



Garda
Ombudsman
INQUIRY INDEPENDENCE IMPARTIALITY

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Submission to Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

Pre – Legislative Scrutiny of the General Scheme of
the Protected Disclosures (Amendment) Bill 2021.

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1. The policy rational for the Bill

The Garda Síochána Ombudsman Commission (GSOC) has engaged with the Department of Public Expenditure and Reform regarding the transposition of EU Directive 2019/1937 into Irish legislation from 2019. GSOC is aware since that time of the need for the transposition to be completed prior to the 17th of December 2021. The Bill an important and necessary strengthening of the legalisation in line with the EU Directive. GSOC had previously submitted observations in 2017 on legislative reform through public consultation processes undertaken by the Department of Public Expenditure and Reform, which can be provided to the Committee if required.

2. The technical, legal and drafting aspects of the Bill

a) Draft Head 10(5).

"The reporting person shall cooperate, as required, with any investigation or other follow up procedure initiated in accordance with section 4(c)."

It is suggested that the time requirements on the disclosure recipient at Draft Head 10(b) (4) (b) and Draft Head 10(b) (5) (seven days and three-six months respectively) be moderated to take account of circumstances where the reporting person does not "cooperate, as required, with any investigation or other follow up procedure initiated in accordance with section 4(c)".

b) Draft Head 14(3).

"Personal data which are manifestly not relevant for the handling of a specific protected disclosure shall not be collected or if accidentally collected shall be deleted without undue delay."

Imposing a requirement not to collect data at an early stage of an investigation (and the requirement is not time-limited), particularly where a criminal wrongdoing is alleged, may limit investigative avenues and frustrate an investigation at a point where it may not be clear what material is relevant and what is not.

The inclusion of the following text is suggested:

"Personal data which are manifestly not potentially relevant for the handling of a specific protected disclosure shall not be collected or if accidentally collected shall be deleted without undue delay."

3. Possible areas where the Bill might be improved

- a) Draft Head 7 'Personal Scope'. Amended section 3 (h) (expanding to include the recruitment process or other pre-contractual process) will bring other persons into and under the remit of organisations receiving and investigating protected disclosures. This will increase the possibility of approaches to GSOC from unsuccessful candidates for the Garda Síochána in particular. However as recruitment includes the Public Appointment Service procedures where members of AGS are on a board and are not running competitions, this may lead to confusion as to who the disclosure is about, particularly

having regard that GSOC has no statutory remit to investigate persons not members of the garda staff. Further clarification may be required as AGS is not the only organisation to use the PAS process in recruitment.

The challenge also arises at the senior level where the Policing Authority is currently dealing with senior appointments and GSOC would have no remit in investigating disclosures which could involve this organisation.

- b) Draft Head 8 - 'Anonymous Disclosures'. A new 5A (1) and (2) is to be inserted in the existing legislation, the Protected Disclosures Act 2012 ("the 2014 Act"). Consideration needs to be given at an early stage to treating anonymous matters as if they were protected disclosures, particularly when transferring information across agencies, given that an investigation may result in the person's identity actually becoming known. Complications may occur where material is provided to GSOC externally by the Ombudsman's office where the original anonymous disclosure was made to the Minister of Justice. The protection of a person's identity is central to the protected disclosures process and while an anonymous disclosure may not directly identify the author the information contained therein may indirectly narrow the disclosure down to one person or a few persons. The non-secure or casual transfer of information across a number of agencies increases the potential for information becoming known to a wider public audience and leading to a breach of section 16 of the 2014 Act. GSOC currently reviews all anonymous correspondence received into GSOC within the Protected Disclosures Unit in an effort to keep such information secure.
- c) Draft Head 9 - Internal Reporting Channels'. This head proposes that Section 6 of the 2014 Act is amended. At (9) (e) a reasonable timeframe to provide feedback, not exceeding three months ... is introduced. In Head 10 'External Reporting Channels' the existing section 7 of the 2014 Act is amended at (4) (d) with a requirement to provide feedback to the reporting person within a reasonable timeframe not exceeding three months... It is the view of GSOC that there should be also an onus on the person making the disclosure to actively engage in order for these timeframes to be met. GSOC has had the experience where disclosers have taken some time to fully engage, provide documentation and complete statements in a timely fashion. This is not to apportion blame as for many the protected disclosure process is difficult and there may be, for instance, family pressures or other personal pressures which means the proposed timeframes would be difficult to meet in such instances. While there is a provision in Head 10 – (4) (d) - in relation to an extension to six months in duly justified cases, this does not deal with the case of a Discloser who is not cooperating with the investigation process.
- d) Draft Head 10 'External Reporting Channels'. Difficulties may arise in fulfilling the obligations under sub-section 4 (e) without infringing the matters set out in subsection 4 (7) and those dealing with protected disclosers may have to return to these provisions in time.
- e) Draft Head 11 'Ministerial Reporting Channels'. GSOC welcomes the inclusion of timeframes, in particular the 7 days turnaround at the amended section 8 (3). It will be

important to ensure compliance with these timeframes but it will also be important to ensure clarity as to who is responsible for such actions in Ministerial offices and provide suitably trained personnel familiar with the legislation to take on the responsibilities under the legislation.

- f) Draft Head 13. 'Duty of Confidentiality'. GSOC understands and welcome the recognition that persons other than the Discloser may be affected by a protected disclosure in a way that the protections offered in section 16 of the current legislation should apply to them as well. However at the new section 16B proposed in Head 13 the reference is to persons concerned. "Person concerned" is defined at Head 2 of the General Scheme in a very broad way and further guidance will be required for persons acting under the provisions of the protected disclosures legislation. In particular how far is the reach of a person with whom that person is associated. This will be particularly difficult if the protected discloser is unaware of such associations.
- g) Draft Head 14. 'Data Protection'. It has been the experience of GSOC that data access requests have been made in an attempt to establish the identity of protected disclosers. GSOC is aware that this is an avenue used in other agencies or departments. Any regulations issued under this Head should have regard to such efforts to breach the protections offered to a Discloser and the statutory rights and protections under data legislation should be balanced with the rights and protections under the protected disclosures legislation.

Generally the issue of data sharing in relation to protected disclosures is challenging. In the case of GSOC protocols with AGS have been established to allow for necessary and appropriate information to be made available to allow an investigation to proceed. Simultaneous disclosures have been made to the Garda Commissioner, the Minister for Justice, GSOC and the Policing Authority but as all parties are covered by the protections in section 16 of the 2014 Act, confirming receipt of the disclosure and appropriately sharing information is challenging. Protected disclosures to GSOC may relate to health and safety breaches and sharing this information with the Health and Safety Authority for instance may constitute a breach of section 16 of the 2014 Act without express consent of the Discloser.

- h) Draft Head 15. 'Record Keeping'. The importance of accurate records goes without saying but again the need for regulations as proposed under Head 14 (2) can't be overlooked or delayed.
- i) Draft Head 16. 'Establishment of Protected Disclosures Office". This is an important new addition that will hopefully bring accountability and consistency in the handling of protected disclosures and as such is welcomed by GSOC.

It is important to note that such an office must be staffed with suitability trained personnel and not just be seen as an "add on" in the current multi-functioning Ombudsman office. GSOC had to set up a separate Protected Disclosures Unit (PDU) within GSOC to ensure the protections at the centre of such a legislative mandate were protected in practice. This required extra personnel being brought into GSOC as the

nature of the work involved could not just be “added on” to the current workload of investigators. The PDU has put in place separate procedures and a separate case management system. The personnel work exclusively on protected disclosures. This is to ensure that no accidental or negligent breach of section 16 of the 2014 Act occurs. Documents are securely stored within the PDU to ensure only those working on such disclosures have access to the documentation, again protecting the identity of the parties involved.

The Ombudsman office will be in possession of information including the identity of the disclosers and “persons concerned” which will have to be protected. GSOC notes at Draft Head 20 that powers are given to the Protected Disclosure Office to investigate disclosures received in the instances as set out in that Head. The Ombudsman will make his/her own case with regard to the structures to be put in place by the Protected Disclosures Office but the experience of GSOC required separate personnel to deal securely with the information involved in protected disclosures and to investigate such disclosures. GSOC would be against any view that suggests that the Ombudsman office can “absorb” the responsibilities under the new regime without providing appropriately trained personnel to deal with the issues and powers arising from protected disclosure legislation.

GSOC would suggest that Head 16 (3) (a) be amended to include Securely transmit disclosures.

The inclusion of Securely transmit should be included at Head 17 2. As well as at Head 18 1. (b) (i) (II).

At Head 19 similar issues occur with regard to reporting at (d) and the GDPR access at (f).

- j) Draft Head 21. ‘Protection from Retaliation’. GSOC would recommend that, if an instance of retaliation occurs during an investigation, an administrative letter should be sent to the employer putting them on notice as soon as possible of the alleged retaliation. This would be with a view to allow the investigation to be completed and the Discloser be protected from any instance that could be seen as an instance of intimidation to put a Discloser off continuing with the investigation.
- k) Draft Head 22. ‘Measures of Support’. Clarification is required as to what ‘effective assistance’ amounts to as this is an obligation placed on Prescribed Persons.
- l) Draft Head 24. ‘Penalties.’ There is a need for the Penalties to be brought in at the time of enactment to ensure that there is a deterrent to this activity.
- m) Draft Head 25. ‘Guidelines for Public Bodies’. Guidelines would be welcomed to ensure that disclosers have access to equitable assistance regardless of what body they interact with during the disclosure process.
- n) Draft Head 26. ‘Reporting.’ A template for such a report should be available for download to ensure consistency in reporting and the template should be updated as required centrally.

3. Possible implications/consequences arising from the Bill

Head 5 1. The introduction of part (i) increased workload of matters which can be considered. (a) breaches falling within the scope of the Union acts set out in the Annex that concern the following areas:

(i) public procurement;

(ii) financial services, products and markets, and prevention of money laundering and terrorist financing;

(iii) product safety and compliance;

(iv) transport safety;

(v) protection of the environment;

(vi) radiation protection and nuclear safety;

(vii) food and feed safety, animal health and welfare;

(viii) public health;

(ix) consumer protection;

(x) protection of privacy and personal data, and security of network and information systems;

This inclusion of the new categories while in keeping with the EU Directive will permit disclosures to be received on further categories and therefore has the potential to increase the workload on organisations which can only be absorbed with the proper resources being allocated to take these new matters into account. It is clear from the EU Directive and the suggested timeframes that an efficient investigation is desirable for all parties concerned. However to anticipate that new responsibilities and new areas of disclosure can be met by existing personnel and currently allocated resources across the public service risks the efficiency principle being undermined from the outset. Training on the new provisions will be essential. It is the experience of GSOC that disclosers wish to meet with investigators outside normal working hours as taking time off to make a protected disclosure and participate in the resulting investigation is not something likely to be discussed with employers or supervisors. Therefore GSOC has had to seek an allowance for its Disclosure investigators over the course of two years to allow for additional required work but this has been unsuccessful to date.

4. Any other comments you may wish to make on the Bill

The provisions of Section 16 of the 2014 Act are an intrinsic part of the legislative protections afforded to the Discloser. On occasion however the Discloser wishes to go public with their name, at which time invariably the media report on such matters. Despite the Discloser deciding to waive their anonymity, there is still an obligation on the Prescribed Person to continue to protect the anonymity of the Discloser which appears to be counter intuitive. This issue has recently been raised in the Fourth Interim Report of the Tribunal Inquiry Terms of Reference [p] (“the Disclosures Tribunal”) at Volume 2, page 767 of the report. The decision of a Discloser to publically identify

themselves does not release the organisation(s) dealing with the protected disclosure of the obligations under section 16 of the 2014 Act. This has led to difficulties for all involved and the recommendations of the Disclosures Tribunal should be considered in that regard.

In conclusion GSOC has been involved in the Network of European Integrity and Whistleblowing Authorities (NEIWA) since its beginning in 2019. Attached to this submission are the Declarations from Paris (December 2019), Rome (June 2020), Brussels (December 2020) and Utrecht (June 2021). The organisations across Europe came together to monitor the various countries' implementation of the Directive on Whistleblowing to ensure protections across the member States. GSOC has been the Irish representative and plans to hold a conference leading to the Dublin Declaration in days preceding the 17th of December 2021.

Paris, December 2019.

[NEIWA+Declaration+2+December+2019.pdf](#)

Rome, June 2020.

[Declaration+NEIWA+26.6.2020.pdf](#)

Brussels, December 2020.

[2020.12.14+Brussels+Declaration+NEIWA+4th+meeting.pdf](#)

Utrecht, June 2021

[Final+declaration+NEIWA+5th+meeting_internal+channels.pdf](#)