An Roinn Caiteachais
Phoiblí agus Athchóirithe
Department of Public
Expenditure and Reform

Statutory Review of the Protected Disclosures Act 2014

July 2018

Foreword

We are pleased to publish this statutory review of the Protected Disclosures Act 2014.

The Act is part of a wider set of government and legislative reforms implemented in recent years to support and strengthen integrity, fairness and openness in Irish society, including the extension of the Freedom of Information Act and the Regulation of Lobbying Act.

The purpose of the Act is to create an environment where workers in the public, private and not-for-profit sectors can be confident that they can speak up about wrongdoing without fear of reprisals. The Act provides for a range of channels – internal, regulatory and external – by which workers may voice concerns and a broad range of wrongdoings can be reported. The Act safeguards the broadest possible range of workers from dismissal or other forms of occupational detriment as a result of making a disclosure.

It is now four years since the Act was signed into law and, in accordance with section 2 of the Act, this review of its operation has been prepared for submission to the Houses of the Oireachtas. We welcome this opportunity to take stock of the impact of the Act, to see how it is working in practice and to see what issues and challenges it presents for workers and employers. The review of the Act also forms part of the suite of measures announced by the Government in October 2017 that are aimed at strengthening Ireland's response to corruption and white-collar crime.

In response to the public consultation process that formed part of the review, a total of 25 submissions were received, including submissions from public bodies, interest groups and members of the public. We would like to formally thank those who made submissions under this process for their valuable contributions. We would also like to thank the various stakeholders, public bodies and staff of the Office of the Attorney General who provided valuable input, support and advice to us and our officials in preparing this review.

Overall, we believe that the review shows that the Act is having a positive benefit for Irish society. The year-on-year increase in the numbers of disclosures made shows that workers feel more confident to speak up about wrongdoing. A number of key cases at the Workplace Relations Commission and the Labour Court show that the Act is protecting workers who have suffered reprisals. Of course, the review has also raised a number of issues that we will endeavour to address.

We are pleased to see that the Act has been well-received internationally and is regarded as a model of best practice for other countries to follow in implementing whistleblower legislation. In particular, we welcome and support the recently published proposals for an EU Directive for the protection of whistleblowers and note that the approach the European Commission has taken strongly mirrors the approach taken in the Irish legislation.

One of the key questions that we must consider in a review of this type is whether any amendment to the legislative framework is required. In this regard, any proposals for changes must be considered in light of the Commission's proposed Directive in this

area. Accordingly, we believe that the best approach at this time is to wait for the text of the Directive to be finalised and adopted and any changes to the Act that may be required can be considered as part of the process of transposing the Directive.

Finally, we would like to take this opportunity to pay tribute to the people most impacted by this legislation – those brave whistleblowers whose heroic actions have lifted the lid and shone a light into the dark corners where misconduct, malfeasance and other wrongdoings have lurked in Irish society. We thank you for the great service you have done for your country.

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Minister for Public Expenditure and Reform

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Section 1 of the Review is introductory and sets out the background to the development and preparation of the Protected Disclosures Act. It surveys the political climate which let to its introduction, and the domestic and international developments which influenced its construction.

It also identifies that the purpose of the Act is to empower workers to speak up about wrongdoings without fear of reprisal, and outlines the key aspects and guiding principles of the legislation.

Section 2: Approach to the Review

Section 2 sets out the approach taken by the Department to carrying out the Review. It details the public consultation process which was carried out, and the contacts made with key stakeholders.

Section 3: Analysis of International Experience

Section 3 analyses the international developments that have taken place since the enactment of the legislation. It outlines whistleblowing legislation that has been introduced in other EU Member States, including comparisons between these and the Protected Disclosures Act. It shows how the Act has been viewed internationally in a positive light and cited as an example.

It also refers to the recently published Proposal for an EU Directive relating to whistleblower protection, which will be negotiated over the coming year.

Section 4: Results to date

Section 4 outlines the results of the implementation of the Act over its first years of operation, analysing data taken from annual reports of public bodies under the Act, the findings of Transparency International Ireland's Speak Up Report, and the outcomes of cases in the Workplace Relations Commission and the courts.

This analysis indicates that the impact of the Act has been broadly positive to date, but that further work is required in terms of awareness raising.

Section 5: Analysis of Submissions

Section 5 analyses the issues raised in the submissions received under the public consultation process, and outlines the Department's response to these issues. The points raised were categorised under the following thematic areas:

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- Interaction with sectoral provisions and policies elsewhere
- Use of a number of Disclosure channels
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- Interaction with sectoral Acts
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Section 6 consists of the conclusions of the Review. It summarises the current situation in relation to the implementation of the Act, and sets out the Review's conclusions in relation to the issues raised under the public consultation process.

It notes that the Act is a framework piece of legislation, drawing on international best practice, and that many of the issues raised related to challenges around the implementation of the Act, rather than the Act itself.

Amendment of the Act is not recommended at this juncture, with the exception of the restriction of protections introduced by way of Regulation by the Department of Business, Enterprise and Innovation where trade secrets are concerned to comply with the Trade Secrets Directive. The report notes that further action is required in some areas, and that amendment to the Act is likely to be required in due course to transpose the EU Directive, once the negotiation process has been completed.

Section 1: Introduction

1.1 Background

Whistleblowers play an important role in exposing corruption, fraud, mismanagement or other wrongdoing helping to save public funds and prevent emerging scandals and disasters. There is an increasing consensus that protecting whistleblowers from unfair treatment can encourage people to come forward to report wrongdoing and bring to light matters of legitimate public concern.

In the everyday context of the workplace, the effective protection of whistleblowers contributes to a healthy organisational culture in that workers are aware of how they may report wrongdoing and have confidence in the protection and follow up procedures that are in place. Whistleblower protection reinforces accountability and integrity in both public and private institutions by encouraging reporting of wrongdoing. This, in turn, helps create an environment of trust and tolerance and enhances the capacity of society to respond to wrongdoing and matters of public concern. In the past decade, many countries have sought to adopt, or have adopted, legal protections for whistleblowing.

While attempts had been made over the years to introduce a general whistleblowing measure in Ireland, in March 2006 the Government decided instead to pursue a sectoral approach towards whistleblowing and to include, where appropriate, "whistleblowing" provisions in future draft legislation. Accordingly, provisions were introduced, for example, in the Health (Amendment) Act 2007, the Communications Regulation (Amendment) Act 2007 and the Charities Act 2009. While many of the statutes provided strong protections in specific areas of employment, there was a lack of consistency between them, as well as significant gaps in both the level of protection provided and the sectors which were covered.

The Programme for Government agreed between Fine Gael and Labour in March 2011 contained a number of reform commitments in the political and governmental sphere. Among these measures, which included the extension of the Freedom of Information Act and the introduction of legislation on lobbying, was a clear commitment to the introduction of whistleblower legislation. The decision to develop the Protected Disclosures Act 2014 was influenced by a range of political and economic developments, both internal and external, as well as the impact of individual cases on the public consciousness and an increasing public awareness of the valuable role played by whistleblowers in raising issues of public concern.

1.2 Purpose and key aspects of the legislation

The Protected Disclosures Act commenced on 15th July 2014. The purpose of the Act is to empower workers to speak up about wrongdoings (as defined in Section 5(3) of the Act) without fear of reprisals from their employer or any third party. The Act has wide application across the economy and encompasses workers in the public, private and not for profit sectors.

The Act provides a broad definition of 'wrongdoings' designed to expose corruption, fraud, mismanagement and other malfeasance. 'Wrongdoings' include the commission of criminal offences, failure to comply with legal obligations, endangering

the health or safety of individuals, damaging the environment, miscarriage of justice, misuse of public funds, and oppressive, discriminatory, grossly negligent or grossly mismanaged acts or omissions by a public body. The definition also includes the concealment or destruction of information about any of the above wrongdoings. Wrongdoings may be occurring or suspected to be occurring either inside or outside of the country. Even if the information is proved to be incorrect, the Act still protects the discloser provided he/she had a reasonable belief in the information.

The Act provides a number of disclosure options, as well as remedies in the event of adverse treatment following the making of a disclosure. The disclosure options are set out in a "stepped" system, with the simplest being for disclosures to be made to the employer, where all that is required is a reasonable belief that the information disclosed shows or tends to show that the wrongdoing is occurring. A person who is or was employed in a public body may choose, as an alternative, to make the disclosure to the relevant Minister. Disclosures may also be made to one of the prescribed bodies listed in SI 339/2014, as amended by SI 448/2015 and S.I. 490/2016. In general, these bodies have regulatory functions in the area which are the subject of the allegations. A disclosure may also be made to an external person, for example a journalist, if it meets a number of conditions as set out in the Act. A disclosure is assumed to be protected until the contrary is proved. Under the Protected Disclosures Act, it is the employer who has to prove that the disclosure is not protected within the meaning of the Act.

The Act provides for redress for employees who are penalised because they made a protected disclosure; for example, dismissal, unfair treatment or threats of reprisal. If a discloser is penalised or threatened, he/she may make a complaint to the Workplace Relations Commission. A discloser who is dismissed from employment because of making a protected disclosure may make a claim for unfair dismissal and, if the claim succeeds, may be awarded compensation of up to five years' pay. (Generally, the maximum compensation in unfair dismissal cases is two years' pay). Unfair dismissal protection does not generally apply to employees with less than one year's service, but these restrictions do not apply where the dismissal is because of making a protected disclosure. Motivation for making a protected disclosure may affect the level of compensation awarded. If the investigation of the wrongdoing was not the only or main motivation for making the disclosure, then the compensation awarded may be up to 25% less than it would otherwise be.

The Act provides for immunity from civil actions for damages, with the exception of defamation cases where a defence of qualified privilege is provided. A discloser may sue a person who causes detriment to them because they made a protected disclosure. If a discloser is charged with unlawfully disclosing information, it is a defence that they were making what they reasonably considered to be a protected disclosure.

The Act also requires all public bodies to put in place procedures for dealing with disclosures.

1.3 Preparation of the legislation

When developing the legislation, the Department had regard to international best practice relating to whistleblowing protection, as reflected in reports and resolutions such as:

- The United Nations Convention Against Corruption (UNCAC) adopted in December 2005 and ratified by Ireland in November 2011, which requires in Article 33 that "*Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention*";

- The draft principles developed by Transparency International in 2009[1] to assist legislators with developing whistleblower legislation;

- The Resolution no. 1729 of 29 April 2010 passed by the Parliamentary Assembly of the Council of Europe, inviting all Member States to review their legislation concerning the protection of whistleblowers, keeping in mind a number of guiding principles;

- The commitment in point 7 of the G20 Anti-Corruption Plan of November 2010 to G20 countries enacting and implementing whistleblower protection rules by the end of 2012;

- The publication by the OECD in 2011, at the request of the G20 Leaders, of a study on "Whistleblower Protection Frameworks – Compendium of Best Practices and Guiding Principles for Legislation"[2].

Legislation in other jurisdictions was also considered, in particular the UK's Public Interest Disclosure Act 1998 and the New Zealand Protected Disclosures Act 2000, both of which featured an overarching legal framework for reporting in all sectors of the economy.

A collaborative approach was used involving wide consultation with stakeholders. The draft Heads of the Bill were published on 27th February 2012, with a view to informing the public debate on the issue of whistleblowing. The Joint Committee on Finance, Public Expenditure and Reform engaged in a series of public hearings to discuss the proposals with presentations heard from the Irish Congress of Trade Unions (ICTU), the Irish Business and Employers Confederation (IBEC) and Transparency International Ireland, among others. These bodies also made submissions to the Department on the draft legislation. Following the submission to the Minister of the Committee's pre-legislative scrutiny report on the Bill, further consultation meetings were held by the Department with ICTU, IBEC, the Irish Human Rights Commission and others. The issues raised as a result of this process were important considerations in the further drafting of the Bill.

Additionally, in March 2012 the Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments (the Mahon Tribunal) was published. The Report made several references to whistleblowing in the context of the corruption allegations investigated by the Tribunal, including the statement that "*whistleblower protection plays an important role in the detection of corruption offences … the protection offered to prospective whistleblowers should be as robust as possible*". One of its

[1] Transparency International (2009), Recommended Draft Principles for Whistleblowing Legislation
[2] OECD (2011), *G20 Anti-Corruption Plan: Protection of Whistleblowers*

recommendations was the introduction of "*a pan-sectoral whistleblower protection act protecting all those reporting suspected offences and/or breaches of regulatory measures from any form of liability, relief and/or penalization arising from that report*".

This Report, from a Tribunal which had been investigating allegations of corruption since the 1990s, pointed to the gap that existed in Ireland's anti-corruption framework, and gave added weight to the arguments in favour of the approach contained in the Bill.

Following further detailed drafting and consultations over the ensuing months, including a comprehensive Regulatory Impact Analysis, the Bill was published in July 2013. It subsequently entered Committee Stage, in the Seanad between September – November 2013 and in the Dáil between February – June 2014. The Bill received broad support in the Oireachtas, and after a number of amendments, particularly in relation to the position of An Garda Síochána, was finally passed by the Seanad on 1st July 2014. The Act was signed into law on 8th July 2014 and commenced on 15th July.

Following enactment, to ensure safe and effective whistleblowing, the Minister published comprehensive guidance under section 21(1) of the Act for public bodies on the implementation of the Act. Public bodies are required to comply with all aspects of the Act, and the purpose of the guidelines is to assist them in the performance of their functions in this regard.

The Workplace Relations Commission also prepared a statutory Code of Practice setting out high level principles for the public and private sector on implementation (S.I. 464/2015). Further support has been provided to assist public bodies through the putting in place of two Framework Agreements to provide training and to carry out investigative and other functions. In addition, the Department provides grant funding to Transparency International Ireland to provide a free and independent Transparency Legal Advice Centre to advise potential whistleblowers and provide legal services where appropriate. A Disclosures Recipient was also appointed under section 18 of the Act to receive disclosures relating to security, defence, international relations and intelligence.

1.4 Guiding Principles

The following guiding principles informed the development of the Act through to its final form:

- The widest possible extent of worker coverage in both the public and private sectors, with an overarching, horizontal legal framework;
- A wide range of protections which can be availed of, creating an environment which encourages workers to report wrongdoings;
- Emphasis on the protection of disclosers rather than a prescriptive approach to investigations;
- Coverage of a wide scope of wrongdoing within the legislation;
- A broad range of channels for disclosure, with a "stepped" disclosure regime;

- Comprehensive redress provisions in the event of penalisation;
- The motivation of the discloser is irrelevant once their concerns are based on a "reasonable belief"- there is no "good faith" requirement.

1.5 Requirement to undertake a Review

The Protected Disclosures Act (section 2) provides that

The Minister shall—

> *(a) not later than the end of the period of 3 years beginning on the day on which this Act is passed, commence a review of the operation of this Act, and*
>
> *(b) not more than 12 months after the end of that period, make a report to each House of the Oireachtas of the findings made on the review and of the conclusions drawn from the findings.*

Accordingly, following approval by the Government, the report of the review must be submitted to the Oireachtas by 8th July 2018.

Section 2: Approach to the Review

2.1 Structure of Report

The purpose of the review is to evaluate the operation of the legislation - considering whether it is effective in terms of workers feeling empowered to speak up about wrongdoings and whether there are any improvements that could be made in terms of implementation of the Act, drawing on the submissions received in the public consultation process and considering legislative developments internationally.

Section 1 sets out the introduction, including the background to the development of the legislation and key aspects of the Act.

Section 2 sets out the approach to the review.

Section 3 considers international developments, including comparisons with the Irish legislation.

Section 4 sets out some early results of implementation of the Act.

Section 5 provides an analysis of the submissions received and the Department's response to those issues, including recommendations where appropriate.

Section 6 sets out the conclusions of the review.

The sources of information underpinning the assessment and recommendations are as follows:

- Submissions received
- Meetings held with stakeholders
- Comparison with legislation internationally
- Results to date (data from Public Bodies, Workplace Relations Commission, court cases)
- Underlying policy decisions in the development of the Act.

2.2 Public Consultation

A public consultation process was carried out from August to October 2017 to promote public debate on the Protected Disclosures Act and how the operation of it is perceived by the public, whistleblowers, public bodies, and bodies in the private and not-for-profit sector. A paper setting out the background to the review (the consultation paper) was published on the Department's website on 17th August 2017 and is appended at **Appendix 1**.

To assist with the public consultation, the Department set out key aspects of the Act that might be considered in the submissions in addition to any other points that respondents might wish to raise. The main points raised included:

- Effectiveness of the Act
- Challenges and unintended consequences
- Protections in the Act
- Definitions in the Act

- Categories of wrongdoings
- Whether there should be a threshold of seriousness of wrongdoings
- Stepped disclosure regime
- Prescribed persons
- Confidentiality provisions – balance of rights
- Whether there should be a requirement to act on disclosures or communicate with discloser
- Whether there should be a requirement for procedures in the private sector
- Whether there should be reporting requirements in the private sector
- Interaction with sectoral legislation

2.3 Advertisement

Advertisements were placed in the daily newspapers on 24th August 2017. Submissions were invited from interested parties giving a closing date for receipt of submissions of 10th October 2017.

2.4 Submissions sought from stakeholders

A number of key stakeholders (Oireachtas members, local authorities, prescribed bodies, etc.) were directly contacted in relation to the Review as follows:

The Department of Public Expenditure and Reform has now commenced the review of the Protected Disclosures Act 2014 and, as part of this review, submissions are invited from interested parties on the operation of the Act. An advertisement appeared in the Irish Times, Irish Independent and Irish Examiner today.

A paper setting out the background to and details about this review can be found on the Department's website at – Public Consultation on the Review of the Protected Disclosures Act 2014. Submissions should be forwarded to PDconsultation@per.gov.ie as soon as possible, but no later than Tuesday 10 October 2017.

In addition, all Government Departments and members of the Protected Disclosures network of public bodies were notified.

2.5 Submissions received

A total of 25 submissions were received on the consultation paper and these are available in full at https://www.per.gov.ie/en/public-consultation-on-the-review-of-the-protected-disclosures-act-2014/ . In addition officials met with some of the stakeholders to discuss their submissions. The submissions contain a range of views on the operation of the Act and these are discussed in Section 5.

Section 3: Analysis of International Experience

3.1 International Research on Protected Disclosures legislation

As has been shown, the development of the Protected Disclosures Act did not occur in a vacuum, and was influenced by developments both at home and abroad, including by legislation that had already been developed in other countries. Equally, matters have not stood still since the Act came into effect, and a growing number of countries, particularly in the EU, have introduced, or are developing, whistleblower legislation in the succeeding years.

A 2014 Recommendation of the Council of Europe's Committee of Ministers calls on Member States to put in place a "*normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, disclose information on threats or harm to the public interest*". The Irish legislation achieves this objective.

The 2016 OECD study "Committing to Effective Whistleblower Protection"[3] found that 13 of the 32 OECD countries surveyed, including Ireland, had enacted dedicated whistleblower protection legislation. Of these, eight (Ireland, the UK, Hungary, Slovakia, Israel, Japan, Korea, and New Zealand), had introduced a single overarching piece of legislation applicable to both the public and private sectors. Other countries, including France, Germany, Austria and Greece, had varying degrees of whistleblower protection included in one or more laws, but not a dedicated whistleblower protection law. A number of countries had no particular whistleblower protection provisions at that point in time.

In July 2016, Eurofound (the EU agency for the improvement of living and working conditions) assessed Ireland as being one of six EU countries (the others being Luxembourg, Romania, Slovakia, Slovenia and the UK), with "comprehensive" regulatory frameworks protecting whistleblowers. 16 countries were found to have "partial" provisions (including Belgium, Denmark, Estonia, Germany and Malta, which could be said to have a "sectoral" approach), while the remaining six had very limited or no provisions.[4]

In April 2018, the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on "Strengthening whistleblower protection at EU Level" (FN) listed Ireland as one of ten Member States with comprehensive whistleblower legislation in place (the others being France, Hungary, Italy, Lithuania, Malta, the Netherlands, Sweden, Slovakia and the UK).

3.2 Comparison with approaches taken elsewhere

Recent legislation in Sweden, the Netherlands, France and Italy is considered in brief for comparison purposes.

- In Sweden, a new Act was adopted in 2016 ("Act on special protection for workers against reprisals for whistleblowing concerning serious irregularities"). It provides

[3] OECD (2016), Committing to Effective Whistleblower Protection, OECD Publishing, Paris

[4] Eurofound (2016), *New developments in the protection of whistle-blowers in the workplace*

protection for all employees, both public and private, including temporary agency workers. It allows for various reporting channels, including internally, to an employee organisation, or externally to the public or a public authority (if it was first reported internally and appropriate action and communication with the whistleblower was not taken, or if there was another justifiable reason to do so). It provides for damages or compensation for breaches of the Act by employers, although it cannot exceed the amount provided for in general employment legislation. In cases of alleged reprisals, the burden of proof rests with the employer – the onus is on them to demonstrate that reprisals have not occurred. Any agreement that revokes or limits a whistleblower's protection is deemed to be invalid. However, a worker who by reporting irregularities becomes guilty of an offence is not protected under the Act. This legislation is similar to Irish legislation in several respects.

- In the Netherlands, the Whistleblowers Centre Act came into force in July 2016. Under the Act, an independent Whistleblowers Authority ("House of Whistleblowers") was set up to, *inter alia*, provide free and confidential advice and support to potential whistleblowers, in both the public and private sectors, and to carry out independent investigations at the request of the whistleblower into suspected wrongdoings and into the treatment of the whistleblower. Internal reporting is recommended in the first instance, and the Authority carries out investigations as a "last resort". The Act also prohibits any retaliation by the employer against the whistleblower (if the report is made in good faith), and requires all employers with at least 50 employees to draw up procedures on dealing with disclosures. A key difference in the approach taken in the Netherlands is that it has set up an independent authority for investigating protected disclosures whereas in Ireland, in view of the fact that the employer should be best placed to investigate any alleged wrongdoing, the expectation is that the employer would carry out the assessment and investigate if necessary. It was reported that after sixteen months in existence, the Whistleblowers Authority had yet to complete an investigation.[5]

- In France, an anti-corruption Law (which includes whistleblowing measures) was passed in December 2016 (known as "Sapin II"). This Law created a new anti-corruption agency, the Agence Française Anticorruption (AFA) to detect and prevent corruption in both the public and private sectors. Specifically in relation to whistleblowing, the Law contains a "good faith" requirement and excludes national security matters. It requires that the matter be raised initially with the employer, and only if no response is received within a reasonable time, a report may then be made to judicial, administrative or professional authorities. If those authorities fail to respond within a three month timeframe, there is a further provision to contact the public as a last resort. The authorities and public can, however, be contacted immediately in urgent and exceptional circumstances. The Law also precludes sanctions or discrimination against whistleblowers, and requires public and private bodies with more than 50 employees to have internal procedures. Severe sanctions (two years' imprisonment and a fine of €30,000) are provided for breaches of confidentiality. Immunity from criminal liability is also provided once the criteria of the Law are met.

[5] NRC.nl, *"Crisis in Huis voor Klokkenluiders"*, 19 October 2017

- In Italy, a new law to protect public and private sector whistleblowers was passed in November 2017. It clarifies the reporting channels to be provided, the sanctions to be applied in the event of retaliation or discrimination, and the limits on what information can be disclosed. Separate processes are provided for public and private sector employees. It provides for fines for public bodies that do not implement whistleblowing procedures, or that do not assess disclosures. Public sector whistleblowers will not suffer dismissal, sanctions or discrimination. Private sector employers must identify specific channels to allow employees to report potential misconduct and to guarantee the confidentiality of the whistleblower. They must also provide specific sanctions concerning fraud or gross negligence against any person who breaches these protections. Penalisation can be reported to the National Labour Inspectorate. This law again has some similarities but a key difference is the sanction where assessments of disclosures do not occur.

Other countries have legislation currently in train or in the development stage for the protection of whistleblowers. Given the typical gestation period for legislation generally and the relatively short time that has elapsed since the Protected Disclosures Act 2014, it is perhaps here that the influence of the Irish Act will be more fully felt and properly assessed. Among the countries currently developing or considering new or revised legislation in this field are Latvia, Croatia, Finland and Bulgaria. In many cases, advice and input has been sought from Ireland, either at official or NGO (Transparency International Ireland) level, based on the experience of developing, enacting and implementing the Protected Disclosures Act 2014.

3.3 Developments from an EU perspective

At European Union level, there has until recently been limited movement towards provision of whistleblower protection measures, and what there has been is of a sectoral, piecemeal and un-coordinated nature, which creates its own problems. One example of this is the Trade Secrets Directive of 2016, which qualifies the exception from liability for whistleblowers who reveal trade secrets by introducing a "general public interest" requirement. The Directive was transposed into Irish law in the European Union (Protection of Trade Secrets) Regulations 2018 (SI No. 188 of 2018), signed on 8 June 2018. This regulation amends Section 5 of the Protected Disclosures Act to give effect to the requirements of the Directive in respect of whistleblowers.

Nonetheless, the European Parliament has exerted pressure for further action, including through the adoption of a "Report on the role of whistleblowers in the protection of EU's financial interests" (February 2017) and a Resolution of 24 October 2017 on "Legitimate measures to protect whistle-blowers acting in the public interest".

On 23 April 2018, the European Commission published a "Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law" (COM(2018) 218 final), which is a proposed new law to strengthen whistleblower protection across the EU. While this proposal is at an early stage, and will be considered over the next year by Member States through a Council working group, the Commission's approach bears similarities in many respects to the principles laid down in the Protected Disclosures Act.

3.4 The Protected Disclosures Act as an example internationally

The Protected Disclosures Act 2014 has been viewed internationally in a very positive light. It is seen as an example for other EU Member States and is seen as setting a new level in best practice, with Ireland being asked to present and discuss the Irish legislation abroad to support other Member States in developing their legislation.

In 2013, Transparency International (TI) published a set of 30 principles (the "International Principles for Whistleblower Legislation").[6] According to TI, these principles are reflected in guidance from the UN, OECD and Council of Europe.

In March 2018, TI published a "Best Practice Guide for Whistleblowing Legislation"[7] with the aim of providing guidance to policy makers and whistleblowing advocates on how to implement the above principles in national law. For each principle, the Guide sets out "*what constitutes current best practice and why. Where possible, it provides examples from existing national legislation or prospective best practice*".

While this report states that no whistleblowing law is fully aligned with the 30 TI principles, it cites the Irish legislation in a number of cases as an example of good or best practice. These include:

- Broad categories of reportable wrongdoing
- Absence of a public interest test
- No "good faith" requirement
- Protection from retaliation committed by third parties
- No contracting-out of provisions
- Provision to bring a civil law suit for damages (action in tort)
- Requirement for public bodies to have internal whistleblowing procedures
- Access to court and industrial relations mechanisms

This provides a further example of the increasing importance of the Protected Disclosures Act 2014 from an international perspective.

Also in March 2018, the charity Blueprint for Free Speech published two reports on the implementation of whistleblower legislation in the EU. They awarded the Irish legislation the highest rating of the Member States measured across a number of standards[8], and highlighted the case of *Aidan & Henrietta McGrath Partnership and Anna Monaghan* (see section 4.4) as an example to Europe of how whistleblower legislation can work in practice[9].

3.5 Conclusion

The Irish Protected Disclosures Act 2014 has been viewed internationally in a very positive light, being cited as an example of good or best practice and influencing the development of legislation in other jurisdictions. It compares favourably with

[6] Transparency International (2013), *Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU*

[7] Transparency International (2018), *A Best Practice Guide For Whistleblowing Legislation*

[8] Blueprint For Free Speech (2018), *Gaps In the System: Whistleblower Laws in the EU*

[9] Blueprint For Free Speech (2018), *Safe or Sorry: Whistleblower Protection Laws in Europe Deliver Mixed Results*

legislation elsewhere. There is a move now to have a consistent approach taken to protected disclosures legislation across the EU and while it is very early days as the draft Directive was only published by the EU Commission in April 2018, it is notable that many of the key features and principles of the Irish Act can be seen in the draft Directive.

Section 4: Results to date

4.1 Data compiled from the annual reports of public bodies

An analysis of the reports made by public bodies was carried out to establish the number of protected disclosures that have been reported since enactment. The Act requires publication of such reports not later than 30 June in each year in relation to the preceding year. Results for 2017 are not yet available therefore. Results show that a small but growing number of disclosures have been made as set out in tabular form below. It should be noted that a number of the disclosures were proper to other Departments/agencies, and in some cases were more appropriate to be dealt with under other employment policies e.g. Dignity at Work. The reports also indicate that protected disclosures are being followed up appropriately by public bodies.

	2014	2015	2016	Total
Disclosures received	16	134	220	370**
Closed at y/e*	9	99	146	254
Open at y/e*	7	33	72	112

*where information available, may also refer to status at time of reporting

**based on reports from 212 public bodies (at 09/05/2018)

Examples of actions reported as taken in relation to issues raised by protected disclosures include:

- Recommendations regarding changes to procedures and processes in the Air Corps
- Cancellation of a procurement process which was found to have been inappropriately handled
- A number of changes made to a SOLAS programme
- Recommendations made by internal audit and implementation tracked
- Examination of service practices
- Appointment of an independent facilitator (by a section 7 body)

4.2 TII Speak Up Report / Integrity At Work Survey

The Speak Up Report published in 2017 by Transparency International Ireland (TII)[10] draws on anonymised data from callers to its "Speak Up" helpline, a non-profit helpline for whistleblowers, witness and victims of wrongdoing. The report indicates that the helpline has provided advice to over 1,000 callers since establishment in 2011. The report highlights a 115% increase in the proportion of whistleblowers calling the helpline since the Protected Disclosures Act 2014 was enacted. TII has advised that this has led to a sharp rise in demand for free legal advice from the Transparency Legal Advice Centre established in 2016 with grant support from the Department to provide legal advice and assistance to potential whistleblowers.

The report includes the findings from the Integrity at Work Survey 2016 which, for the first time, measured the attitudes and experiences of Irish private-sector employees and employers to whistleblowing. The Integrity at Work Survey found that of those

[10] Transparency International Ireland, *Speak Up Report 2017*

that witnessed wrongdoing (the equivalent of over 250,000 people) during the course of their career, 63% (the equivalent of 160,000 people) shared their concerns with a responsible person. Of those who witnessed wrongdoing 69% of women said they reported their concerns, while 58% of men did. However, 21% of those that say they reported wrongdoing suffered as a result, while 28% of those that reported said they benefitted. These findings suggest that an estimated 33,000 workers claim they have suffered as a result of speaking up at work.

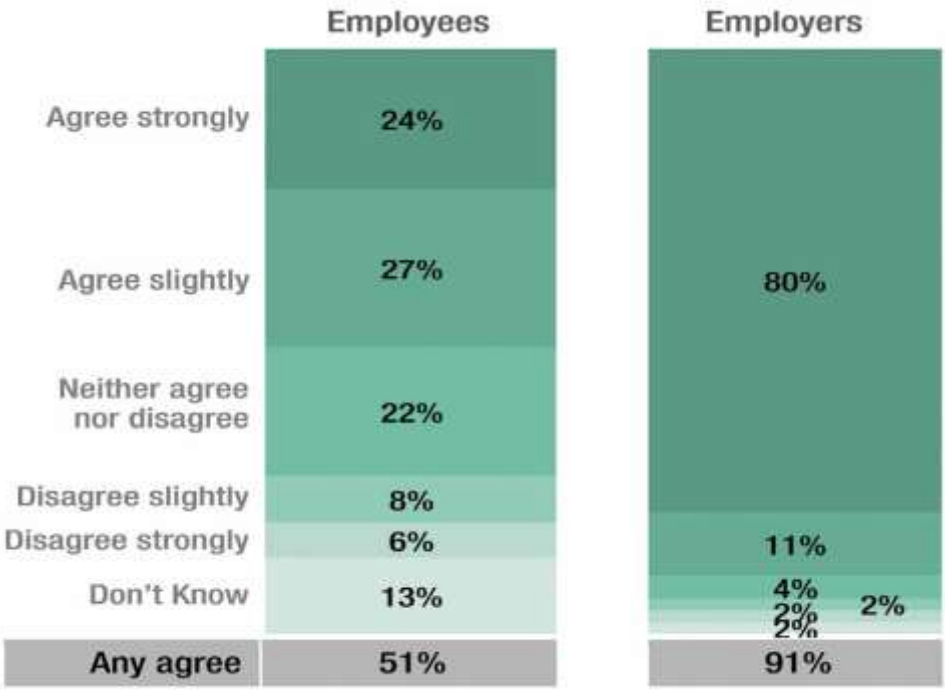
It is notable that we often only hear about the negative experiences of whistleblowers in the media. The survey shows that whistleblowing is far more common than is generally recognised because not every 'whistleblower' thinks of themselves as such. It's more likely that people will be identified or self-identify as whistleblowers if their employer or the authorities take retaliatory action or attempt to cover-up the wrongdoing. The perception of a whistleblower as someone who is disloyal to their employer or who goes straight to the press is also not supported by the findings of the survey with only 2% of employees saying that they would report to the media. This is in contrast to a combined total of 95% of respondents who said that they would bring information to someone inside their organisation. The survey also points to more positive attitudes to whistleblowing among employers than employees with 91% of employers and 77% of employees saying that they believed whistleblowers should be supported, even if it meant revealing confidential information.

Some charts illustrating findings from the survey are set out below (reproduced with the permission of Transparency International Ireland).

Whistleblower: Personal experience of wrongdoing in the workplace
Base: All Employees n = 878

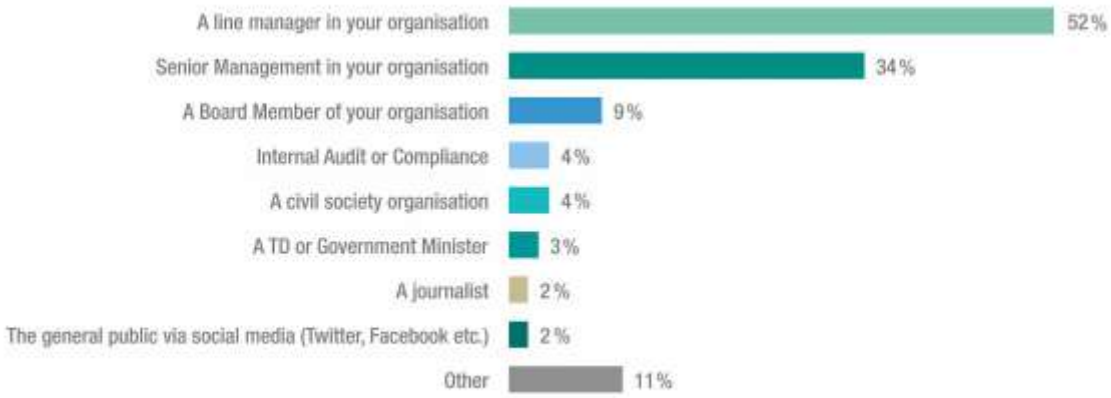
If employees reported a concern about wrongdoing - confidence that it would be acted upon and they would not suffer as a result of doing so

Base: All Employees n = 878 / All Employers n = 353



With whom would you share your concern

Base: All Employees n = 878



4.3 Workplace Relations Commission cases

The Workplace Relations Commission (WRC) received 75 complaints under the Protected Disclosures Act between its establishment in October 2015 and the end of 2017. 53 (71%) of these cases were received in 2017. Of those cases, approximately 23% were withdrawn before or during a hearing, and a further 12% were rejected following adjudication.

4.4 Key findings of Court cases concerning protected disclosures

The Protected Disclosures Act has been in operation for less than four years, and awareness of its provisions, while steadily growing, has taken time to develop. Because of this, the amount of jurisprudence relating to the Act is still relatively small. Nonetheless, there are some important cases which show the impact that the Act has had to date, and which indicate areas that need to be monitored for future developments.

- The first successful reported case in the Circuit Court featuring an application for interim relief in a claim for unfair dismissal was in the case of *Clarke & Dougan v Lifeline Ambulance Limited* in July 2016. In this case the company argued that the dismissals followed a business review rather than the protected disclosure the claimants had made. The judge ruled that he could not find that the dismissals were wholly or mainly due to the protected disclosure, but that the claimants had met the threshold of establishing that there were substantial grounds for contending so. He made an order obliging the company to pay their salaries until the unfair dismissal case was heard at the WRC.

- The first award for penalisation under the Act was in the case of *Aidan & Henrietta McGrath Partnership and Anna Monaghan*. This was a Labour Court recommendation in September 2016, which overturned a previous WRC adjudication which found against Ms Monaghan. She claimed penalisation relating to disclosures she had made to HIQA (which commenced prior to the enactment of the Protected Disclosures Act) relating to health and safety issues in the nursing home in which she worked. The nursing home both denied that the issues amounted to "relevant information" under the Act, and that Ms Monaghan's suspension was related to her disclosures. The Labour Court found that one of the disclosures made by Ms Monaghan was a protected disclosure, and that one of the periods of suspension (which was on full pay) was linked to her having made that disclosure. It awarded compensation of €17,500.

- The WRC itself has subsequently awarded compensation in some cases. A notable such case occurred in March 2018 (*An Employee v A Public Body* ADJ-00005583). In this case the complainant claimed penalisation on a number of grounds following the making of a protected disclosure relating to the assignment of unqualified staff to carry out various tasks, which he claimed was an inefficient use of public funds, a breach of an EU Regulation and of health and safety. He claimed a number of grounds of penalisation, including the stopping of his pay for a month, spurious disciplinary action, isolation, and the failure to inform him that a serious security incident, where he considered himself and his family under surveillance, had been resolved and that the Gardaí had confirmed to his employer that he was not under threat. The adjudication officer found that, while his other grounds of penalisation were not upheld as being related to his protected disclosure, in relation to the security incident the failure of management to inform him that the issue had been resolved constituted unfair treatment under section 3(1)(e) of the Act, and was linked to his protected disclosure. An award of €30,000 was made, which related to six months of penalisation.

- Compensation in a case of unfair dismissal was awarded by the WRC in *Complainant v Respondent* (ADJ-00000456) dated 22nd March 2017, where a

nursing home assistant was dismissed following a disciplinary procedure after making a protected disclosure to HIQA. She also claimed that a concerted effort was made to dismiss her in advance of her having completed 12 months' service (the normal requirement for bringing an unfair dismissal case). The adjudicator found in her favour in both respects, and awarded her two years' salary in compensation, which amounted to €52,416.

- Section 5(5) of the Act has arisen in some cases. A notable case was that of *Donegal County Council and Liam Carr* in the Labour Court, decided in June 2016. The complainant in this case was a Station Officer in the Retained Fire Service and claimed to have made disclosures to his line managers about the behaviour and fitness of firefighters in the station, and claimed penalisation as a result through the undermining of his position as a manager, tension at the station and insubordination. The Court found that the complaints made by him to his managers were made pursuant to the discharge of his duties as a Station Officer, and related to matters other than an alleged omission of the employer, and therefore did not amount to protected disclosures.

- An interesting case relating to protected disclosure procedures was the WRC case *An Employee v An Employer* (ADJ-00003371) from October 2016. This related to an alleged case of penalisation involving a private company. The adjudicator found that the company had a whistleblowing policy which required that complaints be addressed in writing to the Chairman of the company, and that as the complainant did not utilise this policy, no protected disclosure was made by her until she made a disclosure to her legal advisor under section 9 of the Act, which was after the alleged penalisation had occurred.

4.5 Conclusion

While the Protected Disclosures Act has been in operation for four years, the latest reported data indicates that a significant number of protected disclosures have been made to public bodies. There is still a limited amount of caselaw from which to draw conclusions on any weaknesses in the legal framework established by the Act that may need to be addressed.

The results of the Speak Up Report and the Integrity At Work Survey highlight the willingness of those who witnessed wrongdoing to share their concerns with those in a responsible position in their organisation. The number of workers who reported having been subjected to reprisal on account of reporting wrongdoing demonstrates the importance of the protections put in place by the Act.

Indications from the TII Speak up report and the TII surveys show that numbers of calls for advice are increasing.

The findings from the WRC show that in some cases whistleblowers were successful and in others they were not, which indicates that the Act is working as it should. The Courts are only beginning to interpret the Act and some landmark cases have been noted above.

Notwithstanding these first broadly positive results, it is clear that further work needs to be done to increase awareness levels of the Act both amongst employees and employers.

Chapter 5: Analysis of Submissions

5.1 Overview of Submissions

Twenty five submissions were received on foot of the consultation process – 15 from public bodies, four could be described as "professionals" (e.g. TII, ISME, legal), one from a political party and three from the public. Overall, there was a broad acceptance of the necessity to have measures in place for the protection of workers who disclose wrongdoings and welcome that such a framework had now been provided on a general and comprehensive basis.

While a number of issues were raised, a positive finding is that the guiding principles which underpin the Act were generally accepted. The issues which were raised mainly concerned implementation and procedural matters. In the cases where legislative change was recommended, they generally concerned issues which had been examined in detail at the time of the drafting of the legislation and its passage through the Oireachtas, and the Act as it exists reflects the result of that process.

Positive comments on the Act included "*The Central Bank views protected disclosures as a very important tool in fulfilling its regulatory mandate*" (Central Bank of Ireland); "*ISME strongly supports the Protected Disclosures Act…and believes it has already yielded dividends in exposing malpractice in the public and private sectors*" (ISME); "*The legislation supports management in encouraging a flow of information on wrongdoings or potential wrongdoing. The protected disclosures policy and processes are a key part in the governance structure of this Department*" (Department of Justice and Equality).

5.2 Key thematic issues raised

The issues raised in the submissions have been broadly categorised and organised into the following thematic areas:-

- Should there be a requirement to investigate
- Interaction with sectoral provisions and policies elsewhere
- Use of a number of Disclosure channels
- Confidentiality provisions
- Categories of wrongdoing
- Interaction with sectoral Acts
- Definition of worker
- Data protection
- Whistleblowing procedures
- Prescribed persons – seeking more
- Section 5(5) issues – exclusion of matters which are the worker's function to investigate
- Awards, redress and protections
- Threshold of seriousness/good faith
- Definitions
- Anonymous disclosures
- Annual report
- Independent whistleblowing authority

- Disclosure against head of an organisation

In considering the issues raised, it should be noted that protected disclosures, or indeed other employment related issues, can be complex, and dealing with them may give rise to significant challenges. As set out above, the purpose of the review is to determine what improvements might be made to the implementation of the Act. The Protected Disclosures Act provides a broad legislative framework to be applied to individual cases where concerns are raised about potential wrongdoings as they arise. The legislation is not intended to, nor can it, be designed to deal with individual cases; rather it provides a framework for protecting whistleblowers.

5.3 Consideration of key points raised

The key points raised and responses under these thematic areas are set out and considered in brief below.

Issue	Response/Action
Statutory requirement to Investigate?	
There were mixed views on this. Some sought a mandatory requirement to investigate, but even within that one felt such a requirement should not be too prescriptive. Others felt there should be a requirement to assess rather than to investigate. Some felt the current discretionary approach was good, i.e. no requirement to investigate and the body to do so if it considered it warranted/appropriate. Two bodies raised concerns that they might not have the power to undertake an investigation and did not favour a legal requirement to do so within the Act. Others sought clarity on whether the Act required an investigation of all disclosures.	One of the guiding principles in developing the Act was that it would provide protections for disclosers and create an environment to encourage disclosers to come forward to report concerns of wrongdoings. It was not considered appropriate in the legislation to get into the process of how to handle disclosures received – it was felt that such matters are best handled in guidance and by procedures in individual organisations. The Minister published Guidance as a basis on which internal procedures should be drawn up by public bodies for dealing with protected disclosures. In addition, the Workplace Relations Commission produced a statutory code of practice for both the public and private sectors which set out principles to be followed to promote and receive disclosures. The Guidance, and procedures drawn up on foot of it, highlight the requirement to assess all disclosures received and assess which should be investigated. Good practice is that all disclosures are assessed, and that on the basis of that assessment a decision is taken on whether to have a full investigation of the matter. The Act creates an incentive to assess disclosures received and to investigate where appropriate, in that a failure to do

Issue	Response/Action
	so may encourage the discloser to avail of the external disclosure channels provided under the Act. Furthermore, bodies in the public and private sector would be expected to assess any complaint, whether a protected disclosure or not, to see if a wrongdoing had occurred and to carry out an investigation where appropriate as a matter of good corporate governance. However, notwithstanding the above points, the draft Commission Directive includes provisions for the follow up of reports and, pending the outcome of negotiations, it may require amendment to the Act in this respect.
Difficulties were raised by one body on carrying out an investigation where the alleged wrongdoing took place in another body.	Regarding perceived difficulties where the alleged wrongdoing took place in another body, it is considered that relevant papers could be requested by the recipient body and persons interviewed where necessary, in line with existing procedures where regulatory bodies receive complaints about third parties.

Issue	Response/Action
Interaction with other policies:	
Some respondents cited that cases have arisen where the Protected Disclosures Act is being used to pursue personal grievances instead of, in parallel to, or as a follow on to using Dignity at Work or Health & Safety policies. Some proposed that restrictions or exclusions be introduced to avoid overlap with other policies, with one proposing that personal employment matters be specifically excluded. One said that they might receive a protected disclosure which had been subject to another process and if a criminal investigation was warranted, it could give rise to challenges such as double jeopardy or a breach of rights to constitutional justice. One raised concerns that the Act could be used to block disciplinary action or the termination of a one-year contract. Another sought a statutory provision affording discretion to defer an investigation pending resolution of another process.	Exclusion of penalisation that would ordinarily be dealt with under a grievance procedure was considered in drafting the Bill. The concern with including such a provision is that it could be used to exclude legitimate protected disclosures from the protections of the Act. An example of this is the case where the WRC found that a whistleblower in a public body had been treated unfairly (in relation to duties, pay, disciplinary action and was not told that that a potential security threat did not exist), and that this treatment was linked to their protected disclosure about training and employment practices in the institution. An award of €30,000 was given. There can be an intermingling of personal grievances and broader issues within a disclosure. Where a disclosure contains a mix of issues, the recipient should determine under which policy the issues should be handled and discuss with the discloser. If the issues relate to the disclosure of a relevant wrongdoing and it is the primary issue, the matters should all be dealt with under the Act. As regards receipt of a protected disclosure that would have been subject to an internal process and it is decided by another body that a criminal investigation is warranted and the risk of challenges such as a double jeopardy plea, it is expected that most investigations by such a body would have been subject to an internal process first and investigations under this Act would not differ from others in that respect. As a general rule, the double jeopardy principle does not operate to preclude disciplinary proceedings taking place, or vice versa. In addition, whistleblowing is about protecting the public interest and this is emphasised in the Long Title to the Act: "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

Issue	Response/Action
	disclosures in the public interest and for connected purposes", so the focus should not be on the whistleblower but the disclosure itself. Furthermore, section 5(3(b) of the Act goes some way towards alleviating concerns, in that it excludes breaches of a worker's own contract of employment from being reported under the Act. Finally, the statutory Guidance for public bodies states that "*The Procedures should confirm the distinction between a personal employment complaint and a protected disclosure. The Procedures should also confirm that the Procedures are not intended to act as a substitute for normal day to day reporting or other employment procedures*". Nonetheless, given the implementation challenges arising, further consideration will be given to the matter in the context of any amending legislation to transpose the draft Directive or any further guidance needed to clarify the position.

Issue	Response/Action
Use of a number of Disclosure channels:	
Some submissions made references to disclosures being made internally and externally simultaneously, with bodies not being aware of same. There were concerns about duplication of work. Clarity was sought as to who should deal with the disclosure and whether it should be included in annual reports. One body asked, if a disclosure was received by a body under its remit and also by the Minister, which investigation should take precedence. Some sought that disclosers be required to state who else the disclosure was being made to. Another asked for consideration to be given to stating in Guidelines that all internal processes be exhausted before using other channels (e.g. prescribed bodies).	A key principle of the Act is that disclosures should ideally be made to the employer (or his/her nominee), as the employer would be best placed to deal with an alleged wrongdoing. Other channels are subject to conditions such as a reasonable belief that the information disclosed is substantially true (to a prescribed body), and that it is reasonable for the worker to make the disclosure and it is not made for personal gain (where external channels are used). It should be noted that the draft Commission Directive also includes both internal and external disclosure channels. Having a number of channels available increases overall confidence in the system, helps overcome any limitations which may exist in individual channels and increases accessibility[11]. Guidance has been provided in relation to handling of disclosures received by Ministers and further guidance can be considered to guide public bodies on what to do when disclosures are made using a number of channels simultaneously and how to report on them.
One submission raised difficulties in responding to disclosures when they are also made to the media and sought clarification as to how to deal with FOI requests concerning disclosures.	Regarding disclosures which are subject to FOI requests, exemptions at sections 42(m), 41(1) and/or 35(1)(b)) of the FOI Act may be used to protect the disclosures.
One body stated that in the normal course of events they deal with complaints in matters covered under the auspices of security and intelligence, but that a discloser cannot make such a complaint to them under s18(3) of the Act.	In relation to the security issue, the Act provides for the receipt of disclosures relating to security and intelligence by the Disclosures Recipient and, as set out in Schedule 3 (section 5(b)(i)) to the Act, the Recipient shall refer the information to the public body most appropriate to consider the information.

[11] Fotaki M. et al (2018) *Designing and Implementing Effective Speak-Up Arrangements*

Issue	Response/Action
Confidentiality issues:	
A number of submissions raised concerns around the confidentiality requirements. These included: • difficulties in keeping the identity of a discloser confidential when investigating a disclosure;	One of the most important protections provided in the Act is the requirement to keep the identity of the discloser confidential. It is the first line of protection and increases trust in the whistleblowing system. It is not an absolute right, however. Section 16(2) sets out clear exemptions, such as where it is necessary to allow the carrying out of an investigation.
• balancing confidentiality rights of a discloser with the rights of a respondent to know his/her accuser;	Regarding the balance of rights, due process and the right to justice must be observed where an allegation is made against a third party. The case of Lyons v Longford Westmeath Education and Training Board highlights the importance of affording the constitutional rights to fair procedures to the respondent in any disciplinary or related process. It should be noted, however, that there will be cases where the recipient determines following a preliminary assessment that the allegation does not stand up, and in such instances the third party concerned will not be informed of the allegation.
• difficulties where a disclosure is in the public domain but the body has no power to respond;	Where the disclosure is in the public domain and the relevant public body is constrained in responding, it would never be good practice to try to resolve the issues in public. Highlighting that the disclosure has been received and is being assessed/dealt with in accord with the public body's procedures should assist in addressing this issue, particularly in the light of the confidentiality requirement that the body must respect. It is also important to note that where a disclosure has been brought into the public domain under section 10, there are higher thresholds to be met under the stepped disclosure regime in order to qualify as a protected disclosure, and those

Issue	Response/Action
	contemplating such a disclosure should be cognisant of this.
• how to maintain confidentiality when a small organisation is involved;	Where there are particular challenges in meeting confidentiality requirements where small organisations are concerned, it should be possible to put in place structures and arrangements to meet the requirements. The option is available to use another disclosure channel, but even if this happens, the assessment of the matter will most likely require the assistance of the organisation concerned.
• how to supply information for vetting/clearance purposes where a disclosure is concerned.	Where vetting is concerned and the person is the subject of a disclosure under investigation, there is nothing to prevent the provision of such information to the relevant vetting body. The confidentiality provisions of s16 are for the protection of the discloser. If a person is the subject of an investigation, there are no confidentiality provisions in relation to a respondent that are specific to the issue having arisen as a result of a protected disclosure. In providing the information, the name of the discloser should not be provided unless it is necessary for the purposes outlined in section 16(2).
One submission sought clarification as to whether a disclosure is made to the employer, to the person who receives it or to the organisation as a whole.	Section 16 applies to any individual or organisation to whom a disclosure is made. Therefore, disclosures are made to the organisation as a body but also the individuals within that organisation who are recipients of the disclosure. Any disclosure of the information, either within or without the organisation, would only be permitted where it is necessary for the purposes outlined in section 16(2).

Issue	Response/Action
Categories of wrongdoings:	
Some submissions considered the categories to be too broad and sought that limits be placed on the categories of wrongdoings because of how they were being interpreted. One suggested that monetary thresholds be set (giving as an example the requirement that frauds and irregularities over €10,000 be reported to C&AG). Others sought that section 5(3) of the Act be amended to clarify that where a health or safety issue is concerned, it is not applicable if it relates solely to the health or safety of the worker. One sought that the Act make clear that changes in service delivery or work practices are not wrongdoings. Another sought broadening of the categories to cover codes or ethical guidelines. One sought that improper staff recruitment practices be included and one sought inclusion of legislative, procedural or policy inadequacies.	In developing the Act, the aim was to provide protections for a discloser on as broad a range of wrongdoings as possible. It seems, however, that confusion has arisen as to what constitutes a wrongdoing. Of course, public bodies are entitled to make changes to work practices and service delivery – this does not constitute a wrongdoing under the Act. There are already mechanisms in place to deal with unethical behaviour by public officials (e.g. disciplinary processes or by making complaints to the Standards in Public Office Commission, and there are Codes in place dealing with standards and behaviour). It is a matter of policy that breaches of codes and guidelines are not specifically listed as wrongdoings, in that the legislation is intended to protect workers' rights. Private law bodies determine their own codes and rules which apply to members and it is up to those bodies to revise their codes if necessary to align with the Act. If there are breaches of such codes they are likely to be covered under the categories of wrongdoings; if not, they are unlikely to be serious matters that would cause a detriment to the public interest. They would also be likely to be subject to a disciplinary process. The reason for not excluding certain categories (e.g. health or safety matters and improper staff recruitment policies) has already been discussed above.

Issue	Response/Action
Interaction with Sectoral Acts:	
A number of submissions sought clarity on the interaction with sectoral provisions. Some sought repeal of sectoral provisions, whereas others sought their retention and welcomed the protections provided.	Prior to the Protected Disclosures Act, there existed a partial and inconsistent legal framework of protections in various pieces of sectoral legislation. This made it extremely difficult, when drafting the Act, to identify any single solution capable of adequately resolving those inconsistencies, while ensuring that existing protections were fully retained. The approach ultimately decided upon was thus to amend each relevant sectoral provision so that any disclosure falling within the meaning of the Protected Disclosures Act is dealt with under that Act. This means that the protections of the Act, which are generally stronger, are available to the discloser, while on the infrequent occasions that a disclosure does not fall within the Act but does fall within the sectoral legislation, the protections of the sectoral provisions remain available.
Specific issues raised were how to deal with disclosures made under the Health Acts, whether workers in section 38 and 39 bodies can make disclosures to the HSE under the Protected Disclosures Act, and whether 'welfare' issues are covered under the Act.	As regards disclosures from section 38 and 39 bodies in the Health sector, it is proposed, subject to the agreement of the Minister for Health and the HSE, that the HSE be made a prescribed body for the purposes of the Act in relation to functions in respect of which it is already a recipient under the Health Acts.
Clarification was also sought in relation to the Pensions Act, which provides for a relevant person to be criminally liable if they knowingly made an incorrect disclosure. Disclosures have also been made to the Pensions Regulator in situations where no employment relationship exists between the discloser and the pension scheme trustee disclosed against.	In the case of pension schemes, disclosures can be made against the administrator of the pension scheme. Disclosures may be made to the Pensions Authority in this regard. The Protected Disclosures Act does not supersede cases where mandatory reporting arises. The criminal sanctions under section 83 of the Pensions Act 1990 (inserted by section 38 of the Pensions (Amendment) Act 1996) relate to disclosures from "relevant persons", who are obliged to disclose wrongdoings (an auditor, actuary, trustee, insurance intermediary etc.), relating to a material misappropriation or a fraudulent conversion of the resources of the pension

Issue	Response/Action
	scheme in question. An offence occurs if the relevant person fails to disclose such a wrongdoing, or if they knowingly or wilfully make an incorrect report. It would appear that the requirements and sanctions under the Pensions Act relate to the mandatory reporting requirements that come with the specific responsibilities relating to the positions held by the "relevant persons", and that this sufficiently distinguishes them from the more general provisions and protections relating to whistleblowers under the Protected Disclosures Act.
One body raised the issue that the Trade Secrets Directive provides that disclosure of wrongdoing in the case of trade secrets is only protected when it is made for the purpose of protecting the general public interest.	The Trade Secrets Directive was transposed by the Department of Business, Enterprise and Innovation, and given that it was agreed at EU level, Ireland must comply with the Directive and restrict protection where it concerns trade secrets.

Issue	Response/Action
Definition of worker:	
Some submissions sought that volunteers, students on placement and trainees, which are not covered by 'worker' be protected under the Act, and others that employment law remedies be extended to types of workers other than employees. One body sought that the requirement that the information came to the worker's attention in connection with the workplace be removed as it risked being interpreted narrowly, and that the Act should be extended to include clubs, associations etc.	The Act contains a very broad definition of 'worker' including employees, workers under contract, those who are provided with work experience pursuant to training courses etc. Much consideration was given to the inclusion of volunteers when the Bill was being drafted, but the advice was that it was not possible in view of the fact that they do not have an employment relationship, and their inclusion would open up to the provisions of the Act to the general public, which would dilute its purpose and focus. As such employment law remedies cannot be applied. The situation is similar with students on placement. The prevailing view among experts internationally is that whistleblower legislation should not extend beyond the basis of a workplace relationship, because of the access to information available to workers which is not available outside the workplace, and as the risk of sanctions against workers because of their employment status requires that specific legal protections be made available. The guidance issued by the Minister sets out, however, that every effort should be made to apply protections to volunteers etc. in so far as possible.
Clarity was sought on whether the Garda Reserve are comprehended by the definition of worker.	The advice of the Office of the Attorney General is that Reserve Members of the Gardaí are covered by the protections of the Act to the same extent as other members.

Issue	Response/Action
Data Protection:	
Concerns were raised by a few bodies about perceived difficulties of complying with data protection law when making and investigating disclosures, as personal data of third parties may need to be processed. The Data Protection Commissioner (DPC) sought a legislative amendment to make clear the DPC's right to investigate any alleged contravention of data protection law in the context of disclosures.	Data protection law must be abided by in complying with other laws but it would not be appropriate to restate that in another law. There will be circumstances where third-party data must be processed in order to make a disclosure or to investigate one and data protection law does not prohibit that. It is obviously important to maintain an environment where people are able and encouraged to "speak up" in the workplace. Regulations will be made, if necessary, under the Data Protection Act to provide some restriction to data subject access rights in order to protect the confidentiality of the discloser.
Clarity was sought by another body on the interplay between data protection and FOI in the context of protected disclosures. The subjugation of data protection law in order to reveal disclosure of significant acts or omissions by public officials was also proposed.	New guidance is being developed on the interplay between FOI and data protection in the context of the GDPR. There are a number of exemptions that can be used to protect disclosures where FOI requests arise; namely section 42(m), section 41(1) and section 35(1)(b) would apply.

Issue	Response/Action
Whistleblowing procedures:	
The Act requires public bodies to have internal procedures. Some were of the view that there should be a similar requirement for the private sector, including for organisations that are publicly funded to provide services.	Most whistleblower protection legislation makes it a mandatory requirement to have procedures in the public sector, and this was the policy approach adopted in Ireland. In the context of developing the Act and in consultation with Unions, a statutory Code of Practice was developed by the WRC which both the public and private sectors must have regard to. While it would be difficult to enforce compliance with such a requirement in the private sector, it is good corporate governance to have measures in place. Also, the making of disclosures has been a feature in the private sector for years given the value of reporting wrongdoing to the bottom line. This is evidenced in the TII "Integrity At Work" Survey which shows: • Over 95% of employers agreed that it was in the interests of their industry or sector for people to speak up about wrongdoing; • 64% said they would encourage an employee to speak up when it might harm the reputation of their organisation; • More than 1 in 10 employees claimed to have reported wrongdoing at work; • 78% of those said they had not suffered as a result. The EU Commission draft Directive proposes that both the public and private sector (where there are 50 or more employees) establish internal channels and procedures for reporting. Consideration will be given to this matter in the context of the outcome of the agreed Directive.

Issue	Response/Action
Prescribed persons:	
Some bodies sought that further bodies be prescribed to receive disclosures under section 7 and a number of suggestions were made. Others asked for the SI in this respect to be updated given that some of the bodies have since been amalgamated. Guidance was also sought on what is expected of prescribed persons in carrying out investigations.	The SI in relation to prescribed persons has been reviewed in the context of this review and will be updated as appropriate. As regards the role of prescribed persons, each regulator must abide by his/her functions, and the Act is not intended to impose any duties or add any powers which are not compatible with those functions. HIQA for example has developed its own guidance on how to handle disclosures.

Issue	Response/Action
Section 5(5) issues:	
This section provides that where it is the function of a person to detect, investigate or prosecute a matter and it does not involve an act or omission by the employer, it does not constitute a relevant wrongdoing for the purposes of the Act. Some were concerned that this meant that disclosers would have to prove it was an act or omission by the employer in order to gain protection under the Act.	This subsection was included in order to prevent possible abuse of the Act, where employees of public bodies with regulatory or investigatory responsibilities have access to privileged information as a result of their duties. It does not apply where the employee has concerns that there is wrongdoing being perpetrated within the public body itself.
Two submissions were concerned that under section 5(5) it may only be possible for a Garda Member to make a protected disclosure if there is evidence of an act or omission on behalf of the employer (who is the Commissioner in this case).	The advice of the Office of the Attorney General is that section 5(5) does not have the effect of excluding members of the Gardaí or the Defence Forces from availing of the protections of the Act. The intention and true effect of this provision is to exclude workers from those protections in relation to disclosures which consist of wrongdoings which it is the specific purpose of the worker or employer to detect, investigate or prosecute.

Issue	Response/Action
Awards, redresses, protections:	
One body raised a lot of issues, namely: the level of compensation in terms of 260 weeks salary was insufficient; sought provision of interim relief and a statutory right to an injunction pending final determination or where penalisation was threatened. The body also sought the removal of the exclusion for defamation proceedings from the immunity from civil proceedings. Another submission sought that the remedies be extended to include injunctive reliefs, payment of legal fees, compensation for family etc. Another considered that the reduction by 25% of the compensation level, where investigation of a wrongdoing was not the sole or main motivation for making the disclosure, was not sufficient.	The Act provides the following protections in relation to dismissals resulting from protected disclosures which go beyond those in the usual Unfair Dismissals machinery: • Compensation of up to 5 years' salary (as opposed to up to 2 years') • Access to the provisions of the Unfair Dismissals Act regardless of length of service (generally one year's continuous service is required) • Ability to apply for interim relief to the Circuit Court With regard to defamation, it was considered that a provision had to be made in the Act in relation to malicious disclosures, particularly given the absence of a "good faith" requirement and that the protections given to protected disclosures extend beyond employment remedies. However, the provision in the Act extends qualified privilege to all protected disclosures within the meaning of the Act, without regard to the contents of the disclosure. This means that a plaintiff is obliged to prove malicious intent on the part of the discloser in order to trump the qualified privilege, which in practice is difficult to achieve.

Issue	Response/Action
Threshold of seriousness/good faith/ public interest:	
Some were of the view that a public interest test or a threshold of seriousness is required to remove repeated or vexatious submissions or cases where personal grievances were concerned. Another argued against the introduction of tests or thresholds. One sought clarification that where a reasonable belief did not exist, then the protections should not apply.	In developing the Act, international best practice and case law elsewhere were taken into account. A key principle followed was that there should be no good faith or public interest test, because of proof in other jurisdictions that it discouraged the making of disclosures. It is seen a strength of the Act internationally and is held up as an example to others. The Act itself is intended to protect the public interest, as referenced in the Long Title, but the motivation of the discloser is considered irrelevant, as recommended by the Transparency International Principles and by the Council of Europe. In relation to reasonable belief, the Act sets out clearly that this is a requirement for the disclosure to be "relevant information" and thus to be a protected disclosure for the purposes of the Act.

Issue	Response/Action
Definitions:	
Guidance was sought on 'gross negligence' and 'gross mismanagement'. One sought clarity on an organisation's role on assessing whether a disclosure is protected or not. Another asked what evidence is required for a disclosure to be believed to be 'substantially true'. Another considered that sections 17 and 18 of the Act were difficult to understand.	"Protected disclosure" is defined in section 5 of the Act. Guidance and a Code of Practice have been provided to assist bodies in dealing with disclosures, but ultimately only the courts can definitively determine if a disclosure qualifies as a protected disclosure. In any case, protections only become relevant where penalisation occurs. If the matter is dealt with appropriately, and communication maintained with the discloser, concerns should not arise.

Issue	Response/Action
Anonymous disclosures:	
Guidance was sought on how to deal with anonymous disclosures.	Internal procedures should clarify that anonymous disclosures should be dealt with similarly to any other disclosure, i.e. an assessment of the issue and an investigation if appropriate.

Issue	Response/Action
Annual report:	
Public bodies are required to report on disclosures received. Guidance has been sought as to what should be reported and by whom, particularly where the disclosure is made to a number of bodies and another body may be best placed to deal with a disclosure.	Guidance will be provided to ensure a consistent approach is taken by public bodies in reporting on disclosures.

Issue	Response/Action
Independent whistleblowing authority:	
It was proposed that an authority be established to deal with whistleblowing complaints.	Core to the Act is that the employer would be best placed to deal with disclosures and it is strongly believed that this remains the case. Other channels are provided if, for any reason, the discloser is not satisfied with the response, or feels that it is more appropriate to disclose to another. The Act has been in place for four years. It is too soon to make an assessment that a new authority is required, nor has any evidence been put forward of the need for one. Furthermore, the EU Commission draft Directive provides for internal and external reporting channels, rather than one independent whistleblowing authority.

Issue	Response/Action
Disclosure against head of organisation:	
Guidance is sought as to how to deal with a disclosure where it concerns the head of an organisation.	There are particular challenges where a disclosure is made against the head of an organisation. There should be structures in place internally that would help to deal with the matter, e.g. there may be a possibility to report to the chair of the Board. There is also the option that one of the external disclosure channels could be used where a disclosure arises in relation to the head of an organisation. This would include a prescribed body, a Minister or other as appropriate. The matter should be assessed and investigated if appropriate just like any other disclosure.

Section 6: Conclusion

Unlawful activities and abuse (corruption, fraud, malpractice, negligence) may occur in any organisation, whether private or public and can result in serious harm to the public interest. Workers in an organisation, or in contact with an organisation through work related activities are often the first to know of such activities, and therefore in a position to inform those responsible for addressing the issue. It is important to have effective legislation in place to encourage whistleblowers to come forward to make such disclosures without threat or harm.

Much work, consultation and research underpinned the development of the Protected Disclosures Act 2014, and the key aspects and principles adopted are set out in section 1 of this report. The Act is well regarded internationally, and independent research shows that it compares favourably with legislation in other jurisdictions and meets many of the principles seen as best practice, as outlined by Transparency International Ireland. There is now momentum to have a consistent approach taken to protected disclosures legislation across the EU, and while it is very early days (as the draft Directive was published by the EU Commission in April 2018), it is notable that many of the key features and principles of the Irish Act can be seen in the draft Directive.

The Act has now been in operation for four years and a significant number of disclosures have by now been reported, but the caselaw available is still limited. Indications from the TII Speak Up Report, and the TII surveys, show that the numbers of calls for advice are increasing, and the results of the TII surveys are broadly positive. The findings from the Workplace Relations Commission show that in some cases whistleblowers were successful and in others they were not, which indicates that the Act is working as it should. The Courts are only beginning to interpret the Act and some landmark cases have been noted in chapter 4. Notwithstanding these first broadly positive results, further work needs to be done to increase awareness levels of the Act both amongst employees and employers.

The key points raised in the submissions were addressed under various themes and the conclusions and further actions to be taken are set out below.

- There are differing views on whether the Act should provide a statutory requirement to investigate or not, and on this basis and on foot of our assessment, no amendment is proposed at this time. However, the draft EU Directive includes provisions for follow-up to reports, and pending the outcome, an amendment to the Act in this regard may be required in due course.
- The Protected Disclosures Act is an employment related law, and there will be cases where there is interaction with other employment related policies. Internal procedures should advise on how to handle such cases. Given the implementation challenges arising, further consideration will be given to the matter in the context of any amending legislation to transpose the draft Directive or any further guidance needed to clarify the position.
- Consideration will be given to the development of further guidance around handling of disclosures where they are made to a number of bodies, and how to report on same in annual reports.

- As regards confidentiality issues, no amendment to the Act was sought nor is there any basis for change based on the issues raised.
- Some submissions sought restrictions to the range of wrongdoings, whereas others sought expansions to the categories. On balance, it is considered that the wrongdoings, which the Oireachtas considered to be broad enough to capture any potential issue that might arise, should stand as currently defined.
- Our advice at the time of drafting the Bill was that there are valid reasons for not repealing the sectoral provisions relating to protected disclosures. It is considered that both should continue to stand, while noting that the protections in the 2014 Act are generally stronger.
- The Act contains a broad definition of worker. Our advice when drafting the Bill was that for legal and practical reasons, it should not be extended further. The matter will be considered further in the context of the proposed EU Directive.
- It is proposed to make a statutory instrument if necessary to ensure data protection law and protected disclosures law can continue to work in tandem.
- Consideration will be given to requiring the private sector to establish internal procedures in the context of the negotiation of the EU Directive.
- The SI for prescribed bodies will be updated as appropriate.
- Careful consideration was given to the remedies to be made available to whistleblowers in order to discourage penalisation. It is considered that a good balance was achieved. Early results of the implementation of the Act are broadly positive as set out in section 4.
- Some submissions sought the introduction of "good faith" or "public interest" tests. The approach adopted in the Act not to require these tests was based on research in other jurisdictions, which found it discouraged the making of disclosures.
- Guidance and a Code of Practice have been provided to assist bodies in dealing with disclosures, but ultimately only the courts can definitively determine if a disclosure qualifies as a protected disclosure. In any case, protections only become relevant where penalisation occurs. Employers are encouraged to ensure that disclosures are dealt with appropriately.
- Internal procedures should clarify that anonymous disclosures should be dealt with like any other disclosure.
- Guidance will be provided to ensure consistency of approach in reporting on disclosures made and actions taken in annual reports.
- It is too soon to consider establishing an independent whistleblowing authority. The approach proposed in the draft EU Commission Directive is to have a number of disclosure channels, which would be similar to the Irish Act, rather than establishing an independent authority.
- Where a disclosure is made against the head of an organisation, the matter should be assessed and investigated just like any other disclosure. There should be structures in place internally to help deal with the matter, e.g. there may be a possibility to report to the chair of the Board. Alternatively, an external disclosure channel could be used.

Organisations in both the public and private sector have responsibility for the successful operation of the Act within their organisations, and full commitment to

observe the spirit and purposes of the Act is required. This can only be achieved if a culture of support and encouragement to whistleblowers exists, which will in turn build confidence and trust to come forward to make disclosures.

The Act is a framework piece of legislation, with the objective of providing redress for workers who are penalised for making a protected disclosure. This framework was developed drawing on international best practice advice and ensures that effective and robust safeguards are both in place and are accessible for workers who experience penalisation on account of having made protected disclosures. The procedures made under the Act provide guidance on making a disclosure and on how it will be dealt with. The issues raised by those who contributed to the public consultation largely related to challenges around the implementation of the legislation, rather than the legislation itself. These reflect the complexity of issues that can arise in complying with the Act.

The approach adopted under the Act was subject to extensive review and debate in the course of the legislative process leading to the legislation's enactment. It is important to note that many of the issues raised in the course of this review were examined in the course of the preparation of the legislation and its passage through the Oireachtas. The final design, structure and operation of the Act was informed by scrutiny of these types of issues, in light of the fact that it was understood that they would be important features of the implementation of the legislation.

The requirement for the Department of Public Expenditure and Reform to prepare guidance under section 21 of the Act, to inform the preparation of procedures by public bodies for dealing with protected disclosures, was specifically intended to allow for advice to be provided on good practice addressing these and other challenges that would be expected to arise in implementing the legislation. It was clear, however, that often these issues did not inherently relate to the legal framework created by the legislation or would not be resolved by the design of the legal framework but would exist in any circumstances that an organisation was seeking to ensure that concerns raised by workers were properly examined.

It is also important to note that the adoption of some of the proposals made in the course of the review set out in section 5 would have the potential to fundamentally change the legislative framework put in place under the Protected Disclosures Act and give rise to a legislative model that was quite different in several respects from that currently in place. There is no clear evidence provided in the course of the review, or from the operation of the legislation to date, that these legislative changes are necessary or desirable or respond to a generalised weakness in the current legislative model that needs to be addressed, or indeed that they would not give rise to significant unintended consequences that could undermine the efficacy of the current model.

In conclusion, while there are some challenges in implementation and some follow up actions are proposed, in general the implementation of the Act is considered to be effective. Furthermore, a Training Framework is now in place to facilitate public bodies in enhancing their capability to respond to disclosures appropriately. Negotiation of the EU Directive on protected disclosures began in June and subject to the outcome of that, amendment of the Act will likely be required to transpose the Directive in view of, for example, the proposed legislative requirements to follow-up on disclosures and provide feedback to disclosers. In addition, the outcome of the

Charleton Tribunal (a Tribunal of Inquiry established in February 2017 to examine certain protected disclosures in the Garda Síochána) may have implications for the Act. Given this context, and considering the analysis in this Review, it is considered premature to amend the Act until the Directive has been agreed and the Tribunal Inquiry has made its report.

Appendix 1: Public Consultation Paper

Public Consultation on the Review of the operation of the Protected Disclosures Act 2014

Submissions please by: Tuesday 10 October 2017

Email to: PDconsultation@per.gov.ie using the subject line "Review of Protected Disclosures Act"

Or post to: Seamus O'Reilly

Government Reform Unit

Department of Public Expenditure and Reform

7-9 Merrion Row

Operation of the Protected Disclosures Act 2014

Review of the Act

Under section 2 of the Act, the Minister must commence a review of the operation of the Act not later than three years from when the Act was passed. The Minister must then report to each House of the Oireachtas within 12 months on the findings from the review and the conclusions drawn from the findings.

Consultation Process

As part of the review, the Department of Public Expenditure and Reform is inviting submissions from interested parties. Submissions can relate to any aspect of the operation of the Protected Disclosures Act and in considering this, respondents should advise on:-
- whether the legislation has been effective in line with its objectives; and
- how it might be improved.

The purpose of this consultation paper is to summarise the key elements of the Act and to identify some key issues relating to the operation of the Act which respondents may wish to address.

A broad consultation process will help ensure that in reviewing the Act the Minister and the Government in due course are advised and informed by the results of that process.

Please include in your submission
- specific examples where possible from your own experience which support your position where you are making points regarding operation of the Act, and
- reasons for any suggestions for changes or improvements to the Act and appropriate data/examples to support these suggestions.

Background

The Protected Disclosures Act 2014, enacted 8th July 2014, provides detailed and comprehensive statutory protections for workers in both the public and private sectors against penalisation by their employers in circumstances where they have raised concerns about potential serious wrongdoing in accordance with the requirements set out in the Act. The Act and related statutory instruments can be viewed at:

http://www.per.gov.ie/wp-content/uploads/Protected-Disclosures-Act-20141.pdf
http://www.per.gov.ie/wp-content/uploads/SI-339-of-2014.pdf
http://www.per.gov.ie/wp-content/uploads/SI-448-of-2015.pdf
http://www.per.gov.ie/wp-content/uploads/SI-490-of-2016.pdf

The legislation met the commitment in the Programme for Government 2011-2016 to introduce whistleblower legislation and addressed the recommendation contained in the Final Report of the Mahon Tribunal advocating the introduction of pan-sectoral legislation for whistleblower protection. It incorporates many of the recommendations in relation to whistleblower protection legislation made by international bodies such as G20, the OECD, the Council of Europe and Transparency International, and is consistent with best international standards of whistleblower protection. The legislation essentially replaced more limited protections provided for making protected disclosures in multiple sectoral Acts.

Since its enactment, the Protected Disclosures Act has been acknowledged as setting a benchmark internationally in promoting and supporting the role of whistleblowing in relation to anti-corruption measures.

Objective of the Act

The main objective of the Act is the protection of workers in all sectors of the economy – both public and private – against reprisals in circumstances where they make a disclosure of relevant information relating to wrongdoing that came to their attention in connection with their employment. As such it aims to encourage workers to disclose their concerns (i.e. those based on a reasonable belief), even if those concerns subsequently turn out to be incorrect, and provides redress for workers who may be penalised for making a protected disclosure.

The Act aims to minimise some of the significant potential disincentives towards reporting of concerns. For example, it contains no public interest or good faith test to be overcome by a potential discloser – tests which in other jurisdictions have resulted in workers correctly reporting wrongdoing but failing to attract the protections of the relevant legislation.

Workers

The Act seeks to protect a broad range of 'workers' with the definition of 'worker' in the Act including not only persons who are direct employees but also contractors, sub-contractors, agency workers, trainees, and members of An Garda Síochána.

Relevant Information

The Act also provides that a protected disclosure requires the communication of relevant information as defined in the Act (i.e. (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).

Disclosure channels

The Act provides for a "stepped" disclosure regime in which a number of distinct disclosure channels are available – internal, "regulatory" and external – which the worker can access to acquire important employment protections but which require different evidential thresholds. The various channels are to:

- the employer or a person authorised to receive protected disclosures on the employer's behalf.
- Prescribed persons, such as regulators and supervisory bodies, can receive protected disclosures related to the activities they regulate or supervise, provided certain conditions in the Act are met
- A Minister where the worker is or was employed by a public body in respect of which the Minister has statutory functions
- A legal adviser including a barrister, solicitor, trade union official
- External parties in certain circumstances as set out in section 10 of the Act

Specific conditions apply to disclosures relating to security, defence, international relations and intelligence matters.

The Act does not require disclosures to be made in writing nor does it prohibit the making of anonymous disclosures.

Wrongdoings

A wide definition of wrongdoings is included in the Act (see Appendix). In order to avail of the protections of the Act, a worker must have a reasonable belief that the information to be disclosed shows or tends to show the wrongdoing concerned. More stringent conditions apply in the case of external disclosures or disclosures to a prescribed person.

Protections

The Act provides significant protection for workers. The forms of protection available are:

- protection from the retributive actions of an employer (including dismissal and penalisation) with the possibility of claiming redress through the normal industrial dispute resolution mechanisms (the Workplace Relations Commission (WRC) and Labour Court on appeal) or in the case of dismissal a claim under the Unfair Dismissals Act (to the WRC or Labour Court on appeal) and potentially also an application to the Circuit Court for interim relief. Penalisation is widely defined and an employer is prohibited from carrying out any act or omission that affects a

worker to the worker's detriment (e.g. suspension, demotion, transfer of duties, reduction in working hours, dismissal, disciplinary action).

- protection from civil liability (civil immunity from action for damages and a qualified privilege under defamation law) and from criminal liability in circumstances where at the time of the alleged offence, the disclosure was, or was reasonably believed by the discloser to be, a protected disclosure

- protection from victimisation by a third party (a right of action in tort against that person)

- protection against loss caused to a discloser by reason of a failure to comply with the obligation to protect the identity of that discloser (subject to the exceptions set out in section 16 of the Act).

Disclosures made under existing sectoral legislation are given "protected disclosure" status under the 2014 Protected Disclosures Act where they qualify under the (purposely wide) definition contained in that Act to ensure a uniform standard of protection to all workers.

In addition, there are strict confidentiality provisions safeguarding the identity of a worker making a protected disclosure.

The Act does not cover disclosures for personal gain made to an external actor (e.g. a journalist).

The thrust of the Act is to provide protection for the discloser and it does not specifically impose an obligation to investigate protected disclosures.

Obligations of Public Bodies and supports available

All public bodies are obliged under the Act to have procedures in place to receive and deal with protected disclosures and to make these procedures available to their workers. The Department of Public Expenditure and Reform published comprehensive Guidance for public bodies under Section 21(1) of the Act in February 2016 to assist in the development of these procedures. A copy of the Guidance can be viewed at: http://www.per.gov.ie/wp-content/uploads/Guidance-under-section-211-of-the-Protected-Disclosures-Act-2014-for-the-purpo.pdf

In addition, the Workplace Relations Commission, in consultation with staff and employer representatives, developed a Code of Practice (which has a statutory basis) S.I. No. 464/2015 - Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015. providing guidance and setting out best practice to assist employers, workers and their representatives in understanding the Protected Disclosures Act and to assist in the practical implementation of the Act.

Public bodies are required under section 22 of the Act to publish an annual report containing the number of protected disclosures made to the body, the action (if any) taken in response,

and such other information relating to the protected disclosures and the action taken as may be requested by the Minister from time to time.

The Department of Public Expenditure and Reform has procured a Framework Agreement for the provision of training to public bodies to aid their understanding of the Act and its implementation. A Framework Agreement is also being prepared to enable public bodies to engage external expertise in relation to disclosures.

The Department of Public Expenditure and Reform has provided financial assistance to Transparency International Ireland to continue to operate its "Speak Up" helpline and to establish a Transparency Legal Advice Centre, which became fully operational in June 2016 and provides free, specialist legal advice to persons making protected disclosures. Legal advice is given, *inter alia,* to potential disclosers as to whether the information they wish to report can be disclosed under the Protected Disclosures Act.

Key issues for consultation

1. Is the Act operating effectively?

2. What appear to be the main challenges in the operation of the Act? In your view are there any unintended consequences from the operation of the Act which are not consistent with the objectives of the legislation?

3. Do you have any views on the protections contained in the Act (Sections 11 to 16)? Are the protections sufficient to encourage potential disclosers to speak up about wrongdoings or are further safeguards warranted?

4. Are there any of the definitions contained in the interpretation section (section 3) that it would be useful to reconsider, amend, replace, clarify etc.? For example, is the definition of "worker" too broad or too narrow or does it strike the right balance?

5. Do the eight categories of wrongdoings provided for in section 5(3) of the Act capture all of the matters that should be captured in that definition? If not, are the categories too broad or too narrow? Should some of the categories (or wording contained in the categories) be clarified by way of further definition?

6. The Act does not contain any requirement that the disclosure is made in good faith or in the public interest as it was felt that this could act as a significant disincentive to potential disclosers coming forward in the first instance. However, should there be some threshold of seriousness applied in respect of wrongdoing, in order to reduce the disproportionate use of investigative resources? Could this potentially affect one of the aims of the legislation - to encourage workers to disclose relevant wrongdoings?

7. Are the evidential thresholds in the stepped disclosure regime (section 6 to 10) as reflected in the Act about right to encourage persons to disclose to the employer (internally) first where appropriate?

8. Are there any persons with regulatory or other functions who have not been prescribed for the purposes of the receipt of disclosures (section 7 and related statutory instruments) and whom in your view should be prescribed? If your answer is yes please advise whom and why?

9. Does the obligation to protect the identity of the discloser contained in section 16 represent a fair balance between the rights of the discloser and the need to follow up on the disclosure? Could this be improved and, if so, how? State your reasons for this view.

10. Should the Act require recipients to act on disclosures (for example, by providing an obligation to assess or investigate) or to communicate with the person making the disclosure?

11. Should it be mandatory for businesses/firms with employees over a certain number (e.g. 100 employees) to have a Code of Practice/Internal procedures for the handling of protected disclosures?

12. Should such business/firms (e.g. with over 100 employees) be required to report on protected disclosures in their annual reports and accounts – similar to the obligation on public bodies?

13. Do you have any views on how the Protected Disclosures Act 2014 interacts with the other protections for disclosers contained in sectoral legislation? Are there certain issues that need to be clarified in respect of the protections and obligations contained in the 2014 Act and those in sectoral legislation? If there are, how would this be best achieved?

Next Steps

Submissions should be forwarded to PDconsultation@per.gov.ie using a subject line of "Review of Protected Disclosures Act" or by post to Seamus O'Reilly, Government Reform Unit, Department of Public Expenditure and Reform, 7-9 Merrion Row, Dublin 2, D02 V223 as soon as possible, but no later than 10th October 2017. Please include the following information with your reply:

- Name (organisation name or name of individual)
- Address
- Phone number
- Email address

Please remember to include in your submission

- specific examples where possible from your own experience which support your position where you are making points regarding the Act, and
- reasons for any suggestions for changes or improvements to the Act and appropriate data/examples to support these suggestions.

It should be noted that in general submissions received and reports of any meetings undertaken by the Department with any external parties in response to this consultation process will be published on the Department's website and will be subject to Freedom of Information. However in view of the sensitive nature of the subject matter, if a person or body asks that a submission would not be published, then it will be treated as confidential and any aspects of it used in the analysis and report will be anonymised.

Appendix

Background Q&A material on the Protected Disclosures Act 2014

What is the Protected Disclosures Act 2014 intended to achieve?

The main objective of the Act is to provide for the protection of workers in all sectors of the economy, both public and private, against reprisals in circumstances where they make a disclosure of information relating to wrongdoing which came to their attention in connection with the worker's employment. .

In this regard it promotes best practice corporate governance and risk management in both public and private sector organisations by encouraging workers to 'speak up' when they have concerns regarding possible wrongdoing.

Previously a partial, fragmented and inconsistent series of protections for workers existed across various sectors of the economy and this was identified as a significant gap in Ireland's legal framework for preventing corruption.

The Act met a commitment in the Programme for Government 2011-2016 to introduce whistleblower protection legislation and also met the recommendation contained in the Final report of the Mahon Tribunal for the introduction of pan-sectoral whistleblower protection legislation.

The Act reflects international best practice regarding whistleblower protection as recommended by, e.g. the UN, G20, OECD, Council of Europe and European Parliament.

What are the main provisions of the Act?

The Act seeks to safeguard the broadest possible range of workers from being subject to occupational detriment for having made a protected disclosure and also provides for immunity against civil liability. Disclosures made under existing sectoral legislation are given "protected disclosure" status, where they qualify under the (purposely wide) definition contained in the Protected Disclosures Act, to ensure a uniform standard of protection to all workers.

A "protected disclosure" is a disclosure of relevant information made by a worker in relation to wrongdoing that has come to his or her attention in the workplace, either before or after the date of the passing of the Act, in the manner specified in the Act.

What matters can be reported on?

The following matters are relevant wrongdoings for the purposes of the Act:

(a) that an offence has been, is being or is likely to be committed,

(b) 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,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged,

(f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,

(g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or

(h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.

Who is protected?

The definition of 'worker' in the Act is broadly drawn and includes not only persons who are direct employees but also contractors, sub-contractors, agency workers, members of the police forces, members of the security forces and any person who interacts with the work place on a contractual basis.

In addition to persons who are defined as workers under the Act, protection is also made available to third parties who may suffer detriment as a consequence of a protected disclosure having been made by another.

What protections are available?

Workers who are direct employees are provided with access to the existing industrial dispute resolution mechanisms of the state. Employees such as trainees and apprentices who are currently excluded from those mechanisms are provided with access to the mechanisms if they have been penalised for having made a protected disclosure. In the case of all workers who are employees access to the mechanisms is granted on a day one basis without further restriction. In addition, the compensation payable under those mechanisms has been substantially increased in respect of persons dismissed or penalised for having made a protected disclosure.

In the case of workers who are not direct employees and who are operating under a contract for services, an action in tort may be taken against the person who caused them detriment. Similar provisions apply in respect of third parties who claim to have suffered detriment as a consequence of the making of a protected disclosure by another person.

How, and to whom, does a worker report his/her concerns?

The Act sets out a "stepped disclosure regime".

The simplest form of disclosure, and the form which is ordinarily to be encouraged in the first instance, is to the employer, where all that is required is a reasonable belief that the information disclosed shows or tends to show that the wrongdoing is occurring. This is a deliberately low threshold designed to ensure that most reports are made to the person best placed to correct the alleged wrongdoing – the employer. In the case of worker in a public body that worker may choose to report to the relevant Minister.

A worker may choose to report to an external regulatory body with functions in the area which are the subject of the allegations. In such a case the threshold for protection increases to a

reasonable belief in the substantial truth of the matters reported. Prescribed persons to be the recipient of disclosures of relevant wrongdoings are set out by statutory instrument.

A worker may choose to report externally to a member of the Oireachtas or to another external source such as the media. Any person proposing to make such an external report, whilst at the same time attracting the protections of the Act must, however, satisfy a series of strictly drawn conditions set out in the Act.

Is there any restriction on the nature of the information that can be reported? Are there special provisions under the Act in relation to making a protected disclosure in certain areas?

Information which can be disclosed under the Act is "relevant information." This must come to the worker's attention in connection with his or her employment and the worker must have a reasonable belief that it shows or tends to show "relevant wrongdoing" as defined in the Act.

The Act does recognises that certain types of relevant information are more sensitive than others so that, for example, the external reporting of matters relating to law enforcement can only be made to a member of the Oireachtas. In the case of information that might reasonably be expected to adversely affect the security, defence, or international relations of the State, a specific disclosure route is set out which is designed to allow disclosure in a secure and confidential manner.

Does a disclosure have to be made 'in good faith' or in the 'public interest'?

The Act does not contain a 'good faith' test. Experience elsewhere has shown that the inclusion of such a test could call into question the discloser's motivation for coming forward. A disclosure not made in 'good faith' must have been made in 'bad faith' thus calling into question the motivation for the making of the disclosure in the first instance.

It was decided that, even if the matters reported on subsequently proved not to be correct, the discloser should be entitled to the protections of the Act provided he/she had a reasonable belief in the allegations made.

It was considered therefore that the potential for a discloser's motivation to be questioned would act as a significant disincentive to potential whistleblowers coming forward in the first instance. Similar considerations were taken into account in relation to the imposition of a 'public interest' test and no such test is included. As a consequence, the Act specifically states that the motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure.

The only instance where motivation may become an issue relates to the award of compensation for penalisation following the making of a protected disclosure. In the event that the investigation of the wrongdoing concerned is found not to have been the sole or main motivation for making the disclosure, the amount of compensation awarded may be reduced by up to 25 per cent.

Is the discloser's confidentiality maintained?

The Act imposes a burden of confidentiality on the recipient of a protected disclosure or any other person to whom the disclosure is referred in the performance of their duties.

While a failure to comply with this duty is actionable by the person who made the disclosure was made if he/she suffers any loss by reason of that failure, the Act also sets out a number of reasonable practical and pragmatic circumstances under which the duty does not apply. Among these are where the recipient reasonably believes that the discloser has no objection to being identified, or where the revelation of the identity of the discloser becomes necessary for the effective investigation of the complaint, to prevent the commission of a crime or to prosecute a criminal offence.

How does the Act compare with international standards and recommendations?

In formulating the legislation, consideration was given to the publications and recommendations of many international bodies in relation to the content of whistleblower protection legislation. Among these were the United Nations Convention Against Corruption, the G20 Anti-Corruption Plan and subsequent report of the OECD, resolutions of the European Parliament and recommendations from the NGO, Transparency International.

Significant efforts were made to ensure that the recommendations of these bodies were taken into account. As a result the Act benchmarks very favourably with those recommendations and has been praised internationally as a leader in its field.

What are public sector bodies required to do under the Act?

The Act requires that every public body shall establish and maintain procedures for the making of protected disclosures by workers who are or were employed by the public body and for dealing with such disclosures. Written information in relation to those procedures must be provided to workers employed by the public body. The Department of Public Expenditure and Reform has issued Guidance for the purpose of assisting public bodies in the performance of these functions.

Additionally, public bodies are required to publish an annual report, in a form that does not enable the identification of persons involved, containing information relating to the number of protected disclosures made to the public body, the action (if any) taken in response to those protected disclosures, and such other information relating to those protected disclosures and the action taken as may be requested by the Minister from time to time.

What is the private sector required to do to ensure compliance with the Act?

The Act provides for protection of workers in all sectors of the economy, whether public or private. While the reporting provisions of the Act do not apply to the private sector, the Workplace Relations Commission has produced a statutorily-based Code of Practice giving guidance and setting out best practice to assist in the practical implementation of the Act and to give guidance on best principles to organisations and their workers. This includes a "Model Whistleblowing Policy".

Is there a requirement to investigate?

While the Act does not stipulate it, good corporate governance would dictate that disclosures of potential wrongdoings would be investigated.