THE BAR OF IRELAND

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Submission by Council of The Bar of Ireland to the Department of Public Expenditure and Reform on the transposition of the EU Whistleblowing Directive [Directive (EU) 2019/1937]

July 2020

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 2,170 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

The Council would like to acknowledge the contribution of the Employment Bar Association who prepared this submission on behalf of the Council. The Employment Bar Association (EBA) is an association of Senior and Junior Counsel who are members of The Bar of Ireland, and who specialise in employment, equality and labour law in litigation and in advising and supporting employers and employees in resolving workplace disputes. The members of the EBA regularly appear before the WRC, the Labour Court and the ordinary Courts of Ireland representing employees and employers in respect of workplace disputes.

On behalf of the Council, the EBA welcomes the opportunity to provide submissions to the Department of Public Expenditure and Reform (DPER) in response to its public consultation on the transposition of Directive (EU) 2019/1937 of the European Parliament and the Council of 23 October on the protection of persons who report breaches of Union law (commonly referred to as the "EU Whistleblowing Directive"). The following observations are provided in response to the questions asked in the Consultation document prepared by DPER, and specifically in response to the discretionary measures which may be introduced by Member States.

Question 1

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

Answer

This is an extremely difficult question to answer. On the one hand if people wish to make anonymous disclosures of wrongdoing then as a general principle that must be encouraged. However, it is important to draw clear distinction between encouraging anonymous complaints and to having in place systems to ensure the confidentiality of the discloser. It is our belief that anonymous allegations are often given less credence and regarded somehow as being likely to be malicious and false merely because they are anonymous. There are also other issues which arise in that if one accepts anonymous disclosures then it must follow that the makers of those disclosures have to be protected and given the same protections as to someone who is known at least to the recipient. How is that to be itself monitored?

The acceptance of anonymous disclosures raises a number of issues, including the following:

- The fact that a disclosure is anonymous does not of course stop either the recipient, or other parties who become aware of it, seeking to ascertain who the discloser is or even guessing as to who the person might be from the surrounding facts.

- Secondly it is clearly much more difficult to investigate an anonymous disclosure in circumstances where it is not possible to put questions to the discloser to elicit further information or to clarify matters within the disclosure.

- Thirdly, the fact that the discloser is anonymous then it is very difficult, if not impossible, to put in place appropriate protections for that particular person.

- There is a natural tendency, in our view, that anonymous disclosures are treated less seriously, generally speaking, on the basis that people might say "if it is worth saying its worth saying out loud".

- Finally, it seems to us that the receipt of anonymous disclosures might give rise to Data Protection issues and that would have to be carefully considered and further that the acceptance of anonymous disclosures might on the one hand lead to most or every discloser seeking anonymity from the start and further, and perhaps more importantly, it might encourage, even a small number, of malicious complaints.

On balance, we are of the view that whilst the acceptance of anonymous disclosures is probably beneficial, there are risks and down sides and accordingly we would suggest that very careful consideration be given to perhaps introducing a system whereby anonymous disclosures are only accepted if given to a nominated authority (e.g., a minister or a regulator) and are made in writing and perhaps by email, or if made internally, is made in writing. Systems might be considered where there may be some method of securely communicating electronically with anonymous disclosers. Further, serious consideration would have to be given to the use of "hotlines" where employees are encouraged to "speak up". We are aware that such systems are already in place and they are undoubtedly useful where the disclosure is in relation to the wrongdoing of the corporate entity. They do, however, in our view, become more difficult when the wrongdoing is alleged against another individual. These issues also give rise to concerns about the ability of the recipient of a disclosure to fully comply with the well-established rules relating to constitutional justice and fair procedures in investigating wrongdoings by individuals, including and in particular employees. In summary, we are of the view that this matter requires much more careful analysis and study and could not be dealt with simply in a line of text in legislation and would require detailed statutory based procedures and protections, not only for disclosers, but also for victims of malicious anonymous disclosures.

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?

Answer

Having regard to the smaller population in Ireland relative to the majority of other Member States and the fact that there are a significant number of active small entities in this jurisdiction, the Council and the EBA consider that private entitles with less than 50 employees should not be exempt from the obligation to establish internal reporting channels and procedures. In light of the principle of encouraging the reporting of breaches of domestic and/or Union law that are harmful to the public interest, it is important not to exclude significant number of entities from the obligation to have proper reporting procedures. The CSO publication regarding business in Ireland in 2017 (published in December 2019) analysed enterprise and employment across five sectors as follows:- Industry, Construction, Distribution, Services and Financial & Insurance. That analysis concluded that micro enterprises (those with less than 10 employees) and small enterprises (those with 10-49 employees) accounted for 98.6% of all active enterprises across the five sectors in 2017. Further, micro and small enterprises accounted for 48.6% of all employees engaged in enterprises in the five sectors in 2017.

In recognition of the administrative burden and expense in establishing internal reporting channels and procedures and the fact that many small enterprises do not engage in activities with a public risk element, the Council and the EBA do not consider that the requirement should extend to all private entities with less than 50 employees. It is submitted that it would be appropriate to limit the private entities subject to the requirement to have internal reporting procedures. The Council and the EBA consider that the nature of the activity being carried out by the private entity is relevant both to assess any public interest risks and to encourage those employed in higher risk sectors to report breaches of Union law. The Council and the EBA would recommend that private entities with fewer than 50 employees that are subject to external regulatory/licencing requirements, where those entities are engaged in activities which pose a risk from an environmental and/or public health perspective, should be included. Alternatively, the cut-off point might be measured in turn-over rather than employee number.

It should be noted that pursuant to Article 3, Rule 1 of the Directive, the exemption of small and micro enterprises from the obligation to establish internal reporting channels does not apply to private enterprises which are already obliged to establish internal reporting channels by virtue of specific Union Acts. This includes certain regulations and directives which apply in the area of financial services (including the prevention of money laundering and terrorist financing) transport safety and protection of the environment. Further, even if there are no mandatory reporting requirements already in place, Article 8, Rule 4 provides that the 50 employee threshold does not apply to entities within the scope of specified Union Acts which apply to certain financial services, transport safety and protection of the environment.

Despite the fact that the Directive does include certain entities with fewer than 50 employees as being subject to internal reporting requirements, the Council and the EBA is of the view that the Directive may not be sufficient to capture all micro and small enterprises engaged in activities with an environmental/public health risk in an Irish context.

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?

Answer

The preamble to the Directive states that the reporting channels should enable persons to report in writing and submit reports by post, by physical complaint forms, through an online platform, to report orally, by telephone hotline or other voice messaging system, or both. It also states that such channels should also enable reporting by means of physical meetings, where requested, within a reasonable timeframe. The Council and the EBA considers that this process should not be excessively prescriptive and should allow for reporting orally, in writing or, upon request, at a meeting.

The preamble recognises that in smaller entities, the designated person to receive report could be a dual function held by a company officer who could report directly to the organisational head, such as a chief compliance or human resources officer.

The Council and the EBA considers that the requirement for follow-up, so that the reporting person is informed within a reasonable timeframe (not exceeding three months) about the action envisaged or taken as follow-up to the report, should apply to entities with fewer than 50 employees. Where the follow-up is still being determined after the three month period has elapsed, the reporting person should be informed about this and about any further feedback to expect.

The relevant entities must provide information on the internal procedures as well as on external reporting procedures to relevant competent authorities. It is essential that such information be clear and easily accessible, to employees and others who come in contact with the entity through their work-related activities, such as service-providers, distributors, suppliers and business partners. This could be achieved by such information being posted at a visible location and on the company website accessible to all such persons and on the website of the entity, and could also be included in training courses:

Suggested minimum requirements for draft procedures for internal reporting and follow-up

The procedures for internal reporting and for follow-up shall include the following:

(a) internal reporting to a designated person;
(b) channels for receiving the reports in writing, orally or upon request, by meeting;
(c) acknowledgment of receipt of the report to the reporting person within 21 days;
(d) the designated person will follow up on the reports and where necessary, ask for further information from, and provide feedback to, the reporting person;

(e) a reasonable timeframe to provide feedback, not exceeding three months which can be extended for further follow up where appropriate; and

(f) provision of clear and easily accessible information regarding the internal procedures for reporting and also reporting externally.

Question 4

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

Answer

For the same reasons as above, the Council and the EBA would not recommend that public sector bodies with fewer than 50 employees should be exempt. The Council and the EBA consider that the nature of the activity being carried out by the public sector is relevant both to assess any public interest risks and to encourage those employed in higher risk sectors to report breaches of Union law. The Council and the EBA expects that there may be very few public sector entities that have fewer than 50 employees.

Question 5

Should Ireland provide that municipalities (local authorities in the Irish context) can share internal reporting channels?

Answer

Having regard to the manner in which local authorities operate in this jurisdiction, the Council and the EBA would not recommend that local authorities share reporting channels. Members of individual local authorities are elected from local electoral areas which are contained in a specified statutory instrument for each local authority area. In practical terms and to ensure consistency across the local authorities, the reporting channels should encompass the same or a similar process but should not be shared between the authorities.

Question 6

Section 7 of the Protected Disclosures Act provides that the Minister for Public Expenditure and Reform can prescribe any person by reason of the nature of their responsibilities to receive reports of wrongdoing. This is similar to the approach taken in other countries with whistleblower protection legislation, such as France and Latvia. Some countries, such as the Netherlands, have a single competent authority that receives reports and either refers them on appropriate authorities for follow up or follows up itself. Should Ireland continue with the current approach to designating competent authorities or should an alternative model be considered? Please provide reasons for your answer.

Answer

It is considered that the creation of a single competent authority that receives reports and refers them on to the appropriate authorities for follow up is an unnecessary administrative layer, adding unnecessary time and expense to the follow-up process.

In circumstances where the subject matter of many protected disclosers will inevitably have to be referred to regulatory, statutory, or specialised bodies for substantive follow-up, a single competent authority is unlikely to be in a position to adequately follow-up on the subject matter of many such disclosures. Even if such a body were to be tasked with such a role, the resources needed to create such a broad-ranging investigative capacity are likely to divert resources from existing bodies which already have the experience and expertise to follow-up on disclosures in their areas of responsibility.

The Council and the EBA consider that rather than a new administrative referral body being created, the Government should streamline and codify the referral process to prescribed persons, expand the range of statutorily prescribed persons if necessary, and ensure such persons are adequately resourced to carry out their investigative role under the Protected Disclosures Act, 2014. The prescribed persons contact details and email address should be more easily available for reporting persons.

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:

Considering the potential confidentiality, data protection, and other privacy concerns regarding the subject matter of certain protected disclosures, the Council and the EBA recommend that the communication of the final outcome of investigations to disclosers should be limited to formal written correspondence outlining the specific outcomes of the relevant investigations, as delineated by the particular scope of each such investigation.

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

It is agreed that Ireland should provide that competent authorities may close or prioritise reports received in circumstances where the reported breach is clearly minor and does not require further follow-up pursuant to the Directive, other than closure of the procedure; 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; and 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.

The Council and the EBA believe this discretion granted to competent authorities will allow for the efficient use of time, resources and costs in processing protected disclosures.

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.

Answer

The Council and the EBA believe that Transparency International Ireland, or some other appropriate non-governmental authority, should continue to provide its services in relation to protected disclosures with an emphasis on creating widespread public awareness of its existence. In addition, a dedicated section for protected disclosures should be created on its website in plain English, Gaeilge and other appropriate languages to provide information and explain its services to promote access to law and the legal system for all.

The Council and the EBA hold no particular view in regard to psychological support as it is outside our professional remit.

We are aware that reporting persons can obtain legal aid through the Legal Aid Board and legal advice through the Free Legal Aid Centre. In bolstering access to legal advice, the Council and the EBA are happy to invite Transparency International Ireland or any other suitable non-governmental body to join The Bar of Ireland's Direct Professional Access Scheme (DPA). The Scheme allows members of approved professional bodies to instruct barristers directly without going through a solicitor for legal opinions. It should be noted that the Scheme does not extend to contentious matters (for example, court appearances) but only legal opinion.

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

Under the Protected Disclosures Act, 2014 there are two principal mechanisms for providing for effective, proportionate and dissuasive penalties. First, there are the various "employment" protections, including the enhancement of the compensation pursuant to the provisions of the Unfair Dismissals Act, 1977 and the other remedies available under the 2014 Act itself. In relation to effective and dissuasive penalties, we are of the view that modifications are appropriate. It is likely that the transposition of the Directive will result in a widening of the persons who will enjoy protection, including

to persons who are self-employed, perhaps directors and others who are clearly not "employees" even if they are "workers".

We are of the view that the protections afforded in respect of employees are appropriate, however, we think that the transposition of the Directive also gives an opportunity to strengthen the effectiveness of the remedies and penalties under the Act. The increase of the maximum compensation under the Unfair Dismissals Act to five years remuneration is in our view largely irrelevant. The Unfair Dismissals Act provides that compensation is limited to compensation for "actual loss" and a dismissed employee is under an obligation to mitigate that loss whether by finding alternative employment of otherwise. The number of maximum awards under the Unfair Dismissals Act for "ordinary" dismissals in the 43 years of the existence of that Act are very few in number. We believe this is largely because of the inability over the years for employees, except in the rarest of cases, to prove that they would suffer a loss equal to or greater than two years remuneration. It is virtually impossible to envisage a case where an employee dismissed by reason of making a protected disclosure will be able to prove a loss of five years and therefore, we are of the view that that remedy is little more than wholly illusionary.

We are of the view that the quantum of award that might be made, not only under the Unfair Dismissals Legislation, but for other forms of detriment caused to whistleblowers, should be substantially increased and should be awarded on the basis of what is "fair and equitable" rather than based on some measure of proof of actual loss. Support for this type of award can be found in this jurisdiction particularly pursuant to the Employment Equality legislation and accordingly, we would suggest that the Irish legislation needs to be amended so that the penalties and remedies are in reality effective and dissuasive. We are of the view that the present penalties/remedies do not meet the appropriate test.

The second remedy currently available is pursuant to the provisions of Section 13 of the Act of 2014 which provides for a person initiating an action in tort for suffering detriment because of the making of a protected disclosure. We think that this is an appropriate mechanism for dealing with non-employees and we are also of the view that employees should not be limited to taking actions in the employment sphere and we would recommend that a jurisdiction be given to the Circuit Court with either unlimited jurisdiction or a very high limit to deal with claims made by employees and non-employees. Again, under the Employment Equality legislation such a jurisdiction, unlimited, resides in the Circuit Court for claims made by reason of discrimination on the gender ground and we are of the view that the development of that jurisdiction would be appropriate.

It is our belief that in reality the present penalties are not effective or proportionate and most definitely not dissuasive. In this regard the confidential hearing (behind closed doors) at the first stage under the employment process eliminates all dissuasiveness and we are of the view that a first stage jurisdiction in the Circuit Court would resolve these difficulties.

Optional Question A

The personal scope set out in Article 4 of the Directive – in particular the requirement to protect and to facilitate reporting by: suppliers, board members, shareholders, unpaid trainees, volunteers and persons whose work-based relationship has yet to begin.

Answer

We note board members, shareholders, unpaid trainees and volunteers are protected by Article 4 (1)(c); any persons working under the supervision and direction of contractors, subcontractors and suppliers are protected by Article 4 (1)(d); and persons whose work-based relationship is yet to begin are included in Article 4 (3). It is submitted that all categories of persons contained within this question deserve the protection of the Directive in Ireland where they make a protected disclosure. Such protections act as a deterrent to the potential negative ramifications and retaliation in response to a protected disclosure for workers and also to working and volunteer relationships.

Optional Question B

How disclosures by workers in public bodies to a relevant Government Minister under Section 8 of the Protected Disclosures Act should operate in light of the requirements of the Directive.

Answer

No submission is made in relation to the question.

Additional submission on Public Interest

We note the reference in the Directive to "public interest" such as that in Recital 1. We further note that the long title to the Protected Disclosures Act 2014 is in the following terms:

> *"An **Act** to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes."* [emphasis added]

Other than that reference in the long title nothing in the Act in any way defines or limits information or a disclosure as having to have a public interest element.

We are of the view that Protected Disclosures should not be limited only to disclosures made which have a public interest element. It is clear that whilst many of the well known whistleblowing issues which have arisen in this jurisdiction have a public interest, we are equally aware, from our members who work in this area, that not all Protected Disclosures, particularly those in private employment, necessarily have a public interest. We note that the definition of protected disclosures within the Act of 2014 includes at paragraph 5(3)(b) that a "wrongdoing" includes:

> "*that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services"*

Whilst accepting that there may need to be amendments of this provision in respect of new categories of persons enjoying the protection in relation to contractual relationships between them and the subject of their disclosure, we are of the view that there should be no requirement that there be an

overall public interest element. It is not difficult to envisage situations where a wrongdoing, that is the failure to comply with a legal obligation, might not have a public interest but yet it would be in the interest of society as a whole that such wrongdoing is brought to the attention of the appropriate authorities.

We are of the view that the insertion of a public interest requirement in the text of the legislation is unnecessary and would simply lead to a new test which would have to be met by a discloser that there was a public interest. Is that test to be subjective or objective? Is it sufficient for the discloser to reasonably believe that it was in the public interest? We are of the view that the purpose of the legislation is not enhanced by requiring an express public interest provision in circumstances where the purpose of the legislation should be wider, not only to protect the public interest but also generally to protect employees and others who observe wrongdoing and who wish to bring that to the attention of the appropriate authorities.

Conclusion

We would like to take this opportunity to thank DPER on behalf of all of our members for inviting our submission in response to the public consultation on the EU Whistleblowing Directive. We welcome any further queries that you may have on the issue.

EMPLOYMENT BAR ASSOCIATION

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