RESPONSE TO THE CONSULTATION QUESTIONS

QUESTION 1: SHOULD IRELAND AVAIL OF THE OPTION TO REQUIRE ANONYMOUS REPORTS BE ACCEPTED AND FOLLOWED-UP?

ANSWER: YES

The issue of whether or not to accept anonymous reports is left open by the EU Directive. However, the European Parliament Resolution is more positive about their value and "believes that the option to report anonymously could encourage whistle-blowers to share information which they would not share otherwise; 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; 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; considers that any breach of anonymity should be subject to sanctions".[1] Both the OECD and Transparency International assert that there should be protection of identity through the availability of anonymous reporting [2] and the UK Department for Business, Energy and Industrial Strategy provides that it is good practice for managers to have a facility for anonymous disclosures.[3] Indeed, anonymous

[1] European Parliament, *Legitimate measures to protect whistle-blowers acting in the public interest*, (2016/2224 INI),2017.

[2] Organisation for Economic Co-operation and Development, G20 *Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers,* Paris, 2019; Transparency International, *International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest,* Berlin, 2013.

[3] Department for Business, Energy and Industrial Strategy, *Whistleblowing Guidance for Employers and Code of Practice*, London, 2015.

disclosures are already explicitly dealt with by statute in some jurisdictions.[4]

The importance of facilitating anonymous disclosures of wrongdoing is underlined by empirical research. According to the OECD, approximately half of the member countries surveyed allow anonymous reporting in the public sector. In the private sector, 53% of respondents to the 2015 OECD Survey on Business Integrity and Corporate Governance indicated that their company's internal reporting mechanism provided for anonymous reporting.[5] In the US, Section 301 of the Sarbanes-Oxley Act 2002 requires public companies to set up procedures so that people can report financial misconduct anonymously [6] and in their large –scale study Stubben and Welch found that 28.5% of those reporting chose to remain anonymous.[7] In the UK NHS 2014 survey, staff were asked if a range of measures would make it likely or unlikely that they would raise concerns about suspected wrongdoing in the future. The ability to report anonymously was the second most supported option by NHS trust staff and the most supported option by primary care staff.[8]

QUESTION 2: SHOULD IRELAND PROVIDE THAT PRIVATE SECTOR ENTITIES WITH FEWER THAN 50 EMPLOYEES SHOULD ESTABLISH INTERNAL REPORTING CHANNELS AND PROCEDURES?

---

[4] For example, Commonwealth of Australia (Public Interest Disclosures Act 2013, s 28(2)); New Zealand (Protected Disclosures Act 2000, s 19(3)(a)); Serbia (Law on the Protection of Whistleblowers Act, no 2014/128, art 13).

[5] OECD, *Committing to Effective Whistleblower Protection*, Paris, 2016. https://www.oecd.org/corruption/anti-bribery/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf

[6] Section 301(4) requires audit committees to "establish procedures for (a) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (b) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters".

[7] Stubben, S & Welch, K: "Evidence on the use and efficacy of internal whistleblowing systems". *Journal of Accounting Research*. 2020. https://doi.org/10.1111/1475-679X.12303.

[8] Annex Di of the *Freedom to Speak Up Review Report*.2015. http://freedomtospeakup.org.uk/the-report/

ANSWER: YES. THE REQUIREMENT TO HAVE WHISTLEBLOWING ARRANGEMENTS SHOULD APPLY TO ALL ENTITIES IN BOTH THE PUBLIC AND PRIVATE SECTOR.

Ireland is heavily dependent on small and micro enterprises. Firms with 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 the Irish economy. Firms with 10-49 staff (small enterprises) employ 22% of people in the private sector and constitute 6.4% of all enterprises. Small enterprises contribute 10% of gross value added to the Irish economy [9]

As a matter of principle, whistleblowing arrangements should exist in all organisations because they promote transparency, integrity and business efficiency.[10] Significantly, paragraph 15 of the Council of Europe Recommendation 2014 does not have a small employer threshold for putting reporting procedures in place.

It should also be noted that international research demonstrates that most people try to report internally first, and do so on a number of occasions if necessary .[11] Thus not having whistleblowing arrangements in place in smaller organisations would represent a lost opportunity to address concerns before they escalate.

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,*

[9]Source 2015 CSO data: https://www.cso.ie/en/releasesandpublications/ep/p-bii/bii2015/sme/

[10] See: Transparency International, *The business case for 'speaking up': how internal reporting mechanisms strengthen private-sector organisations*, Berlin, 2017.

[11] Brown, AJ, Lewis, D, Moberly, R, Vandekerckhove, W, (eds.) 2014. *The International Whistleblowing Research Handbook.* Cheltenham, Edward Elgar. E-ISBN 978 1 78100 679 5

***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?**

ANSWER: NO

As a matter of principle, the requirement to have proper whistleblowing arrangements should apply to all sectors and irrespective of the numbers employed in the legal entity. One problem with operating a numerical threshold is that an entity's need for staff can both expand and contract. A uniform requirement irrespective of entity size or sector provides both employers and workers with a degree of certainty about rights and obligations.

In Ireland, the presence of a well-established and experienced organization (Transparency International's *Integrity at Work Network)* that provides significant support for the introduction, implementation and maintenance of reporting channels, shows how effective assistance can be provided and extended (with support from the state) to the SME sector, in a straightforward manner.

QUESTION 4: SHOULD IRELAND EXEMPT PUBLIC SECTOR BODIES WITH FEWER THAN 50 EMPLOYEES FROM THE OBLIGATION TO ESTABLISH INTERNAL REPORTING CHANNELS?

ANSWER: NO

The reasoning given above in answers to Questions 2 and 3 applies.

QUESTION 5: SHOULD IRELAND PROVIDE THAT MUNICIPALITIES (LOCAL AUTHORITIES IN THE IRISH CONTEXT) CAN SHARE INTERNAL REPORTING CHANNELS?

ANSWER: As a matter of principle it is desirable that local authorities have internal reporting channels that fit their particular ethos and requirements. Whistleblowing policies etc provide an opportunity for top management to demonstrate its own commitment to receiving concerns about wrongdoing and acting upon them.

However, it is accepted that economic and logistical constraints may necessitate some sharing of arrangements. Indeed, empirical research indicates that the perceived independence of the recipient enhances the likelihood of people speaking-up.

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?

ANSWER:

The advantage of having prescribed persons as recipients of concerns about wrongdoing is that they may have industry knowledge and expertise. However, if such persons have many commitments, for example as regulators, they may lack the time and resources to handle concerns properly. A single competent authority is likely to be better equipped but a new specialist whistleblowing agency can also have drawbacks. For example, in the Netherlands the relevant body has difficulty in separating its advisory from investigative functions. One answer might be to have a single whistleblowing agency with the power, inter alia, of overseeing the functioning of prescribed persons. Whatever approach is taken it is imperative that actual and potential whistleblowers are made aware of how concerns can be raised externally in a safe manner. This will require education and training to be provided nationally in addition to the information supplied in employer policies/procedures.

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?

ANSWER:

Whether or not the investigation was internal or external, the final outcome of an investigation should be communicated in writing to a whistleblower within 7 days of a conclusion being reached.

Subject to data protection safeguards, Irish law should require employers to maintain a record of all investigations conducted for at least 5 years and to make such records available to any national whistleblowing agency that is established. In communicating outcomes and maintaining records of investigations particular attention should be paid to protecting the identity of those who have been incorrectly accused of wrongdoing.

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?

ANSWER: Yes if the wording of the relevant statutory provision contains safeguards against abuse of these processes and individuals have the facility to claim that the competent authority has acted unreasonably in closing a case or not giving it appropriate priority.

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?

ANSWER:

All the support measures mentioned in Art.20 of the EU Directive should be made available and the suggestion made in Paragraph 89 of the Recital should be taken up i.e. Member States could extend advice to legal counselling and: "Where such advice is given to reporting persons by civil society organisations ….. Member States should ensure that such organisations do not suffer retaliation, for instance in the form of economic prejudice …..."

It should be noted that the EU Directive requirements for employer procedures do not go as far as those

applying to Australian companies. Here whistleblowing policies must include explicit guidance on 'how the company will support whistleblowers and protect them from detriment'[12] – or in the words of the regulator, provide 'practical protection'[13] rather than simply stating that legal protection is available.

QUESTION 10: WHAT PENALTIES SHOULD IRELAND IMPOSE UNDER THIS ARTICLE? WHAT WILL MAKE THESE PENALTIES "EFFECTIVE, PROPORTIONATE AND DISSUASIVE"?

ANSWER:

In order to ensure that penalties are "effective, proportionate and dissuasive" the Irish law should extend both civil and criminal remedies. For example, in relation to tort actions there should be specific provisions that impose vicarious liability (see the UK Employment Rights Act 1996 Section 47B which deals with detriment claims). There should be no cap on compensation for unfair dismissal in whistleblowing cases and the amounts awarded should reflect all economic and non – economic losses suffered as well including a punitive element in appropriate circumstances. One argument for making punitive/exemplary damages available is that they might serve as an economic deterrent to retaliation against whistleblowers. Thus by making those who victimize whistleblowers responsible for all financial losses resulting from this behaviour and adding a punitive element, potential retaliators might be made to think more carefully about how they respond to disclosers of information.[14] However, it should be noted that both individuals and organisations might obtain insurance against damages and that this could undermine the deterrent effect even if such cover is expensive. The argument that exemplary damage would constitute a windfall for plaintiffs can be countered by the suggestion that such damages could be shared with a public whistleblowing agency. Indeed, such an allocation would be an acknowledgement that exemplary damages reflect the public interest in punishing and deterring outrageous conduct.

[12] Section 1317AI(5)(c) of the Commonwealth of Australia's Corporations Act 2001 (as amended in 2019).
[13] Australian Securities & Investments Commission, Regulatory Guide 270: Whistleblower Policies, Canberra, 2019, p.31 < https://download.asic.gov.au/media/5340534/rg270-published-13-november-2019.pdf>
[14] Section 337BB (1)(E) of the Commonwealth of Australia's Fair Work (Registered Organisations) Act 2009 (as amended) provides for exemplary damages where a reprisal is taken or threatened against a whistleblower.

To underline the importance of encouraging the reporting of wrongdoing and protecting whistleblowers, Ireland should provide for the imposition of criminal sanctions as a last resort. Again it is appropriate to impose both personal and vicarious liability (subject to a reasonable steps defence) in appropriate cases. In relation to hindering reporting, paragraph 46 of the European Parliament Resolution suggests that 'gagging' orders should attract criminal penalties. In relation to retaliation, best practice would be to declare detrimental treatment null and void [15] and Section 19 of Australia's Public Interest Disclosure Act 2013 makes reprisals a criminal offence with a maximum of 2 years' imprisonment. As regards confidentiality, paragraph 47 of the European Parliament Resolution suggests that breaches of confidentiality should attract criminal penalties. Indeed, under the French whistleblowing law, Sapin II, a breach of confidentiality attracts two years' imprisonment and a €30,000 fine.[16]

One argument for imposing criminal sanctions rather than punitive damages on those who retaliate against whistleblowers is that, in effect, such damages amount to a fine and defendants should therefore be entitled to the criminal standard of proof. It is not being maintained that the criminal law would need to be invoked frequently. In this respect it might be argued that exemplary damages are also needed as this civil punishment is sought by individual victims and does not depend on any state decision to prosecute.

David Lewis

Professor of Employment Law at Middlesex University, London and Convener of the International Whistleblowing Research Network.

d.b.lewis@mdx.ac.uk

[15] See Transparency International position paper 1/2019.

[16] Australia's Public Interest Disclosure Act 2013 Section 20 provides that, subject to exceptions, 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 discloser as a person who has made a public interest disclosure. The offence carries a penalty of imprisonment for six months and/or thirty penalty units.