



Oifig an  
Rialaitheora Pleanála  
Office of the  
Planning Regulator

Department of Public Expenditure and Reform,  
Government Reform Unit,  
Government Buildings,  
Upper Merrion Street,  
Dublin 2, D02 R583

By email only: PDconsultation@per.gov.ie

**8 July 2020**

***Re: Consultation on the Transposition of the EU Whistleblowing Directive***

To Whom It May Concern,

I am writing to you in relation to the Consultation on the Transposition of the EU Whistleblowing Directive currently led by your Department.

The Office of the Planning Regulator (OPR) was established in April 2019 on foot of recommendations made by the Mahon Tribunal. As part of the 'Final Report of the Tribunal of Enquiry into Certain Planning Matters and Payments 2012', Mahon J recommended:

"The Minister for the Environment's enforcement powers should be transferred to an Independent Planning Regulator who should also be charged with carrying out investigations into systemic problems in the planning system as well as educational and research functions..."

The legal footing of the OPR is provided under the Planning and Development Act (the Act), as amended, and gives the OPR a statutory basis to carry out three main functions:

- i. Independent assessment of all local authority and regional assembly forward planning, including development plans, local area plans and regional spatial and economic strategies;*
- ii. Examination of the systems and procedures used by any planning authority, including An Bord Pleanála, in the performance of any of their planning functions, including assessing risks of maladministration or corruption; and*
- iii. Driving national research, training, education and public information programmes.*

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Further to the above, one of the key statutory functions of the OPR, is the conduct of reviews and examinations of the systems and procedures operated by planning authorities, *inter alia*, matters relating to maladministration and corruption. Such reviews or examinations may be instigated by the OPR, by a request of the Minister, or as a result of complaints.

In that regard, the Planning Regulator as a statutory office holder, is in the process of being prescribed by your Department, under the Protected Disclosures Act 2014, as a recipient of disclosures of relevant wrongdoing relating to matters appropriate by reason of the nature of the responsibilities or functions of the Office of the Planning Regulator. Given the OPR is not yet a competent authority under the above Act and would therefore have a limited experience as of yet of protected disclosures, we have responded to the questionnaire in relation to certain topics.

It is important to recognise that the enactment of the Protected Disclosures Act 2014 placed Ireland as one of ten EU Member States to implement a comprehensive legal framework for the protection of whistleblowers. This enactment and indeed the forthcoming transposition of the EU Whistleblowing Directive represent important developments in the strengthening of the suite of measures available in the State to address the risk of criminal offences, maladministration and corruption, and to offer appropriate protections to whistleblowers.

I note that the Directive seeks to transpose a range of provisions and your Department is now seeking stakeholder views in relation to the exercise of Member States options.

**Article 6:**

*‘Without prejudice to existing obligations to provide for anonymous reporting by virtue of Union law, this Directive does not affect the power of Member States to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches.’*

**Question:** Should Ireland avail of the option to require anonymous reports be accepted and followed up?

As part of the current regime, policies and procedures of a State body should clearly distinguish between anonymous and confidential disclosures. While ensuring appropriate aspects of anonymous disclosures are taken into account by public bodies, such a body’s policies and procedures should clearly outline that difficulties may arise in the case of anonymity of the discloser such as providing appropriate protection from penalisation, or keeping the discloser abreast of the investigation. A risk of an increased number of vexatious disclosures should also be considered in this area.

**Article 8:**

*‘Member States may provide that internal reporting channels can be shared between municipalities or operated by joint municipal authorities in accordance with national law, provided that the shared internal reporting channels are distinct from and autonomous in relation to the relevant external reporting channels.’*

**Question:** Should Ireland provide that local authorities can share reporting channels?

There are 31 local authorities within the Irish Local Government system which are grouped within 3 Regional Assembly areas. The OPR plays a key role in the oversight of the functioning of the systems and procedures of the local authorities, including the examination of risks relating to maladministration or corruption. In that regard, a scenario may be envisaged where issues arising from a protected disclosure may affect multiple local authorities’ administrative areas. To this end, it

would be important for appropriate structures to be implemented to avoid the duplication of administrative efforts as part of the examinations of protected disclosures.

*'Member States may exempt from the obligation referred to in paragraph 1 municipalities with fewer than 10,000 inhabitants or fewer than 50 workers, or other entities referred to in the first subparagraph of this paragraph with fewer than 50 workers.'*

**Question:** Should Ireland exempt public sector bodies with fewer than 50 employees from the obligation to establish internal reporting channels?

Internal reporting channels in the form of policies and procedures on protected disclosures are an important aspect of ensuring accountability and transparency in public bodies. Within the national context, many State organisations fulfil key regulatory or oversight roles, while employing fewer than 50 employees. It is important that all State bodies place particular importance on the implementation of appropriate whistleblowing policies and procedures including the protection of disclosers, regardless of staffing numbers, albeit ensuring that sufficient support resources are available to the organisations via the central Government.

**Article 11:**

*'Member States may provide that competent authorities, after having duly assessed the matter, can decide that a reported breach is clearly minor and does not require further follow-up pursuant to this Directive, other than closure of the procedure. This shall not affect other obligations or other applicable procedures to address the reported breach, or the protection granted by this Directive in relation to internal or external reporting. In such a case, the competent authorities shall notify the reporting person of their decision and the reasons therefor.'*

*'Member States may provide that competent authorities can decide to close procedures regarding repetitive reports which do not contain any meaningful new information on breaches compared to a past report in respect of which the relevant procedures were concluded, unless new legal or factual circumstances justify a different follow-up. In such a case, the competent authorities shall notify the reporting person of their decision and the reasons therefor.'*

*'Member States may provide that, in the event of high inflows of reports, competent authorities may deal with reports of serious breaches or breaches of essential provisions falling within the scope of this Directive as a matter of priority, without prejudice to the timeframe as set out in point (d) of paragraph 2.'*

**Question:** 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?

There are both merits and drawbacks in continuing with the current approach of designating competent authorities or considering an alternative approach such as a single national competent authority that either refers on protected disclosures for follow-up or follows up itself. The distributed model as in many EU states has the benefit of protected disclosures being handled by designated authorities for different sectors that are competent and knowledgeable by virtue of their familiarity with the issues, albeit that there will be a need for constant training and experience sharing in the case-handling aspects to ensure a consistency of approach in the level of service provided to whistleblowers. A centralised model would offer advantages in relation to achieving such a consistency above

but would rely on the relevant expert or sectoral authorities to provide the detailed input needed to authoritatively address the specific complaint made and that could create additional delays and complexities. On balance, the current distributed model would appear to have some modest advantages.

**Question:** Should Ireland provide that competent authorities may close or prioritise reports received in accordance with paragraphs 3, 4 and 5 of Article 11?

It is considered that a regime for prioritisation or closure of reports would be merited in line with Articles 3, 4, 5 and 11 of the Directive. However, when doing so, there should be a requirement that the competent authority clearly sets out the rationale for same in a documented manner.

## **Article 20**

*'Member States may provide for financial assistance and support measures, including psychological support, for reporting persons in the framework of legal proceedings. 3. The support measures referred to in this Article may be provided, as appropriate, by an information centre or a single and clearly identified independent administrative authority.'*

**Question:** What measures of support should Ireland provide for reporting persons? What mechanisms might be used to provide such support? Who should provide that support?

There are merits in providing some level of support for reporting persons who may be unsure of the mechanisms around protected disclosures, whether their concern is in fact a protected disclosure or where such concerns might be addressed alternatively. Accordingly, the provision of a confidential helpline service for reporting persons through channels such as citizens' advice bureau or through a central contact point would have its merits.

I trust our comments are of assistance and please do not hesitate to contact me if you wish to discuss the above in further detail.



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Joanna McBride  
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Office of the Planning Regulator