, awards for detriment are treated in the same manner as discrimination claims. A provision such as s 49(2) of the Employment Rights Act 1996 in the UK should be included in the 2014 Act to provide guidance as to what should be taken into consideration when an award in a penalisation claim is being made. Currently, there is no such guidance, and this is resulting in an inconsistent approach to the award of damages, where awards are being made in an ad hoc manner.

Awards of compensation for both unfair dismissal and any other penalisation

Further, in respect of the issue of compensation, there appears to be an unnecessary limitation in the 2014 Act where a worker cannot be compensated for both unfair dismissal and any other penalisation. Again, the 2014 Act should be amended to remove the limitation under s 12(2) and (4) in order to ensure that a worker who is unfairly dismissed is properly compensated for any other wrongs suffered by them. This amendment would again mean that, as well as fulfilling the purpose of the 2014 Act, an employer who both dismisses a worker for having made a protected disclosure and penalises that worker in other forms in retaliation for having made a protected disclosure is punished accordingly and other employers are deterred from similar future infractions.

Balancing the rights of the whistleblower with the rights of the alleged wrongdoer

The explanatory memorandum to the Council of Europe’s Recommendation (2014)7 on the Protection of Whistleblowers acknowledges that the principle of confidentiality can conflict with the rules of fairness and provides:

The principle also recognises that protecting the identity of the whistleblower can occasionally conflict with the rules of fairness (for example, fair trial and the common-law notion of natural justice). Where it is impossible to proceed – for example, to take action against a wrongdoer or those responsible for the damage caused without relying directly on the evidence of the whistleblower and revealing his or her identity – the consent and co-operation of the whistleblower should be sought, and any concern that he or she might have about their own position addressed. In some cases, it may be necessary to seek a judicial ruling on whether and to what extent the identity of the whistleblower can be revealed (Council of Europe, 2014).

The submission by the Houses of the Oireachtas Service to the DPER Statutory Review demonstrates the conflict experienced by organisations when balancing the rights of the whistleblower with the rights of the alleged wrongdoer. It stated that:

The issue of the rights of employees who are the subject of an accusation are not dealt with in the context of the current Act. In light of the recent judicial pronouncements in cases such as *Lyons v Longford* and *Westmeath Education and Training Board [2017] IEHC 272* these rights should be considered. This is particularly so in the context of the statutory position of anonymity for the person making the disclosure (section 16). It may be these issues should be addressed in procedures implemented rather than in any legislative provision but it should be noted that those rights can be a critical challenge for an organisation dealing with a disclosure made pursuant to the Act.

Further the Policing Authority argued in its submission to the DPER Statutory Review that ‘The protections contained in the 2014 Act for individuals who make a disclosure need to be balanced with some provisions that address the protection for persons who are the subject of allegations by a whistleblower availing of the protections of the 2014 Act.’ The issue was also highlighted by the Department of Education and Skills; the HSE; Resolve; and Transparency International Ireland.

There are a number of statutory changes that should be adopted in order to assist organisations with their obligations regarding the rights of the whistleblower and the alleged wrongdoer. The Department of Education and Skills submitted to the DPER Statutory Review that ‘It may be necessary to amend or make provisions in the Protected Disclosures Act 2014 in light of the General Data Protection Regulation (GDPR) and the associated Data Protection Bill 2017.’ This proposal to deal with the interplay between the 2014 Act and data protection through a statutory amendment was echoed by GSOC in their submission to the DPER Statutory Review. GSOC suggested that there should be a balancing test included in legislation to balance potential competing rights under the various statutory regimes. These submissions were responded to by DPER in its Statutory Review, which confirmed that ‘It is proposed to make a statutory instrument if necessary to ensure data protection law and protected disclosures law can continue to work in tandem’ (Department of Public Expenditure and Reform, 2018: 44). This proposal needs to be complied with.

The research undertaken by Kierans (2019) established that the interplay between the rights of the whistleblower and the alleged wrongdoer is multifaceted and specific guidance is necessary for an organisation to assist them in balancing the rights of both parties. It is arguable that the current DPER Guidance, the WRC Code of Practice on Protected Disclosures Act 2014, and the Code of Practice on Grievance and Disciplinary Procedures are inadequate to address the organisation's obligations regarding the rights of the whistleblower and the alleged wrongdoer in the context of protected disclosures.

It is recommended that a code of practice that deals specifically with investigation and disciplinary procedures, as well as the issue of data protection, in the context of a protected disclosure, be developed that addresses the following:

(i) The rights that apply to the alleged wrongdoer in the context of a protected disclosure process.

(ii) How to balance the rights of the alleged wrongdoer and the whistleblower under natural justice and fair procedures.

(iii) The application of data protection rules in the context of a protected disclosure process.

(iv) When and how the identity of the whistleblower be protected and what are the limitations to this protection.

(v) How to deal with anonymous disclosures.

It is also recommended that training for recipients of disclosures is designed to ensure they are familiar with what is meant by natural justice and fair procedures and to recognise when these rights should be afforded to the alleged wrongdoer, as well as how to balance those rights with the right to protection of the identity of the whistleblower (Roberts, Brown, and Olsen, 2011). There should also be training on the interaction between data protection rules and protected disclosures.

Trade secrets

With the adoption of the EU Whistleblowers Directive, the protection of whistleblowers supersedes protection of trade secrets, therefore whistleblowers cannot be prosecuted if the reported information includes trade secrets (Abazi, 2016 and Abazi, 2020).

Article 21(7) of the EU Whistleblowers Directive provides that:

In legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labour law, persons referred to in Article 4 shall not incur liability of any kind as a result of reports or public disclosures under this Whistleblowers Directive. Those persons shall have the right to rely on that reporting or public disclosure to seek dismissal of the case, provided that they had reasonable

grounds to believe that the reporting or public disclosure was necessary for revealing a breach, pursuant to this Whistleblowers Directive.

It is therefore argued that s5(7A) of the 2014 Act be deleted in order to ensure that the minimum standards in the EU Whistleblowers Directive are complied with and that the unnecessary and burdensome requirement for workers to establish that the disclosure of trade secrets was in the public interest is no longer a disincentive for workers to speak-up about wrongdoing.

Sources:

Abazi, V., (2016) “Trade Secrets and Whistleblower Protection in the European Union”, *European Papers*, 1(3): 1061-1072.

Abazi, V., (2020) “The European Union Whistleblower Directive: A ‘Game Changer’ for Whistleblower Protection?” (2020) *Industrial Law Journal*, forthcoming.

Council of Europe (2014) “Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers”. Explanatory Memorandum. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ea5 [10 July 2020].

Department of Public Expenditure and Reform (IE) (2018) “Statutory Review of the Protected Disclosures Act 2014”. Available at: <https://www.gov.ie/pdf/?file=https://assets.gov.ie/3750/051218105136-8df038b13a654f8d8408495c167444e9.pdf#page=1> [9 July 2020].

Kierans, L. (2019) PhD Thesis, 'An Empirical Study of the Irish Protected Disclosures Act 2014', Middlesex University.

Roberts, P., Brown, AJ., and Olsen, J. (2011) *Whistling While They Work A good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press: Canberra).