

PROTECTED DISCLOSURES (AMENDMENT) BILL 2021

GENERAL SCHEME

SUBMISSION TO THE JOINT COMMITTEE ON FINANCE, PUBLIC EXPENDITURE AND REFORM BY THE DIRECTOR GENERAL OF THE OFFICE OF THE OMBUDSMAN

16 JULY 2021

1. We welcome the opportunity to make a submission to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach on the General Scheme of the Protected Disclosures (Amendment) Bill 2021. The General Scheme proposes amendments to the Protected Disclosures Act 2014 in order to implement Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law. This important Directive strengthens whistleblower protection across the EU, recognising the critical role that whistleblowers can play in uncovering unlawful activities that damage the public interest and the welfare of our citizens and society.
2. The role of the Office of the Ombudsman is to examine complaints from people who feel they have been unfairly treated by certain public service providers, including government departments and offices, local authorities, the Health Service Executive and health and social services agencies, publicly funded third-level educational bodies, public and private nursing homes and Direct Provision centres. The Ombudsman is appointed by the President and reports to the Oireachtas. The Ombudsman is supported in his or her work by staff, who are managed by the Director General. The role of the Director General covers the Office of the Ombudsman, the Office of the Information Commissioner (OIC), the Office of the Commissioner for Environmental Information (OCEI) and the secretariat to the Standards in Public Office Commission (SIPOC) and the Director General is also the Director of the Office of the Commission for Public Service Appointments (CPSA). While each of these Offices carries out separate and distinct statutory functions, they share a corporate framework under the rubric of the Office of the Ombudsman. Corporately they function as a single amalgamated agency under one Vote and one Accounting Officer and a management team which manages the Office, while simultaneously protecting and preserving the statutory independence and functions of each of the constituent parts. Each statutory Office has its own staff complement but the finance, human resources, legal, communications and information technology functions are shared. The Offices also share common values. The central themes of the Offices' Mission Statements are of fostering transparency, increasing accountability and the improvement of services in the public sector. Our focus is on extending the impact of our Office on the wider public service, on continuously improving the level of services we provide, and ensuring that our systems and processes allow us to deliver on those objectives. In order to successfully deliver on our Mission Statements we promote a positive culture of ethical behaviour and effective governance.

ESTABLISHMENT OF THE PROTECTED DISCLOSURES OFFICE (PDO)

3. Recital 64 of the Directive notes that competent authorities may include authorities of a more general competence at a central level within a member state or ombudsmen. Recital 65 of the Directive notes that competent authorities should have the necessary capacities and powers to ensure appropriate follow up, including assessing the accuracy made in the report and addressing the breaches reported by launching an internal enquiry, investigation, prosecution or action for recovery of funds, or other appropriate remedial action, in accordance with their mandate. As independent civil servants of the State, who support an independent Office-holder in fulfilling his/her mandate, the Ombudsman's office has the necessary independence, capacities and expertise to take on the role of the Protected Disclosures Office (PDO). The Office also views the principle of whistle-blowing as a means of enhanced accountability and transparency, which is entirely consistent with the role of the Ombudsman in respect of maladministration.
4. The nature of the work carried out by the Ombudsman is investigation, which aligns with the requirements of the Directive. However, as this is a new area with which the existing staff of the Office of the Ombudsman will be unfamiliar, significant assistance will be required in establishing the specific capacity and expertise required to carry out the function in practice. In addition, further detailed engagement with the Department is required in relation to the legal status and structure of the PDO.

INDEPENDENCE

5. The Directive provides for specific requirements to demonstrate independence and autonomy of reporting channels, which apply to every recipient of a protected disclosure. As a protected disclosures office of last resort, and the recipient of all disclosures made to a Minister, the substantive independence of the PDO is crucial. Over the last 40 years, the Office of the Ombudsman has clearly demonstrated its independence, as each holder of the role of Ombudsman has carried out the functions of that Office without fear or favour. That independence is possible as a result of a number of key factors. In this regard I refer to a couple of significant points from the recently adopted Venice Principles¹ which describe the requirements of the Office of Ombudsman:

Principle 14 – “The Ombudsman shall not be given nor follow any instruction from any authorities”

Principle 16 - “The Ombudsman shall be entitled to request the co-operation of any individuals or organisations who may be able to assist in his or her investigations. The Ombudsman shall have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential. This includes the right to unhindered access to buildings, institutions and persons, including those

¹ CDL-AD(2019)005-e Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019)

deprived of their liberty. The Ombudsman shall have the power to interview or demand written explanations of officials and authorities and shall, furthermore, give particular attention and protection to whistle-blowers within the public sector."

6. Returning to how this independence requirement operates in the Irish context, I note that there are a number of safeguards in place to protect the independence of the Office. First, there is a robust and transparent appointment process for the role of Ombudsman and the term of office is of sufficient duration not to undermine independence. Second, the Office is funded on the basis of its own Vote, rather than other sources such as grants in aid. Third, the Ombudsman alone (or someone acting on his authority) has the power to decide whether or not a complaint is within the Ombudsman's jurisdiction and also the power to determine the complaint. The Ombudsman's determination is final. Fourth, the Office has a strong corporate "spine", which contributes to its substantial independence by the provision of its own ICT systems and support, high-level cyber security protection, human resources, finance, procurement and facilities. The Office therefore is not reliant on the Department of a Minister for such support. Additionally, the staff of the Office are civil servants of the State, rather than civil servants of a Minister.
7. The Ombudsman and his staff are committed to continuing to ensure practical and demonstrable independence in the exercise of statutory functions across all statutory offices, including the PDO.
8. In that context, the proposed provision that the PDO shall be independent in the performance of his or her functions, which mirrors the statutory provision made in relation to the Ombudsman, is welcome. However, the drafting of the PDO's functions needs to be carefully scrutinised to ensure that its independence is not compromised, particularly in relation to its functions in respect of Ministerial disclosures. There should also be a mechanism to ensure that whistleblowing disclosures by PDO staff are not investigated by the PDO.

RESOURCING

9. Article 11(1) of the Directive provides that Member States shall provide competent authorities with "adequate resources". As Accounting Officer of the Office of the Ombudsman, and the other four offices falling under the corporate rubric of that Office, I am committed to ensuring value for money through the efficient use of resources. Whether the resourcing of the PDO is "adequate", in accordance with Article 11(1) of the Directive, will depend on several factors. The following examples are illustrative, but not exhaustive:
 - If the legal status of the PDO is excessively complex or does not easily sit within the existing corporate structure of the Office of the Ombudsman, considerable and unnecessary additional resources will be required to ensure that the PDO can operate as needed under the legislation.
 - It is crucial that there is clarity in the legislation about the precise remit, functions and powers of the PDO. It is the experience of this Office that, in the absence of such clarity, the PDO will be required to expend its limited resource, including its legal resource, coming to finely balanced conclusions about the extent of its remit,

functions and powers. Where those conclusions have an operational impact, they may also result in protracted litigation. Key issues include ensuring that:

- i. There is no room for dispute about whether the PDO can refer a report to a suitable authority for follow-up;
 - ii. The PDO can decline to refer to a prescribed person where it would be wholly inappropriate to do so (e.g. where the prescribed person is implicated);
 - iii. Any preliminary duties placed on the Minister and the PDO in relation to Ministerial disclosures are reasonably achievable within the allocated timeframe;
 - iv. The functions of the PDO are consistently stated, irrespective of how it receives a report, so that it is not required to establish different systems for reports received from a Minister and in its capacity as a prescribed person;
 - v. The provisions in the legislation relating to timeliness are clear and justifiable;
 - vi. The PDO has clear and specific powers to obtain information from persons concerned and from other persons who may hold relevant information;
 - vii. The PDO has the power to prioritise investigations of serious wrongdoing; and
 - viii. The extent of the PDO's function in providing administration and support services to the Disclosures Recipient is clear.
- It is essential that the legislation should deal clearly and consistently with issues which determine the jurisdiction of the PDO and other prescribed persons to act on receipt of a report, as well as their powers to refuse to act. It is the experience of this Office that jurisdictional issues can be exceptionally time consuming and resource intensive and can result in protracted litigation. Key issues include:
 - i. If the legislative provision is insufficient to protect against malicious, frivolous or abusive reports, the PDO's limited resources may be consumed dealing with such reports, instead of dealing with the whistleblowing disclosures that the Directive is designed to protect;
 - ii. There must be clarity in the definition of a worker, the exclusion of interpersonal grievances from the definition of relevant wrongdoing and the exclusion from this regime of matters dealt with by other regimes;
 - iii. The territorial scope of the duties under the legislation must be clarified, including how cross-border cooperation should take place in the event of a report with a cross-border dimension.
 - If the Department envisages that there will be a broad category of cases which will require direct investigation by the PDO because a suitable authority cannot be identified, the PDO's investigative team would need to be resourced in a manner that ensures sufficiently broad expertise to cover the subject-matter of the Act and sufficient flexibility to enable the PDO to deal with 'surges' in the event of unexpected high inflows of reports.
 - If the PDO has insufficiently strong investigative powers, particularly in relation to private sector bodies, and if there are insufficient duties on persons concerned to cooperate and insufficient sanctions against persons concerned for hindering investigations, additional resource will be needed in order to conduct an effective investigation into reports relating to reluctant persons concerned.

- If there is insufficient guidance from the Department in respect of the obligations of the PDO to transmit information to relevant EU agencies, additional resource will be required for the PDO to ensure that it complies with its statutory duties in that respect.
 - On commencement, it is likely that reports previously referred to Ministers under the existing provisions of the 2014 Act will be referred to the PDO. In addition, reporting persons who have already raised, or would have raised, concerns in other forums may immediately avail of this avenue of protection. It is important that the PDO is fully resourced from the point of commencement so that it is capable to begin addressing any backlog of reports as well as new reports.
10. Detailed discussion on the appropriate level of resourcing of the PDO should follow the Department's detailed consideration of the examples above and others, as the Department's conclusion on such issues will have a substantial impact on the resources that are adequate for the PDO.

DETAILED CONSIDERATION OF THE GENERAL SCHEME

11. We welcome the Committee's conduct of pre-legislative scrutiny of the General Scheme. The General Scheme requires careful scrutiny in order to ensure that the Directive is implemented in Ireland in a manner that continues the commitment to transparency that was demonstrated by the enactment of the Protected Disclosures Act 2014. In parallel with the Committee's work, this Office will work closely with the Department on the aspects of the legislation that are relevant to the establishment, functions, remit and powers of the PDO.

IMPLEMENTATION OF THE LEGISLATION

12. Detailed engagement with the Department will be required in relation to implementation of the legislation, including matters such as:
- the amount of staff resource to be allocated;
 - the nature of that resource, including specialist expertise and training;
 - support for the PDO's functions, including accommodation, ICT and communications;
 - the relationship of the PDO with the Department;
 - the issuing of any guidance on the operation of the regime.

CONCLUSION

13. We look forward to the Committee's report on pre-legislative scrutiny of the General Scheme. This Office remains at the disposal of the Committee should it require any further information.



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