



THE BAR
OF IRELAND

The Law Library

**SUBMISSION OF THE
COUNCIL OF THE BAR OF IRELAND**

Protected Disclosures (Amendment) Bill 2021

JULY 2021

Introduction

The Council of the Bar of Ireland (“the Council”) is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,150 practising barristers. The Council has prepared the following submission for the Joint Committee on Finance, Public Expenditure and Reform and Taoiseach (“the Joint Committee”) on the General Scheme of the Protected Disclosures (Amendment) Bill 2021.

The submission has been sub-divided to address what the Council regard as the eight most important issues that arise from consideration of the Protected Disclosure (Amendment) Bill General Scheme (“the Bill”) and its interaction with existing legislation; namely, the Protected Disclosures Act 2014 (“the PD Act”).

They are as follows:

1. Policy rationale for the Bill
2. Personal Scope of the Bill
3. Material Scope of the Bill
4. Applicable Legal Test for a Protected Disclosure
5. Protective Measures provided by the Bill
6. Reporting Channels
7. Protected Disclosures Office
8. Support Measures

1. Policy rationale for the Bill

The Bill will be enacted to transpose Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (“the Directive”) and ensure compliance with European law. The deadline for transposition is 17 December 2021.

The Directive seeks to provide for a common minimum set of standards relating to the protection of persons that report breaches of Union law and policies in certain areas.

The Joint Committee should note that the European Commission (“the Commission”) does not view the Directive as a social policy instrument, but rather as one that is essential to the identification and correction of breaches of Union law. Not only does the Commission view this as being in the public interest, but also as integral to the operation of a fair and competitive single market.

Therefore, Ireland, as a Member State, can expect a vigilant attitude from the Commission as to the effectiveness and accuracy of the Directive’s transposition. This is an important principle to bear in mind and feeds into the remainder of the points made by the Council on the current status of the Bill.

2. Personal Scope of the Bill

The personal scope of the Directive is considerably wider than the current PD Act. The Bill's proposals in respect of this expansion start at Head 2 which defines reporting person which is a term from the Directive.

"Reporting person means a worker who has made a protected disclosure in accordance with the provisions of this Act."

In turn, 'worker' is defined at section 3 of the PD Act as an individual who:

- a) is an employee;
- b) entered into or works or worked under any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertook to do or perform (whether personally or otherwise) any work or services for another party to the contract for the purposes of that party's business;
- c) works or worked for a person in circumstances in which—
 - (i) the individual is introduced or supplied to do the work by a third person, and
 - (ii) the terms on which the individual is engaged to do the work are or were in practice substantially determined not by the individual but by the person for whom the individual works or worked, by the third person or by both of them, or
- d) is or was provided with work experience pursuant to a training course or programme or with training for employment (or with both) otherwise than—
 - (i) under a contract of employment, or
 - (ii) by an educational establishment on a course provided by the establishment, and includes an individual who is deemed to be a worker by virtue of subsection (2)(b) and any reference to a worker being employed or to employment shall be construed accordingly.

The Bill proposes amending section 3 and the definition of worker at Head 7 of the Bill.

The following subsections would thus appear after subsection d):

- e) is a shareholder;
- f) is a member of the administrative, management or supervisory body of an undertaking, including non-executive members;
- g) is a volunteer or an unpaid trainee;

- h) acquires information on a relevant wrongdoing during a recruitment process or other pre-contractual process.

In the Council's view, the effect of the Bill is to create two definitions; reporting person and worker, with both definitions covering the same matters. This may flow from the importance attached to the concept of 'worker' in the PD Act. Indeed, the PD Act focuses primarily on the protected disclosures within the context of an employer-employee relationship. While the Council appreciates that the majority of protected disclosures will arise in this context, the effect of the Directive is to cast the net wider in terms of the scope of protective measures.

In this regard, Recital 37 of the Directive is particularly relevant:

“Effective enforcement of Union law requires that protection should be granted to the broadest possible range of categories of persons, who, irrespective of whether they are Union citizens or third-country nationals, by virtue of their work-related activities, irrespective of the nature of those activities and of whether they are paid or not, have privileged access to information on breaches that it would be in the public interest to report and who may suffer retaliation if they report them. Member States should ensure that the need for protection is determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship, so as to cover the whole range of persons connected in a broad sense to the organisation where the breach has occurred.”

Recital 38 then notes that workers as defined under European law (employees) are the primary benefactors of the protective measures. However, Recital 39 provides:

“Protection should also extend to categories of natural persons, who, whilst not being ‘workers’ within the meaning of Article 45(1) TFEU, can play a key role in exposing breaches of Union law and may find themselves in a position of economic vulnerability in the context of their work-related activities. For instance, as regards product safety, suppliers are much closer to the source of information about possible unfair and illicit manufacturing, import or distribution practices concerning unsafe products; and as regards the implementation of Union funds, consultants providing their services are in a privileged position to draw attention to breaches they witness. Such categories of persons, which include self-employed persons providing services, freelance workers, contractors, subcontractors and suppliers, are typically subject to retaliation, which can take the form, for instance, of early termination or cancellation of a contract for services, a licence or permit, loss of business, loss of income, coercion, intimidation or harassment, blacklisting or business boycotting or damage to their reputation. Shareholders and persons in managerial bodies can also suffer retaliation, for instance in financial terms or in the form of intimidation or harassment, blacklisting or damage to their reputation. Protection should also be granted to persons whose work-based relationship has ended, and to candidates for employment or persons seeking to provide services to an organisation, who acquire information on breaches during the recruitment process or another pre-contractual negotiation stage, and who could suffer retaliation, for instance in the form of negative employment references, blacklisting or business boycotting.”

As noted, the effect of Irish law at present and as proposed in the Bill is to focus on the concept of

‘worker’. It is the Council’s view that the expansion of the list of persons classifying as a ‘worker’ as per the Bill has resulted in an artificial meaning of this term to include categories of individuals not ordinarily reckoned as such and to the point where a more comprehensible solution would be to replace the term in its entirety. The Council would also note in further support of this point that it is important for the law to be accessible and easily understood. To stretch the meaning of ‘worker’ beyond its traditionally understood meaning could result in persons that would otherwise be protected not believing they classify as a worker and therefore not making a protected disclosure. An approach more in keeping with the effect and purpose of the Directive would be to amend Irish law so as to provide protection to a reporting/disclosing person. A reporting/disclosing person could then be defined as per the list of persons already provided for in the PD Act and the additional persons provided in the Bill.

Apart from the above positive definitional changes, the Council also sees scope for negative or exclusionary definitions. In this context, Recital 27 is significant. It provides:

“Members of professions other than lawyers and health care providers should be able to qualify for protection under this Directive when they report information protected by the applicable professional rules, provided that reporting that information is necessary for the purposes of revealing a breach falling within the scope of this Directive.”

The Directive envisages certain classes of professionals (such as accountants for example) coming under the scope of the Directive even if what they report/disclose is captured by their applicable professional rules (confidentiality or secrecy) when they report/disclose breaches of Union law. However, the Directive specially excludes lawyers and health care providers and the Council views this as a welcome clarification that could be inserted into Irish law.

The Directive also provides for the protective measures to apply, where relevant, to:

- a) facilitators;
- b) third persons who are connected with the reporting person and who could suffer retaliation in a work-related context, such as colleagues or relatives of the reporting persons; and
- c) legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context.

The Bill has included the term ‘facilitators’ within Head 2 adopting the Directive’s definition set out at Article 5 of the Directive. The other two sub-heads are undefined in the Bill but given the structure of the PD Act, this may not present a difficulty given section 13 of the PD Act. This will be addressed further under section 5.

Submission:

1. The Council is of the view that the Bill could be improved by a more comprehensive and inclusive definition for the persons entitled to whistleblowing protection. Therefore, the Council recommends that the term ‘worker’ be replaced by ‘reporting/disclosing person’ and to enumerate the term a ‘reporting/disclosing person’ (as is the Model of the PD Act and the Bill at present) with the various categories of persons that ought to be caught by the protections.

2. The Council recommends the insertion of a subsection excluding the application of the PD Act and the Bill to lawyers as per Recital 27 of the Directive.

3. Material Scope of the Bill

The Directive's application is over breaches of Union law.

A breach of Union law is given a wide interpretation as per Article 5 of the Directive:

'breaches' means acts or omissions that:

- i. *are unlawful and relate to the Union acts and areas falling within the material scope referred to in Article 2; or*
- ii. *defeat the object or the purpose of the rules in the Union acts and areas falling within the material scope referred to in Article 2.*

Article 2 of the Directive sets out the areas of Union law to which the Directive applies: public procurement, financial services, product safety, transport safety, environmental protection, nuclear safety, food and animal safety, public health, consumer protection, privacy and data protection, financial interests of the Union and matters relating to the internal market such as competition, state aid and corporate tax. The specific legal instruments covering these areas are set out in the Annex to the Directive. In total, the Annex extends to over 130 legal instruments. Yet in fact, the catchment is wider. Recital 19 provides that any legal instruments cross-referred to within the respective listed legal instruments set out in the Annex or corresponding national measures are also included. Recital 19 is also significant in that it provides for a dynamic application of the Directive by stating that should any listed legal instruments be replaced or amended by subsequent legal instruments, that those legal instruments are to be subject to the Directive.

The Bill seeks to make the necessary changes to the PD Act by the inclusion of a definition of 'breach' at Head 2 in line with the Directive's definition at Article 5 and by amending section 5(3) of the PD Act as per Head 5 of the Bill.

The changes are simple and cross-refer Irish legislation to the Directive. Indeed, given the sheer vastness of the scope of the Directive, the Council views the current proposal of the Bill to be an efficient and pragmatic drafting solution.

Head 5 of the Bill also sets out an exclusionary definition taking inspiration from Recital 22 of the Directive. The Joint Committee should note that Recital 22 gives Member States a choice to legislate for this exclusion.

It provides:

"A matter is not a relevant wrongdoing if it is a matter concerning interpersonal grievances exclusively affecting the reporting person, namely grievances about interpersonal conflicts between the reporting person and another worker and the matter can be channelled to other

procedures designed to address such matters.”

The Council, in principle, welcomes the addition of this exclusion and expects that it will provide much needed clarity to certain disputes. The use of the word ‘exclusively’ is important as it narrows the scope of the exclusion. Therefore, for example, an employee could be protected if they made a disclosure concerning their boss that they claimed was bullying them if they also believed and disclosed that the boss was bullying other employees. This type of disclosure is not captured by the exclusion and would arguably be a protected disclosure depending on the particular circumstances.¹ However, the Council is of the view that further clarification can be brought to bear on this exclusion. It is important that such an exclusion not work against potential reporting/disclosing persons when they are trying to expose wrongdoing. To this end, the Council recommends that efforts be made to define the term ‘interpersonal grievance’.

Submission:

3. The Council approves of the proposed manner of legislating for the material scope of the Directive as per Head 5 of the Bill and the definition of ‘breach’ at Head 2 of the Bill.

4. The Council also approves of the exclusionary provision concerning interpersonal grievances but advises that the term ‘interpersonal grievance’ be defined in the Bill to ensure that this exclusion is interpreted narrowly by adjudicative bodies and/or the courts.

4. Applicable Legal Test for a Protected Disclosure

The current legal test under Irish law for a person to avail of the protections offered by the PD Act is for ‘relevant information’ to be disclosed in a manner specified in sections 6 to 10.

Relevant information is defined at section 5(2) as follows:

- (2) For the purposes of this Act information is “relevant information” if—
- (a) in the reasonable belief of the worker, it tends to show one or more relevant wrongdoings, and
 - (b) it came to the attention of the worker in connection with the worker's employment.

The Bill does not propose changes to this term despite Articles 5 and 6 of the Directive. The combined effect of these Articles is to make the test concerning the reporting of information on breaches of Union law that the reporting person has reasonable grounds to believe the matters reported to be true. However and crucially, Article 5 defines ‘information on breaches’ as:

“information including reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur in the organisation in which the reporting person works or has worked or in another organisation with which the reporting person is or was in contact through his or her work, and about attempts to conceal such breaches”.

¹ Protected Disclosures Act 2014, section 5(3)(d) that the health or safety of any individual has been, is being or is likely to be endangered,

As can be seen, the definition for information that is reported is extremely broad and even includes reasonable suspicions. Such a wide definition seems connected to Recital 43 which provides:

“Effective prevention of breaches of Union law requires that protection is granted to persons who provide information necessary to reveal breaches which have already taken place, breaches which have not yet materialised, but are very likely to take place, acts or omissions which the reporting person has reasonable grounds to consider as breaches, as well as attempts to conceal breaches. For the same reasons, protection is justified also for persons who do not provide positive evidence but raise reasonable concerns or suspicions. At the same time, protection should not apply to persons who report information which is already fully available in the public domain or unsubstantiated rumours and hearsay”.

The Joint Committee’s attention is also drawn to Recital 32 which provides:

“To enjoy protection under this Directive, reporting persons should have reasonable grounds to believe, in light of the circumstances and the information available to them at the time of reporting, that the matters reported by them are true. That requirement is an essential safeguard against malicious and frivolous or abusive reports as it ensures that those who, at the time of the reporting, deliberately and knowingly reported wrong or misleading information do not enjoy protection. At the same time, the requirement ensures that protection is not lost where the reporting person reported inaccurate information on breaches by honest mistake. Similarly, reporting persons should be entitled to protection under this Directive if they have reasonable grounds to believe that the information reported falls within its scope.”

The Council is of the view that the definition of ‘relevant information’ as currently provided for may cause difficulties in light of the broader definition in the Directives which clearly envisage protection to persons reporting/disclosing a suspicion of wrongdoing or even being mistaken as to wrongdoing (so long as it is an honest mistake). The language of the PD Act is more affirmative in what the disclosure must do - it must tend to show a relevant wrongdoing in the reasonable belief of the person making the disclosure. It could be said that these are only language divergences between the PD Act and the Directive, but it is clear that there is scope for some uncertainty. In the Council’s view, this uncertainty could easily be reduced (if not eliminated) through further drafting efforts bringing the Irish position more in line with the Directive.

Submission:

5. The Council recommends amendments to the definition of ‘relevant information’ to include actual or potential relevant wrongdoings and reasonably held suspicions on relevant wrongdoings.

5. Protective measures

The provision of protective measures in the Directive was, to a large extent, already adequately covered by the PD Act. The Bill seeks to complement the PD Act in certain ways, but no major changes are required.

The Council notes and approves of the amendment to the definition of ‘penalisation’ as per Head 2 of the Bill to transpose Article 19 of the Directive.

The most significant amendment from the Council’s point of view can be found at Head 21 (4) of the Bill. This subsection extends the application of interim relief to all forms of penalisation as opposed to solely applying to relief for dismissal. While the Council approves of this amendment and notes the need for same in order to comply with the Directive, the Joint Committee is advised that this is likely to increase the workload of the Circuit Court and impinges on the already extended resources of that Court.

The Council also acknowledges and approves of Head 21 (3) which provides for an award of compensation capped at €13,000 for the new additions to the Irish legal landscape; volunteers, trainees, non-executive directors, etc. who are not paid for the services they provide.

As noted at section 2, protective measures can apply to persons connected with the reporting person where relevant. The Directive sets out three classes of persons:

- a) facilitators;
- b) third persons who are connected with the reporting person and who could suffer retaliation in a work-related context, such as colleagues or relatives of the reporting persons; and
- c) legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context.

Apart from facilitators, these persons have not been expressly legislated for in the Bill. Yet in the Council’s view, section 13 of the PD Act is set out in broad enough terms to include such persons. The Council notes that facilitators has been defined at Head 2 of the Bill and they could be included within section 13 as well for overall comprehension, however it does not see this as an essential inclusion. Further, the Joint Committee may consider amending section 13 to include a-c as above for overall accessibility of the legislation to those that may be affected. See similar comments at section 2 in respect of the meaning of ‘worker’.

The Council is supportive of the division in remedies depending on the nature of the detriment suffered (dismissal, penalisation or other) and the forum in which such detriment can be corrected, whether through the Workplace Relations Commission (sections 11 and 12 of the PD Act) or the courts (section 13 of the PD Act). The division is largely based on the type of relationship the reporting/disclosing person has with the person or legal entity over which the report/disclosure is based. Given the wide net cast by the Directive in terms of the type of persons who can make a report/disclosure and which includes persons not in an employer-employee relationship but rather hired as consultants or professionals or advisers, relief for dismissal or penalisation is largely ineffective and a separate cause of action capable of being litigated in court is necessary. This is particularly the case in respect of self-employed persons who may find themselves subject to predatory business conduct in the form of contract cancellation or negative reviews. To this end, section 13 is an essential provision.

However, the Council is of the view that section 13(2) which acts as mandatory exclusion on tortious

relief in the courts against persons who have sought redress for their dismissal or for penalisation is unnecessary and contrary to the purposes of the Directive. In this regard, Recitals 94 and 95 are particularly informative. They provide:

(94) Beyond an explicit prohibition of retaliation provided in law, it is crucial that reporting persons who do suffer retaliation have access to legal remedies and compensation. The appropriate remedy in each case should be determined by the kind of retaliation suffered, and the damage caused in such cases should be compensated in full in accordance with national law. The appropriate remedy could take the form of actions for reinstatement, for instance, in the event of dismissal, transfer or demotion, or of withholding of training or promotion, or for restoration of a cancelled permit, licence or contract; compensation for actual and future financial losses, for example for lost past wages, but also for future loss of income, costs linked to a change of occupation; and compensation for other economic damage, such as legal expenses and costs of medical treatment, and for intangible damage such as pain and suffering.

(95) While the types of legal action may vary between legal systems, they should ensure that compensation or reparation is real and effective, in a way which is proportionate to the detriment suffered and is dissuasive. Of relevance in this context are the Principles of the European Pillar of Social Rights, in particular Principle 7 according to which 'Prior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access to effective and impartial dispute resolution and, in case of unjustified dismissal, a right to redress, including adequate compensation.'. The remedies established at national level should not discourage potential future whistleblowers. For instance, providing for compensation as an alternative to reinstatement in the event of dismissal might give rise to a systematic practice, in particular by larger organisations, thus having a dissuasive effect on future whistleblowers.

To clarify, the Council is not proposing a state of affairs where reporting/disclosing persons could potentially recover in two different forums.² Simply put, the Council notes that the mandatory nature of section 13(2) could potentially exclude legitimate claims from persons requiring the intervention of the workplace dispute process as well as the courts. Whether they can recover in both forums will depend on the particular facts and circumstances of their case, as well as the type of detriment they suffered, but such considerations should not be automatically excluded.

Submission:

6. The Council is supportive of Head 21 of the Bill but cautions on the increased workload for the Circuit Court arising out of the extension of the applicability of interim relief to an employee as defined in the PD Act and the Bill claiming to suffer from penalisation wholly or mainly for having made a protected disclosure.

² It is unlikely such a position would ever materialise in practice in any event given the different natures and powers of the Workplace Relations Commission & Labour Courts and the courts. For example, the Workplace Relations Commission is not equipped to consider damages for general pain and suffering.²

7. The Council advises for the repeal of section 13(2) of the PD Act which creates a mandatory exclusion on persons bringing a claim to the Workplace Relations Commission for redress for having been dismissed or for redress or for having been penalised at work and a tort claim in the courts based on detriment suffered by them arising out their making of a protected disclosure.

6. Reporting Channels

Head 9 of the Bill seeks to amend section 6 of the PD Act which provides for a public disclosure by a worker to their employer.

The Council approves of the proposed amendments under Head 9 which give effect to Articles 7-9 of the Directive except for the proposed subsection 11 which provides that:

“The reporting person shall cooperate, where required, with any investigation or any other follow up procedure initiated in accordance with the proposed section 6(9)(d).

This subsection is vague as to what type of cooperation is envisaged. Further, the consequences for such a failure are also unclear.

Head 10 of the Bill seeks to amend section 7 of the PD Act which provides for a disclosure to a prescribed person. Again, the Council approves of the proposed amendments under Head 10 which give effect to Articles 10-14 of the Directive except for the proposed subsection 5 which is similar to the proposed subsection under Head 9 (11).

Head 12 of the Bill seeks to amend section 10 of the PD Act which provides for disclosures in other cases. It does so by an entire substitution of the section to give effect to the Directive’s requirements for a public disclosure as set out in Article 15.

The Council approves of the entire substitution of section 10 as proposed in the Bill given the significant divergences between the PD Act and the Directive.

Submission:

8. The Council approves of the Bill’s general approach in Head 9 and 10 but is concerned about the ambiguity within the proposed sections 6(11) and 7(5) which would benefit from greater clarity as the Bill progresses onwards.

7. Protected Disclosures Office

The Council approves of the establishment of the Protected Disclosures Office (“the Office”), the position of the Director of the Protected Disclosures Office (“the Director”) and the functions of said officeholder.

The Council believes that it is in the interests of an efficient and whistle-blower friendly regime to have such an Office. The Council strongly approves of the functions of the Office in transferring a protected

disclosure to a suitable authority as defined at Head 17 (3). Further, the default position of the Office/Director examining a protected disclosure if a suitable authority cannot be identified is also endorsed.

Submission:

9. The Council supports the creation of the Protected Disclosures Office.

8. Support Measures

An important principle flowing from the Directive is the concept of a reporting person making an informed decision on whether to report/disclose. Another guiding principle is the tackling of barriers that confront potential reporting persons.

These principles can be seen through Recital 59, 75, 89, 99 and Article 20 of the Directive.

The Bill provides at Head 10 (10 – 14) for commendable procedures in respect of protected disclosures to prescribed persons. Head 22 then goes on to provide for support measures to be provided by the Minister. It is unclear whether it is envisaged that such support measures will include legal aid and psychological support in the form of specific and individualised support to reporting/disclosing person or a potential reporting/disclosing person.

Arising out of the serious public interest in the uncovering of wrongdoing by whistleblowers, the Council is of the view that the Bill's support measures ought to expressly include the provision of legal aid and psychological support. In line with Article 20(1)(c) and 20(2) of the Directive and the Recitals cited above, this type of support will guarantee specific and individually tailored advice to a potential reporting/disclosing person or an actual reporting/disclosing person. Thereafter, it will provide for ongoing professional and personal support if such support is required.

Submission:

10. The Council recommends for the provision of legal aid to certain persons making or contemplating making a protected disclosure given the complexity and sensitivity of this area. Further, the Council views the provision of legal aid and psychological support as consistent with the ethos of the Directive which seeks to empower would be reporting persons into making a fully informed decision as to whether they will make a report/protected disclosure and for them to be supported thereafter.