**Whistleblowing protection in the EU - Learning from Ireland’s experience – John Devitt**

Dear members of the Standing Committee on Home Affairs, thank you for your invitation to take part in the roundtable discussion on the transposition of the EU Directive. I will try to briefly set out some of the lessons that can be drawn from Ireland’s experience in protecting whistleblowers and what we should expect from the transposition of the EU Directive later this year.

Before I do so, I should explain the role my organisation plays in supporting workers in Ireland and the background to the legislation.

[Transparency International Ireland](http://www.transparency.ie) has been campaigning for whistleblowing protections for over a decade and lobbied for and advised the Government on what became the [Protected Disclosures Act](https://revisedacts.lawreform.ie/eli/2014/act/14/front/revised/en/html) (‘the PDA’) in 2014. It operates Ireland’s freephone [Helpline](http://www.speakup.ie) for whistleblowers and works alongside its partner charity, the [Transparency Legal Advice Centre](https://transparency.ie/helpline/TLAC) in providing access to legal advice to workers making disclosures under the PDA. It also manages [Integrity at Work](http://www.integrityatwork.ie), a programme aimed at helping employers create safer working environments for people to speak up. To date, almost 2,000 people have been advised by the Helpline; over 30 organisations including the Irish police and security services are participating in Integrity at Work; and free legal advice valued at almost €1 million has been provided to workers making disclosures under the PDA.

In spite of the many benefits of whistleblowing, we know whistleblowers often pay an enormous price for speaking up. Too many examples illustrate the financial, psychological toll and the risks that whistleblowers bear to their livelihoods and sometimes their lives for speaking up.

The purpose of any whistleblowing law is therefore to help protect whistleblowers from reprisal and see that any information shared in the course of blowing the whistle is acted upon without undue delay. To this end, the Oireachtas (Ireland’s parliament) enacted the PDA – a law that is considered to be very strong by international standards. It was drafted with the support of TI Ireland and others and drew from [TI’s International Principles for Whistleblowing Legislation](https://www.transparency.org/en/publications/international-principles-for-whistleblower-legislation) as well as guidance and legislation from comparable jurisdictions such as the UK and New Zealand.

The PDA covers all workers, regardless of whether they are in the private, public or not-for-profit sectors, and allows a wide range of wrongdoings to be reported. These include crime, health and safety issues, the improper use of public money and the cover-up of wrongdoing.

It also sets out a framework of disclosure options based on the ‘stepped disclosure regime’; seeks to shield the identity of the whistleblower by imposing obligations on recipients of disclosures to maintain confidentiality; and minimises the risk of adverse legal proceedings by offering immunity against civil and criminal proceedings for workers making disclosures as set out under the Act. In addition, it provides remedies if a worker suffers as a result of speaking up. These include a right for employees to claim unfair dismissal and for anyone to sue for damages if they suffer loss as a result of a protected disclosure having been made – even by a third party such as a colleague.

Despite the comparative strength of the PDA, the body of case law developing since 2014 is still relatively small. We have analysed those cases, summarised and made recommendations which are available in TI Ireland’s [Speak Up Reports](https://www.transparency.ie/resources/whistleblowing) for 2017 and 2020. However, and notwithstanding the comprehensive protections provided for in the Act, it is difficult to conclusively evaluate the impact of the legislation.

Firstly, there are numerous extraneous factors that will determine whether someone suffers penalisation as a result of blowing the whistle. These include working environment and culture, the compliance risk appetite of an employer, industry risk profiles, an employer’s reputational exposure, organisation size, remote working practices, existing HR systems, internal whistleblowing procedures, the quality of whistleblowing policies, as well as the availability of training and education for disclosure recipients and employers. Another determinant will be the response of the recipient to the disclosure and the speed with which they act on the concern.

While we are seeing many more whistleblowing cases in the courts and covered by the media, one of the most important factors influencing the outcome in such cases is the will and ability of the employer or external regulator to act on the concern raised. It is more likely that a worker will suffer reprisal where their disclosures are not treated seriously, and this is supported by data from surveys conducted in [Ireland](https://www.transparency.ie/sites/default/files/18.01_speak_up_2017_final.pdf), the US and UK which points to the deterrent effect a fear of futility will have on prospective whistleblowers.

It is for that reason that an obligation to act and report on action taken is essential and the test of any legislation will be set by how employers and regulators respond to reports of wrongdoing not just by their words of encouragement.

Many of our recommendations will be addressed in the forthcoming amendment of the PDA as Ireland transposes the EU Directive later this year. These include reversing the burden of proof in cases of penalisation, meaning the employer must show that any alleged detrimental action was justified.

The Government recently set out the likely reforms in a [General Scheme for the Protected Disclosures Amendment Bill 2021](https://www.gov.ie/en/press-release/d263a-minister-mcgrath-publishes-general-scheme-of-protected-disclosures-amendment-bill/) which we have broadly welcomed. However, there are a number of issues that might be worth considering.

Not least of these is the proposal that in most cases, public sector workers will have to report to their employer before reporting to a government minister. Currently, such workers have a right to report directly to a minister and the removal of such a right will mean that they are no longer protected other than in very limited circumstances.

We could also see fewer anonymous disclosures investigated if the Government’s proposal to provide an exemption to recipients of disclosures not to act on anonymous concerns is included in the legislation. Likewise, a de minimis interpretation of the Directive could mean that all entities, including charities and companies with fewer than 50 staff, will be free from the requirement to establish or make their workers aware of reporting channels or procedures.

I am sure Ireland is not alone in proposing measures that could lead to the weakening of existing rights and safeguards. Many of these proposals stem largely from a literal rather than a purposive interpretation of the Directive. To understand the purpose of the Directive we need to understand the context in which it was drafted. It was heavily influenced by prevailing public controversies such as LuxLeaks that had highlighted the role of whistleblowing in protecting the public interest. Another important factor was the passage of whistleblower laws in France, Ireland and the Netherlands that showed European policymakers the promise of such legislation.

These member states set an example for the rest of the EU to follow. However, we are in danger of weakening those standards by moving towards a lowest common denominator. While the Directive could only oblige states to introduce measures under which it has legal competence, it makes it clear that national governments must not weaken existing safeguards while encouraging them to go beyond the protections set out in the text. It is essential therefore that the transposition process be used as an opportunity to build on the work done to make whistleblowing safeguards clear, comprehensive and supported by the resources necessary to make them fit for purpose.