

# Blowing in the wind

*The government have made some changes to their Whistleblowers bill, but doubts remain over whether those legacy cases will still get justice*

**By Cillian Doyle**

In January the Oireachtas Joint Committee on Finance, Public Expenditure and Reform and the Taoiseach published the influential “Report on the Pre-Legislative Scrutiny of the General Scheme of the Protected Disclosures (Amendment) Act 2021” on the government’s whistleblowing bill.

The report dealt with some of the current system’s shortcomings, while assessing the bill, which is being introduced to transpose an EU directive. The Directive and therefore the transposed bill provides protections not just to traditional employees but to a broad range of reporting persons, including shareholders and volunteers.

The report identified significant shortcomings in both the current legislation and Minister McGrath’s new bill. It made extensive reformist recommendations and highlighted potentially “regressive” aspects of the Government’s new bill.

In total the report sets out a total of 60 conclusions and recommendations which arose from detailed scrutiny of the legislation from experts, academic and professionals. As well as the detailed and harrowing evidence provided by former whistle-blowers themselves, whose names would likely be familiar to Village readers.

The Committee, to its credit, undertook the scrutiny of this bill with the seriousness that it warranted, with Deputy Mairéad Farrell, Senator Alice Mary Higgins and the Chairman John McGuinness having distinguished themselves in particular. The Minister has now published his bill and whilst some of the recommendations were taken on board, others were not. The Minister is now on record in the Dail is stating that he is willing to work at committee stage to see if additional improvements can be made. It begs the question why these recommendations were not automatically included?

Will he resist his officials and the peculiarly Irish culture of protecting institutional reputations at all cost? It’s still too early to tell, but the signs that we’ve had from his time as Minister haven’t been encouraging. “Pretend and extend” is his default tactic. One major omission, which was recommendation No.1 of the Report was that the new bill would be retrospective in nature, thus

giving any new protections to those whistleblowers whose cases remain unresolved. The Minister says this matter is currently with the Attorney General for consideration, but whistleblowers themselves already see this as a red flag and an indication that the Minister is not serious in this regard.

“Key problems include that while the existing Act protects people from dismissal, the protections from penalisation are much too weak.

The Minister has broadened his definition of ‘penalisation’ in line with what the Committee recommended, and this is welcome.

However, he has pushed ahead with his requirement to add restrictive conditionality for public service workers complaining outside their organisation, only if there is a so called “emergency situation”, which is of questionable compliance with the EU Directive.

With regard to private sector organisation the Minister now proposes to include organisation with 50 employees or more within the regime. So if you work in an organisation with 49 workers...well tough luck!

These problems simply go unaddressed in the bill.

Of the 60 recommendations the following were key, and are identified as having been taken on board or not:

- The first recommendation, and arguably the one where there is the greatest doubt, is whether the new legislation will be retrospective in nature and any additional protections be given to whistleblowers who have unresolved cases. This has yet to be taken on board.
- That consideration be given to the new “restrictive conditionality” for making a protected disclosure to the relevant Minister - as it may be incompatible with the EU Directive. This recommendation was not taken on board
- The Committee, in consultation with the Office of Parliamentary Legal Advisor (OPLA), found that the changes in the Ministers forthcoming bill found that the requirement for a reporting person to believe that the perceived wrongdoing “was substantially true”, rather than simply “true” as under the current act raised the current threshold for reporting

externally. This was deemed to be incompatible with the EU directive. It was also found the requirement to “cooperate, as required” with an investigation into wrongdoing should be removed, as there could be valid reasons for not cooperating with such an investigation. This recommendation was taken on board.

- That the new bill/Act should be retrospective in nature to ensure protected disclosures made before the enactment of the amended legislation receive the full benefit of the legislation
- That the definition of penalisation be broadened to include “vexatious proceedings brought against a discloser” and “attempts to hinder further reporting”. This was taken on board.
- That there should be a legal requirement to accept anonymous reports of breaches and determine follow-up on the same basis as other disclosures. This was taken on board.
- That consideration be given to the removal of caps on awards for those seeking financial redress. This was not taken on board.
- That free legal and psychological counselling services be provided to those making protected disclosures. This was not taken on board.

The report is quite detailed so I would encourage those with an interest to take a look for themselves. It can be found on the Finance Committee’s homepage.

It should also be noted that the December deadline for the government to transpose the EU directive, through its own bill, has now passed and this State could find itself fined for this, as we were previously with our failure to enact the Anti-Money laundering directive on time.

The fastest way for the government to do this, and avoid a potential fine, is to enact Deputy Farrell’s own Protected Disclosure (amendment) bill which has proceeded to second stage. This bill already gives expression to many of the recommendations of the report, as it was crafted in consultation with legal practitioners, academics and whistleblowers themselves.

This government, just like those that went before it, is happy pay lip service to the bravery of whistleblowers. And yet it is in reality quite content to allow the organisations, in which wrongdoing was revealed, to attempt to extinguish them.

At the start of this year the Taoiseach claimed that “disinformation” is now “a very real threat to the sustainability of free democracies”. When I heard that, I wondered what the numerous whistleblowers who appeared before the Committee to tell their stories would have made of those words. I’m sure they felt like their attempts to reveal the truth were often misconstrued as “disinformation”. **✚**

*Cillian Doyle is Advisor to Sinn Féin’s Spokesperson on Public Expenditure and Reform, Mairéad Farrell*