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Pre-legislative scrutiny of General Scheme of the Protected Disclosures (Amendment) Bill 2021.

1. Introduction

Raiseaconcern works with private sector employers and public bodies in the prevention, detection, investigation and remediation of workplace wrongdoing. Under an Office of Government Procurement Framework Tender, we are currently the only approved outsourced service provider of the role of '*Confidential Recipient*' to the Irish public service. Part of this service involves protecting the identity of the '*worker*' making a disclosure of wrongdoing ('the Discloser'). We send the disclosure of wrongdoing to the public service employer for investigation but do not reveal the identity of the Discloser.

We also undertake independent workplace investigations of allegations of employee wrongdoing where we are not involved as Confidential Recipient, particularly in the area of allegations of bullying, harassment and sexual harassment.

As our name suggests, we specialise in the area of whistleblowing.

We have already made a submission to the consultative process undertaken the by Department of Public Expenditure & Reform on the transposition of the EU Whistleblowing Directive into Irish law[1]. We are pleased to note that a number of our recommendations have been adopted into the General Scheme for the Bill.

[1] file:///C:/Users/Philip%20Brennan/Downloads/88090_2b3627f6-866a-4fe4-b4ec-65ba329a9092.pdf

2. The policy rationale for the Bill

The Bill will give effect to *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protections of persons who report breaches of Union law, and to provide for related matters* ('the EU Whistleblowing Directive'). The EU Whistleblowing Directive, which must be transposed into Irish law by 17 December 2021, sets common minimum standard across EU Member States for the protection of persons who report information about threats or harm to the public interest obtained in the context of their work-related activities. To this end, the adoption of many (but not all) of the provisions into Irish law is non-discretionary. Ireland already has what is generally regarded as comprehensive legislation in this area in the form of the Protected Disclosure Act 2014. This already incorporates many of the provisions of the EU Whistleblowing Directive. Ireland is of course free to go beyond the provisions of the EU Whistleblowing Directive in the Amendment Bill but, by reason of Article 25 of the Directive, is not permitted to regress from the provisions and protections already contained in the 2014 Act.

The focus on this submission is on those areas where Government has choice either with regard to implementation of certain limited aspects of the EU Whistleblowing Directive or with regard to taking the opportunity to go beyond its provisions.

The Bill (as initiated) has not been published at this point. This submission is based on the General Scheme of the Bill published on 12 May 2021.

In this submission, we have not commented on every Head in the Scheme of the Bill. We have done so by exception and only in circumstances where we have a comment or recommendation to make.

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

3.1 Head 5 Material Scope

It is proposed that Section 5 of the Principal Act is amended by the insertion of the following after subparagraph 8:

"(9) A matter is not a relevant wrongdoing if it is a matter concerning interpersonal grievances exclusively affecting the reporting person, namely grievances about interpersonal conflicts between the reporting person and another worker and the matter can be channelled to other procedures designed to address such matters."

The Explanatory Note to Head 5 clarifies that it inserts a provision that matters concerning interpersonal grievances are not relevant wrongdoings, in accordance with Recital 22 of the Directive.

The intent here is to eliminate from the protection of this legislation disputes between employees and members of management and suchlike. Raiseaconcern agrees that this should be the case, unless the interpersonal grievance is something that already comes within the provisions of Section 5 (3) by reason of being a '*relevant wrongdoing*'.

Of most concern is that claims of bullying, harassment and sexual harassment are often regarded by employers as being personal grievances between employees and dealt with accordingly under a grievance procedure. However, bullying, harassment and sexual harassment can also be breaches of Health & Safety, Employment and Equality legislation. The threat of penalisation for bringing forward a disclosure of bulling, harassment or sexual

harassment is a very real one and, absent protection from it under the Protected Disclosures Act, can be a deterrent to those suffering such fate from coming forward and disclosing it. We believe that this would be a regressive step.

We recommend that it is made unequivocally clear that disclosures of a reasonable belief of bullying, harassment and sexual harassment by the party who claims to have endured such behaviour are not excluded from the protections provided by the Principal Act, as amended by the proposed Section 5 (9). Section 5 (9) should only apply to interpersonal conflicts of a more general nature, such as regarding performance assessment, promotion, reward, employment terms and conditions or differences of an operational work-related nature.

3.2 Head 8 Anonymous Disclosure

It is proposed that the Principal Act is amended by the insertion of the following section after Section 5:

"*Anonymous disclosures*

5A. *(1)* *A worker who makes an anonymous disclosure in the manner specified by this Act but is subsequently identified and suffers penalisation shall qualify for the protections set out in this Act.*

(2) *Without prejudice to any other enactments that provide for anonymous reporting of wrongdoing, nothing in this Act shall impose an obligation on any of the legal entities within the scope of this Act to accept and follow up on anonymous disclosures."*

Raiseaconcern supports the explicit inclusion of anonymous disclosures under the Principal Act in the manner specified and affording persons who make such disclosures, if subsequently identified, the protections of the Act if they subsequently suffer penalisation.

The Explanatory Note to Head 8 explains that this transposes Article 6(2) of the Directive, which provides that recipients of anonymous reports are not obliged to accept and follow up on anonymous reports.

Article 6(2) states:

"Without prejudice to existing obligations to provide for anonymous reporting by virtue of Union law, this Directive does not affect the power of Member States to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches."

This does not mean that recipients of anonymous reports are not obliged to accept and follow up them. It means that Ireland is free to choose in adopting the EW Whistleblowing Directive whether or not it requires that anonymous disclosures are followed up.

For reasons already put forward in the consultative process, it is the view of Raiseaconcern that Ireland should avail of the leeway afforded to it to impose a requirement for employers to accept and follow up on disclosures made by anonymous Disclosers.

A key focus of the EU Whistleblowing Directive is to encourage and protect those who wish to disclose to others concerns they have about possible work related wrongdoing and to

facilitate them in doing so safely. It is the experience of Raiseconcern that concern over their identity being revealed is the single biggest fear that Disclosers have and is the most significant deterrent to disclosure[2]. This is why we feel that the service of '*Confidential Recipient*' is so important. While it is to be welcomed that it is proposed to afford anonymous Disclosers the protections of the legislation if subsequently identified, it makes little sense in our view to then afford legal entities within the scope of the legislation the latitude to ignore and not follow up on them.

Disclosers can be concerned about their identity being revealed for any one of a number of reasons. The obvious ones are the potential for penalisation by management or detriment (which can potentially be serious detriment in the case a material disclosure) caused to them by impacted persons, colleagues or others. However, it is also the experience of Raiseaconcern that Disclosers' reluctance to come forward can simply arise from fear that the process will involve being challenged by superiors, from a fear of being mistaken, or from a fear that they will be made to feel that blame for the consequences of their disclosure rests with them, rather than with those involved in the reported malpractice or those who should have but did not call it out. Employee disclosure is a stressful process and some Disclosers, understandably, are unwilling to subject themselves to any level of possible personal stress or risk. If the Act presents recipients of such anonymous disclosures with the right not to accept them and to ignore them, then this is likely to act as a deterrent.

[2] This is why we feel that the service of '*Confidential Recipient*' is so important. In so doing, Raiseaconcern offers protection of identity, or effective anonymity, but with the capability of intermediation between Discloser and Employer to assist in evaluating and investigating the wrongdoing disclosed.

There has traditionally been a nervousness amongst many employers and advisers about acting on anonymous disclosures. This is understandable, as any employee focused on knowingly and maliciously making claims against others that they know to be untrue can hide behind the veil of anonymity. Equally, the level or generality of information disclosed may be such that investigation is impossible or impractical. However, some level of evaluation is always possible.

The Heads of Bill introduce for the first time an obligation on legal entities within the scope of the Act to follow up on worker disclosures. "*Follow up*" is helpfully defined in Head 2 as:

"*.....any action taken by the recipient of a protected disclosure to assess the accuracy of the information contained in the protected disclosure and, where relevant, to address the relevant wrongdoing reported, including, but not limited to, actions such as an internal inquiry, an investigation, prosecution, an action for recovery of funds or the closure of the procedure.*"

We see no logic or justifiable reason why a requirement to follow up should apply to all other disclosures of relevant wrongdoing, but not to anonymous disclosures, particularly where protection of anonymous Disclosers is now provided for.

3.3 Head 9 Internal Reporting Channels

Section 6 of the Principal Act is amended to include all employers and public bodies with 50 or more employees. Raiseaconcern repeats the point made in the consultative process undertaken the by Department of Public Expenditure & Reform. While it may sound attractive from the point of view of reducing the compliance burden on micro or small

enterprises, we feel there is no logic in exempting employers with less that 50 from the requirement to establish internal reporting channels and procedures.

Setting a minimum standard requiring that employers with more than 50 employees establish internal reporting channels and procedures was an expedient well-intentioned compromise, amongst EU member states, to address the prospect of countries who currently have no domestic legislation in this area, having to introduce it right down to micro and small enterprises.

65% of member states currently do not have overarching legislation protecting whistleblowers. Ireland, on the other hand, has operated very progressive legislation granting such protection for seven years now. We are a leader in this area and the Irish Protected Disclosures Act was used as an important reference point when drafting the Directive.

The key consideration, leaving aside the matter of the cost of compliance (dealt with later) is whether there are coherent principled reasons why employers with less than 50 employees should not be subjected to the same provisions as those with more than 50. Are such small enterprises any less prone to wrongdoing? Is the seriousness of any potential work related wrongdoing they encounter likely to be proportionate to the number of employees they have? Are they less likely to penalise Disclosers? Would implementing such provisions seriously impede their operations or act as a disincentive to setting up or to competing with other EU countries who may not adopt such provisions?

Raiseaconcern's view is that the answer to all of those questions is '*no*'.

In the operation of other aspects of legislation, Ireland does not operate exemption or '*lite touch*' provisions for micro or small enterprises. They must all adhere to the same tax administration provisions, health and safety provisions and environmental protection provisions (to name but a few) as medium and large enterprises.

If enterprises with less than 50 employees are (as currently) subject to the provisions of the Protected Disclosures Act, but simply not required to put internal reporting channels or procedures in place, would the Prescribed Persons/Competent Authorities on whom the responsibility for implementing and facilitating such reporting and other procedures would default be equipped or resourced to deal with all such cases? Would the micro or small enterprises want the reporting or other provisions vested in the Prescribed Persons/Competent Authorities – would a small employer prefer that an employee reported poor tax compliance by their manager to the Revenue Commissioners or to a designated person within the firm?

Unlike many EU countries, the notion of disclosure of work related wrongdoing has become far more socially acceptable in Ireland over recent years since enactment of the Protected Disclosures Act. Our legislators should promote an environment where all enterprises, small as well as big, act legally and properly. The reality is that the cost of setting up and operating an employee disclosure process should be low. The Government of Ireland is required under Article 20 of the Directive to provide support on the design of policies and procedures and on their operation. There is nothing to prevent government bodies, trade associations, voluntary bodies and others making template policies, procedures and processes available at no or low cost to micro or small enterprises. Equally, a Government sponsored public awareness process would educate employees of enterprises of all sizes on their rights and protections. After that, the only imposition on micro or small

enterprises would be to examine and, if necessary, address any reasonable belief of wrongdoing brought to their attention by workers. This should be part of everyday business and something that would be in their interest to do.

The view of Raiseaconcern is that Ireland should not differential between sectors in adopting the Directive. All sectors, private and public, irrespective of size, should be required to operate to the same provisions.

Government should actively promote the updating of the Protected Disclosures Act as something that is positive and good for business and other enterprises, micro and small as well as medium and large and indeed positive for citizens as a whole.

3.4 Head 11 Ministerial Reporting Channels

Section 8 of the Principal Act permits Disclosers who are employed by a public body to make disclosures to a Minister of Government on whom any function relating to that public body is conferred or imposed by or under any enactment. In other words, by way of example rather than a Revenue employee making a disclosure to the management of Revenue, that employee can make such a disclosure directly to the Minister for Finance.

Head 11 proposes to replace Section 8 of the Principal Act and in so doing to introduce a range of conditions that must be met. Head 11 provides that such disclosures shall be referred to the new Protected Disclosures Office.

Raiseaconcern can understand that there may be an argument to be made that there are administrative benefits in having a central point, a Protected Disclosures Office, to which

Government Departments can refer worker disclosures for evaluation and handling. However, introducing new hurdles for the Discloser to meet in order to make a disclosure to a Minister would seem to us to narrow the ability of Disclosers to use Section 8 and, therefore, to be regressive and contrary to Article 25 of the EU Whistleblowing Directive. For example, using the same example, that employee of Revenue could under the Principal Act decide to make his/her disclosure to the Minister for Finance simply by having a reasonable belief of wrongdoing. Head 11 now introduces three conditions, one or more of which must be met as follows:

(i) *"the worker has previously made a disclosure of substantially the same information in the manner specified in section 6 or section 7 or both but no appropriate action was taken in response to the disclosure within the timeframes for follow-up specified in section 6 or section 7"; or*

(ii) *"the worker reasonably believes the Head of the public body concerned is personally complicit in the relevant wrongdoing reported"; or*

(iii) *"the disclosure contains information about a relevant wrongdoing that may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage".*

This will significantly impact the ability of public servants to use Section 8.

4. Possible areas where the Bill might be improved.

The whole thrust of the Protected Disclosures Act is to avoid and prevent workplace wrongdoing and to harness the assistance of diligent and responsible employees to assist with this.

The Bill imposes a requirement (i) under Head 9 for all those covered by the Act to set up an internal reporting channel staffed by competent employees; (ii) under Head 10, for Prescribed Persons or Competent Authorities to set up independent and autonomous reporting channels staffed by dedicated competent employees and (iii) under Head 11, for an extensive new infrastructure in the form of a Protected Disclosures Office (Head 16-20) to be set up to centrally manage all public service disclosures. All these channels and functions will be charged at various levels with managing the disclosure process, evaluating the disclosures, investigating or overseeing the investigation of the disclosure where necessary, providing feedback to Disclosers and referring any adverse findings against wrongdoers to the appropriate person or body.

However, there is one final step in this overall process on which the General Scheme is silent. All of the aforementioned process should be considered as part of a risk management system. The final step in any such a system, following investigation and reporting back on the specific wrongdoing disclosed, should be a mandatory requirement to undertake a root cause analysis to establish the broader underlying root causes that prevailed which facilitated or enabled the wrongdoing to take place and did not identify it before the whistleblower came forward. It is only by completing this final step and taking remedial steps to address the root causes that similar future problems can be avoided at a general level, not just in the entity or public body in question, but on a broader scale.

The provisions of the Act should not alone be to encourage disclosure, so as to identify and address the wrongdoing and the wrongdoer, but also to identify and address the root causes that permitted the wrongdoing to occur. This will mitigate the risk of recurrence in the future. There should sharing of the learning and indeed, in the case of public bodies,

there may be scope to incorporate provisions in this regard into the Reporting Section 22 as amended by Head 26. The Protected Disclosures Office could play a key role in this at public service level which would be in the public interest.

5. Possible implications/consequences arising from the Bill.

The creation of a Protected Disclosures Office in the Ombudsman's Office to centralise and co-ordinate public service disclosures is proposed. This is not a requirement of the EU Whistleblowing Directive.

The success or otherwise of this proposal will be predicated on the availability of adequate levels of trained resources and an adequate budget to operate and to outsource to competent independent third parties work that cannot be undertaken internally.

Likewise, by reason of the Directive, the Act will impose significant additional responsibilities on '*prescribed persons*' to establish independent autonomous channels for receiving and handling protected disclosures. Again, the success or otherwise of this requirement will be predicated on the availability of adequate levels of trained resources and an adequate budget to operate and to outsource to competent independent third parties work that cannot be undertaken internally.

6. Other comments on the Bill

Subject to the aforementioned, it is the view of Raiseaconcern that the General Scheme of the Bill is well considered and in addition to transposing the EU Whistleblowing Directive takes the opportunity to introduce an appropriate level of additional provisions.