



John McGuinness, T.D.
Cathaoirleach to the Committee
Joint Committee on Finance, Public Expenditure and Reform,
Leinster House
Dublin 2
D02 XR20

28 July 2021

By email

Re: General Scheme of the Protected Disclosure Amendment Bill

Dear Deputy McGuinness,

I write in my capacity as Chairperson of the Employment & Equality Law Committee of the Law Society of Ireland ('the **Committee**').

The Committee's role includes reviewing draft and existing legislation and we write in response to your correspondence which invited us to make a written submission on the General Scheme of the Protected Disclosure Amendment Bill ('the **General Scheme**').

1. Policy rationale for the Bill

Notwithstanding the requirement to implement the Directive by 17 December 2021 and the principle of non-regression, the Protected Disclosures Act 2014 ('the **Principal Act**') already provides an extensive and sophisticated structure for the protection of whistle-blowers in Ireland, surpassing similar frameworks in a number of other Member States.

It is therefore submitted that, while any additional mandatory protections provided by the Directive should be incorporated into the amending legislation to the extent that they are not already included in the Principal Act, further national protections are unnecessary.

2. Technical, legal and drafting aspects of the Bill

Whilst simple adoption of the wording of the Directive (with an element of '*Irishisation*') may be appropriate for other/historic legislation, it would not be appropriate for this transposition due to the already expansive nature of our existing legislation.

When the Principal Act was introduced, it was described by the Government as being "world class" with significant protections for workers, including a stepped disclosures regime, no good faith requirement and no public interest requirement (except in limited circumstances).

It is submitted that the blanket transposition of Articles of the Directive into the provisions of the Principal Act (particularly in the absence of very careful drafting) could create unintended consequences and make the navigation of the Irish whistleblowing regime, and its application in practice, potentially unworkable. For this reason, it is submitted that the mandatory provisions required by the Directive which are not already included in the Principal Act should be ring-fenced.

3. Possible areas where the Bill might be improved

Given the limited time available to respond, the Committee has limited amendments to the detail of the General Scheme however, a number of areas of concern (which, in our view, warrant particular attention) are listed below.

In general terms, greater clarity and certainty is needed in respect of:

1. The proposed reversal of the burden of proof in circumstances where the discloser is allegedly penalised.
2. The proposal to exclude interpersonal grievances where the facts giving rise to the grievance overlap with the definition of a protected disclosure.
3. What the terms 'grievances' and 'interpersonal conflicts' mean and when they will not be considered to constitute a relevant wrongdoing.
4. Head 21 – the remedies available to workers who do not fall within the definition of employee.

Further areas of concern are:

5. Role and scope of the Director of the PDO - potential conflict between:
 - i. Head 16 (5) and the note at the end of proposed section 8; and
 - ii. Head 16 (3 c) and Head 16 (5).
6. Guidance to public bodies – Head 9 refers to the repeal of section 21 but Head 25 refers to replacement of section 21(3) and (4).
7. Head 26 – a proposed new section 22 (or 21?) requires a public body to include PDs made under section 8 in its annual report but Head 18 does not require the Minister or the Director of the PDO to notify a public body of a disclosure under section 8.
8. The inclusion of medical referrals in the definition of 'penalisation' should, in our view, be limited by the extent to which an employer is required to discharge its legal obligations to the relevant employee (e.g. duty of care, health and safety and/or reasonable accommodation).
9. Will any/all requirements transposed from the Directive apply to entities without employees, such as special purpose vehicles (which generally have directors and shareholders but no employees)?
10. Will the requirement to establish reporting channels from 17 December 2021 apply to financial service organisations (and all employers falling within the Union acts referred to in Parts I.B and II of the Annex to the Directive) with less than 50 employees (including legal entities with no employees e.g. special purpose vehicles)?

4. Possible implications/consequences arising from the Bill

See paragraph 2 above.

It is submitted that enactment of a Bill (which mirrors the General Scheme) may increase the volume of claims being referred to the WRC and Labour Court.

We also note the extensive role which is envisaged for the Director and believe that steps should be taken to ensure that each of these entities/functions are adequately resourced to effectively cope with case-load volume.

Conclusion

The Committee appreciates the opportunity to comment on the General Scheme and will be glad to engage further in respect of any of the issues raised.

Given the significance and complexity of the issue, we will also welcome the opportunity to comment on the technical, legal and drafting aspects of the Bill itself once available.

Yours sincerely,

*sent by email bears no signature

Catherine O'Flynn
Chairperson
Employment & Equality Law Committee

