Oifig an Ard-Rúnaí
An Roinn Oideachais agus Scileanna

AN ROINN OIDEACHAIS AGUS SCILEANNA | DEPARTMENT OF EDUCATION AND SKILLS

Office of the Secretary General
Department of Education and Skills

Ms Margaret Falsey
Committee Secretariat
Committee of Public Accounts
Leinster House
Dublin 2

Your ref: PAC32-I-938
Our ref: S1814157

12th June 2018

Dear Ms Falsey

I refer to your letter dated 29 May 2018 referring to the Committee's meeting of 24 May at which you state:-

"A case in CIT was cited whereby the terms of reference of an investigation into a protected disclosure were set by individuals named in the disclosure."

The Committee requested that I respond to their concerns in relation to such a practice and guidance provided to educational institutions in relation to protected disclosures and the avoidance of possible conflicts of interest.

At the outset, I have reviewed the relevant extracts of the transcript of the Committee's meeting and it is clear that the case raised by the Committee refers to the investigation of approximately 200 issues raised in anonymous complaints communicated to the Department, Higher Education Authority (HEA), C&AG and PAC in May and December 2014.

While it may be open to the person who made these anonymous complaints to seek redress under the Protected Disclosures Act, 2014, I am not aware that this has been the case in this instance.

I am satisfied, having confirmed with the HEA, that it is not the case as stated by the Committee in its letter that the terms of reference into the issues raised in the anonymous correspondence were indeed set by individuals against which allegations were made in the correspondence.

The HEA have advised that the Terms of Reference were set by independent legal advisers for CIT's Audit Committee and that the Audit Committee subsequently appointed independent

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consultants to review the allegations who reported that the allegations offered no basis for concern. This approach adopted in this instance was, therefore, consistent with good practice, and importantly, the terms of reference for the Audit Committee.

As highlighted by the Committee's request it is, of course, a basic principle of natural justice applying to any review or investigatory process within any organisation that it is undertaken independently from any person who is the subject of or directly associated with the matter(s) being investigated in order to ensure that no actual or perceived conflict of interest arises.

With regard to the Committee's concerns in relation to the practice of internal assessment and, where necessary, internal investigation of a protected disclosure, such internal assessment processes are recognised as best practice and are consistent with the approach recommended in the Department of Public Expenditure Reform (DPER) Guidance under Section 21(1) of the Protected Disclosures Act 2014. Specifically, the DPER Guidance advises that appropriate procedures should be in place in organisations to provide "a safe platform for workers who wish to make a protected disclosure to do so in the confidence that they enjoy the protections of the 2014 Act" and highlights the benefit of such disclosures being made to "independent functions" within organisations.

This approach is further endorsed within the Workplace Relations Commission (WRC) Code of Practice on Protected Disclosures Act 2014 (S.I. No. 464 of 2015) states that "It is in the best interests of all concerned in the workplace – management, workers, and their representatives – that disclosures about wrongdoing are managed internally."

A review of the Protected Disclosures Act is currently being undertaken by the Department of Public Expenditure and Reform. I will ensure that that DPER is advised of the concern raised by the Committee so that it can be considered in the context of the review and any revision of the DPER Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act.

In the course of the Committee's meeting on 24 May, the Department was also requested by a member of the Committee, in consultation with the HEA, to consider following the evidence provided to the Committee by a representative of CIT in relation to specific matters first raised in 2012 whether a "protected disclosure" was made to CIT prior to the Protected Disclosures legislation coming into effect which took place in July 2014.

As the Committee may be aware, the Protected Disclosures Act has retrospective effect to the extent that redress can be sought by a worker in respect of penalisation for making a protected disclosure made before the legislation was commenced where the penalisation was subsequent to or ongoing from that date.

As was the case in relation to the anonymous disclosures in CIT, any concerns raised internally prior to July 2014 when the Protected Disclosure Act came into force would have been a matter for CIT to deal under whatever policies and procedures were in place at that time.

At the meeting of the Committee on 24 May, CIT representatives stated that this approach was adopted in respect of the matters raised at the Committee which were responded to by

CIT under the policies in place at that time with the outcome as communicated at the meeting.

As discussed at the Committee meeting on 24 May, at the point in time that disclosures are made they cannot be unequivocally categorised as comprising or not comprising a protected disclosure. Irrespective of whether a disclosure was made subsequent to or prior to the legislation coming into effect, it is only when a claim for redress is determined that it is possible to conclude definitively whether a protected disclosure was made or not.

Under the DPER Guidance for public bodies for dealing with protected disclosures, it is recommended that that disclosures received by public bodies are assessed and, if considered on the basis of that assessment as potentially constituting a protected disclosure identifying wrongdoing under the Protected Disclosures Act, investigated.

However, outside of the scope for a discloser to have the matter assessed through the legal process, given that the concept of a protected disclosure as set out in the 2014 Act did not exist prior to that legislation coming into effect it does not seem possible to conclude whether any specific issues first raised in 2012 should now, on a retrospective basis, be classified as potentially comprising what may now be regarded as a protected disclosure.

I trust the foregoing is of assistance to the Committee.

Yours sincerely

Mr Seán Ó Foghlú
Secretary General