

Mr. Seamus O'Reilly
Government Reform Unit
Department of Public Expenditure and Reform
7 – 9 Merrion Row
Dublin 2.

12th October 2017

**RE: PUBLIC CONSULTATION ON THE REVIEW OF THE PROTECTED
DISCLOSURES ACT 2014**

Dear Mr. O'Reilly

I refer to the above consultation process and now enclose herein a submission on same from the Garda Síochána Ombudsman Commission. I apologise for the delay which was due to final legal consideration of same.

As you may be aware the Commission has now had considerable experience of dealing with the provisions of the Protected Disclosures Act 2014. Of particular concern to the Commission has been the fact that we are, uniquely, dealing with disclosures about personnel or the general workings of another organisation, An Garda Síochána. Also, we operate under the Garda Síochána Act 2005 in terms of our own practices and procedures and no consideration of this legislation and how it functions appears to have been considered when drafting and passing the 2014 Act. Therefore the submissions enclosed raise a number of difficult issues we have encountered in practice.

Please do not hesitate to contact me directly if you wish to discuss matters further.

Yours sincerely

A handwritten signature in black ink that reads 'Mary Ellen Ring'. The signature is written in a cursive style and is positioned above a horizontal line.

Ms. Justice Mary Ellen Ring
Chair, Garda Síochána Ombudsman Commission

Encl.

Amendments Required to Enable Effective Investigation of Protected Disclosures by GSOC

1. Anonymity of Discloser

The Protected Disclosures Act, 2014 provides in section 16 for the protection of the identity of the person making the protected disclosure (the "PD").

The protection of the identity of the person making the PD does not apply where disclosure of the identity is necessary for the effective investigation of the relevant wrongdoing concerned.

Where an investigation is required by GSOC it will, in almost all cases, require that the identity of the person making the PD is disclosed. This is in order to accord with fair procedures and to comply with the provisions of the provisions of Section 88(3) of the Garda Síochána Act 2005.

Where a person makes a PD to GSOC, in order to investigate the disclosure, GSOC needs to apply a public interest test. If GSOC considers that investigation of the PD is in the public interest then it can do so. If the person who makes the PD decides to withdraw from the process GSOC may still determine that the investigation should proceed and that the identity of the discloser needs to be revealed absent his/her consent to do so.

Proposed Solution

A statutory provision confirming that:

i) an investigation commenced by GSOC in relation to a protected disclosure may proceed without the discloser's consent and may require the disclosure of his/her identity;

or

ii) GSOC may discontinue the investigation of a PD where it is no longer possible to continue the investigation without disclosing the identity of the discloser and the discloser does not consent to his/her anonymity being waived.

2. Mandatory Referrals by the Minister for Justice and Equality (the "MoJE")

GSOC may receive PDs directly, as a prescribed body, or indirectly via referrals from the MoJE in accordance with s102 (5) or s102 (7) of the Garda Síochána Act, 2005 (the "GSA 2005"). If the referral of the PD is made by the MoJE pursuant to section 102 (7), GSOC has a discretion to investigate. If the referral of the PD by the MoJE is made pursuant to s102 (5), GSOC is mandated to investigate the referral.

It is not clear why a public interest test should be imposed by GSOC where it directly receives a PD and why a referral of a PD by the MoJE pursuant to s102 (5) mandating an investigation would not be subject to such a test. In GSOC's view this could be perceived as a fettering of GSOC's independence.

Proposed Solution

It would be preferable if GSOC retained a discretion to investigate referrals by the MoJE rather than being mandated to do so by the MoJE and that the same public interest test would be applied by GSOC when considering the referral of PDs by the MoJE.

3. Whether Referrals by the MoJE should be treated by GSOC as PDs?

Statutorily, a PD may be referred to GSOC for investigation by the MoJE pursuant to s102 (5) or s102 (7). Such a referral does not fall for investigation by GSOC under s102A of the GSA 2005 (the provisions relating to investigations of PD's to GSOC as a prescribed person under s7 of the Protected Disclosure Act, 2014). This creates an ambiguity for GSOC in relation to the rights and protections afforded to a discloser under the Protected Disclosure Act, 2014 and whether such obligations extend to GSOC as a third party recipient of information relating to a protected disclosure, in particular the requirement to protect the identity of the discloser.

Proposed Solution

It would be preferable if the GSA 2005 provided clarity as to whether information relating to PD's made to the MoJE, that he in turn decides to refer to GSOC for investigation, should also be treated as PD's by GSOC.

4. Notifications to the Garda Commissioner in accordance with s 88 of the GSA 2005

GSOC is obliged to make certain notifications to the Garda Commissioner in accordance with s88 of the Act at the outset of an investigation. This may result in the identity of the discloser being made known to the Garda Commissioner and the Garda member or members who are the subject of the disclosure.

Proposed Solution

It would be preferable if GSOC had an express provision to enable delay in notifications to the Garda Commissioner where concerns may arise in relation to loss of evidence, witness interference or where notification of the investigation may result in the identification of the discloser and such identification is not necessary, at that stage, to further the investigation.

5. Data Protection and Protected Disclosures

There is no specific exemption for disclosure of personal data received by GSOC with respect to PDs.

The sharing of information in compliance with the current statutory regimes for Protected Disclosures, the Data Protection Acts and the Garda Síochána Act is complicated.

GSOC receives requests from the Policing Authority for the suitability of applicants for promotion. Consent is obtained from such applicants for enquiries to be made with GSOC. However, having regard to the terms of s16 of the Protected Disclosure Act, 2014, GSOC may be precluded from sharing such information even though this may have significance for the Policing Authority.

GSOC may also wish to communicate with the Minister for Justice or An Garda Síochána to establish if there is an existing investigation into the subject matter of the protected disclosure. The reason for this is that if an investigation is already in train by another agency this is a relevant consideration for GSOC when determining whether investigation of the protected disclosure to GSOC is in the public interest.

Proposed Solution

A specific exemption dis-applying the provisions in relation to the processing of data where such processing is in aid of a regulatory function.

or

Legislate for a balancing test to balance potential competing rights.

6. Deferral of GSOC Investigation

Having regard to the terms of the Protected Disclosure Act, 2014 a discloser may make an internal PD before making a PD to a prescribed person (pursuant to s7) or the MoJE (pursuant to s8). By the time the PD is received by the GSOC an investigation into the same subject matter as the PD to the GSOC may already be underway. Likewise the discloser may have also complained to other statutory bodies such as the Data Protection Commissioner, who may have an active investigation into elements of the disclosure. This may create difficulties for any GSOC investigation.

Proposed Solution

An express statutory provision affording the GSOC a discretion to defer the investigation of a matter pending resolution of another process would enable the GSOC to better defend potential delay arguments.

7. Disciplinary and criminal proceedings

The GSOC may receive a PD that has been the subject of a previous internal process e.g. an internal disciplinary investigation. The GSOC may decide that a criminal investigation is warranted notwithstanding that there has already been an internal disciplinary investigation. Such a decision may give rise to challenges such as a double jeopardy plea or a breach of rights to constitutional justice plea.

Proposed Solution

A statutory acknowledgement that a person may be subject to a multiplicity of proceedings including disciplinary and criminal that may already have been the subject matter of one process would assist in defending any challenges in this regard.

8. Scope of investigation into protected disclosure

The current statutory framework provides for investigation of “the disclosure” if GSOC considers such an investigation to be in the public interest. Where GSOC identifies systemic issues during the course of the investigation it may face challenges as to whether it has the jurisdiction to investigate these matters.

Proposed Solution

A statutory amendment to expressly allow for a PD investigation into systemic and related matters raised by the subject matter of the PD would make clear that the GSOC investigation is not limited to the terms of the disclosure made.

9. Pre- admissibility enquiries

There is no provision under the current legislation to make any pre-admissibility enquiries to determine whether the matter disclosed requires investigation and, if so, whether a criminal or disciplinary investigation should be initiated.

Proposed Solution

To make statutory provision for pre-admissibility enquiries to determine if and how a protected disclosure should be investigated.

10. Protected Disclosures relating to Security and Intelligence

In the normal course of events GSOC will deal with complaints in matters which are covered under the auspices of Security and Intelligence. However a discloser cannot make such a complaint to GSOC given the provisions of Section 18 (3) of the Protected Disclosures Act, 2014.

Proposed Solution

A statutory amendment to enable GSOC to investigate protected disclosures relating to security and intelligence.

11. Reserve members of the Garda Síochána

The Garda Síochána Protected Disclosure Policy (February 2017) confirms that reports of wrongdoing by members of the Garda Reserve will be treated as protected disclosures.

It appears that there is a concern that the definition of “worker” as set out in section 3 of the Protected Disclosure Act, 2014 does not cover reserve members of the Garda Síochána.

Proposed Solution

A statutory amendment to specifically include reserve members of the Garda Síochána as “workers” under the Protected Disclosure Act, 2014.