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Health Service Executive

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JCFPERT-
R-0409-2021
Rec'd 16/07/21

Mr John McGuinness TD
Chair
Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach
Leinster House,
Dublin 2.

Re: Refs (JFPERT-I-0315)

Dear Deputy Mc Guinness

I refer to your recent correspondence to Mr. Paul Reid, Chief Executive Officer, and Mr Robert Morton, National Ambulance Service, Health Service Executive, regarding *a submission from the HSE and Mr Robert Morton, on the General Scheme of the Protected Disclosures (Amendment) Bill 2021*. Following contact with the secretariat it was agreed that one submission with input from Mr Morton would be acceptable.

Please find below for the attention of the Joint Committee members a submission on the matter as requested.

If any further information is required please do not hesitate to contact me.

Yours sincerely,

Ray Mitchell
Assistant National Director
Parliamentary Affairs Division

Encl.

GENERAL SCHEME OF THE PROTECTED DISCLOSURES (AMENDMENT) BILL 2021

HSE SUBMISSION JULY 2021

1. Introduction

- 1.1** The HSE encourages the making of Protected Disclosures by workers (i.e. employees, contractors and agency staff) in line with the relevant legislation. Two sets of legislation apply to the making of Protected Disclosures in the Health Sector. These are the Health Act 2004 (as amended in 2007) and the Protected Disclosures Act 2014.
- 1.2** While a worker can raise a Protected Disclosure under either Act, most disclosers raise their concerns in line with the 2014 Protected Disclosures Act, as this appears to provide higher level of protection to workers.
- 1.3** Based on returns received by the HSE's national Protected Disclosures Office **61** Protected Disclosures were raised with the HSE in **2019 and 54** in 2020.

2. Transposition of the EU whistleblowing Directive

- 2.1** In October 2019 the EU introduced Directive 2019/1937 on the protection of persons who report in the public interest breaches of Union Law. The purpose of the Directive was to enhance the enforcement of EU law and policies by laying down minimum standards, providing protection of person reporting breaches of Union law. Persons are protected for reporting breaches of Union law in the areas of Public Procurement; Financial Services; Money laundering & terrorist financing; Product safety; Transport Safety; Environmental Protection; Radiation Protection and Nuclear Safety; Food and Feed safety; Animal health and Welfare; Public Health; Consumer Protection; Data Protection. Breaches affecting financial interests of the Union and also the internal market.
- 2.2** This EU Directive must be transposed into the law of Member States by 17th December 2021. Where existing legislation is in place the Directive states that *"The transposition of the Directive should under no circumstances, provide grounds for reducing the level of protection already granted of reporting persons under national law in the areas in which it applies"*
- 2.3** This transposition requires substantial changes to the Protected Disclosures Act 2014. The Government are planning to introduce a number of other amendments to the 2014 Act in response to consultations with various sectors in Ireland.
- 2.4** The Report on the General Scheme is an overview of the changes, in advance of the issue of the Heads of Bill which is due in coming months. Many issues within it require greater clarification and further definition.

3. Health Act and Protected Disclosures which is relevant for the HSE

- 3.1** Sectoral legislation was introduced for the HSE and other health sector bodies and groups through an amendment in 2007 of Part 9 of the Health Act 2004 related to complaints.

This amendment provided for concerns to be raised by employees of public and private health sector bodies and funded agencies and by members of the public in certain circumstances.

- 3.2** Associated procedures were adopted in 2009 which encompassed concerns from employees of the HSE and funded agencies to be raised with an Authorised Person in the HSE who was required to investigate them. This legislation remains in force.

4. Protected Disclosures Act 2014 and associated guidelines

- 4.1** The Protected Disclosures Act 2014 was introduced in July 2014 to encompass disclosures from workers across the public and private sectors. A broad range of relevant wrongdoings were set out and also was a stepped regime in terms of persons and agencies to which a disclosure could be made.
- 4.2** It was a matter for individual employers to determine the internal channels for disclosures to be made. Significant protections were provided for disclosers in relation to penalisation and detriment.
- 4.3** A Statutory Instrument *Code of practice and a Guidance for Public Bodies* issued by the Department of Public Expenditure and Reform [DPER] outlined recommended actions to deal with Protected Disclosures. HSE procedures were adopted in line with the DPER Guidance.

5. EU Directive (2019/1937) –to be transposed into Irish Law by 17 December 2021.

- 5.1** The Amended Protected Disclosures Act currently being drafted will transpose requirements in the EU Directive and also address some of the issues identified in the Review of the Protected Disclosures Act 2014. The EU Directive requires Member States to have formal channels for reporting:

- **Internally** to a reporting persons employer;
- **Externally** to a *competent authority*; and
- **Public disclosure** to a third party including journalists.

The Directive also outlines procedures for reporting through these channels.

- 5.2** In terms of competent authorities Article 64 states that *“it shall be for the Member State to designate the authorities competent to receive information on breaches falling within the scope of the Directive and give appropriate follow up to reports. Such competent authorities could be judicial authorities, regulatory or supervisory bodies competent in the specific areas concerned or authorities of a more general competence at a central level within a Member State, law enforcement agencies, anticorruption bodies or ombudsmen.”*

6. Main provisions in the General Scheme as outlined

- Broadening the categories of *whistleblowers* to include shareholders, members of administration, management or supervisory body of an undertaking including non executive members, volunteers or unpaid trainees and job applicants.
- Penalisation: Expanded list of prohibited behaviours.
- Protection from retaliation: Extension of interim injunctive relief to penalisation claims.
- €13,000 cap on compensation for unpaid whistleblowers that are penalised.
- The protection of identity afforded to the whistleblower is extended to *“person concerned”* to include both *“natural and legal persons”*.
- Anonymous disclosures: No obligation to accept but protections are provided to anonymous disclosers.

- Internal reporting procedures to incorporate stricter more prescriptive processes and timelines.
- Reversal of the burden of proof concerning penalisation; i.e. this moves from the worker to the employer.
- Matters concerning interpersonal grievances exclusively affecting the reporting person, [*namely grievances about interpersonal conflicts between the reporting person and another worker*] are not a relevant wrongdoing and can be channelled to other procedures designed to address such matters.

7. Potential implications

7.1 It is not possible in this paper to explore all of the issues related to the new proposed legislation, however there are obvious implications related to all of the provisions outlined above. Some of these are set out below.

7.2 Further definition and clarification will be required on many aspects of this scheme. These include:

- Head 5 relating to interpersonal grievances will require fuller legal clarification. EU Recital 22 states that these could be channelled to other procedures not that they are not Protected Disclosures. Recent High Court case states that a grievance can qualify as a Protected Disclosure.
- Clarity is required around when a breach, as defined in Article 5 (1) of the Whistleblowing Directive, has occurred, is occurring or is likely to occur. Likely to occur – without specific guidance – could mean anything to anyone.
- The provisions in relation to anonymous disclosures are potentially ambiguous. There may be no *legal* obligation to investigate an anonymous disclosure. However, if you don't investigate there is a risk of facing reputational harm if the matter becomes public. These will require careful consideration as to whether to investigate or not.
- The implications in relation to protection of "person concerned" needs to be further defined.
- The term 'appropriate action' will need to be defined.
- Greater clarity in relation to the rights of 'job applicants' will require greater definition as will what constitutes the employing agency.
- It would appear that the HSE Board and Committee members fall within the scope of this legislation. Clarity on this would be helpful.
- Clarity would be helpful on Head 23 which provides the right of a 'person concerned' to access their file.
- The 2014 Act broadly defines "penalisation" as "any act or omission that affects a worker to the worker's detriment" and lists examples including suspension, lay-off or dismissal, or unfair treatment. The General Scheme proposes to add further examples to this list, including a negative performance assessment and failure to convert a temporary employment contract into a permanent one. There needs to be clarity around this before the Bill is transposed into law in December 2021
- Greater clarity would be helpful on how an employer will make reparation following findings of penalisation concerning volunteers or unpaid trainees, board members or job applicants, and the extent to which such groups will have access to the WRC.
- Greater clarity on the penalty regimes would be helpful.

7.3 Organisational and operational issues

7.3.1 This amended legislation has significant organisational and operational implications.

The Heads of Bill have not been issued and the date for transposition and operation of this new legislation is December 2021. Operational arrangements, new Protected Disclosure procedures and required training and information will need to be in place in advance of this date.

7.3.2 Challenges arise in relation to the organisational and operational arrangements required, a sample of which are outlined below.

7.4 Structure and organisational arrangements

7.4.1 The HSE will need to consider what national structure and arrangements will need to be put in place to provide effective management, oversight and organisation of the Protected Disclosures process.

7.4.2 Head 9 states that *“Internal reporting channels may be operated by a person or department designated for that purpose or provided externally by a Third Party”*.

7.5 Additional resources to meet legislative requirements

The HSE has already recognised the need to enhance the national Protected Disclosures Team to support its whistleblowing processes. There may also be a requirement to supplement local resources who manage and investigate Protected Disclosures. The introduction of this revised legislation will place a set of additional responsibilities on the HSE and additional resources to allow the health service meet these responsibilities. These include:

(1) Meeting legislative requirements related to:

- Protected Disclosures from the broader scope of persons encompassed by the legislation including job applicants and volunteers. [Protection from Retaliation will cover a wider group including volunteers and unpaid trainees so that may result in more potential WRC/Labour Court cases against the HSE and Section 38 organisations. It would be difficult to predict the impact of this change in terms of third party cases but it's something that services which engage volunteers and facilitate work placements will need to be aware of. The “unpaid trainees” may include students who are on work placements from college and are not direct employees although may be in receipt of an allowance e.g. student nurses years 1-3].
- The statutory timelines required by the Act, including speedy investigations
- Infrastructure including oral recording technology
- Database/IT System
- Costs related to face to face meetings with disclosers including accommodation, scribes etc,
- Resources dedicated to interactions with third parties Needs related to training and information provision.

(2) New Protected Disclosures procedures will be required for the amended Act.

(3) Arrangements related to interactions with thirds parties including the Ombudsman will need to be developed which may include data sharing agreements.

- (4) Issues arise in relation to the reporting requirements outlined in head 26. These include the requirement *“if ascertained the estimated financial damage and the amounts recovered following investigations and proceedings.”*

7.6 Setting the bar for protected disclosures

7.6.1 In the current Protected Disclosure Act a discloser can make a disclosure to the Employer and/or to the relevant Minister based on *“reasonable belief.”* Thereafter a higher bar was applied to disclosures made to prescribed persons and to other parties, including that the concern is substantially true. This threshold appears to have changed.

7.6.2 The requirement to be *“true”* rather than substantially true applies under the proposed Scheme of the Bill to Protected Disclosures made to prescribed bodies. Disclosures made to other persons i.e. public disclosures do not appear to have a requirement, that is being substantially true or *“true”* and a number of other conditions for these disclosures also no longer apply.

7.7 The Ombudsman and Protected Disclosures Office

7.7.1 The establishment of a Protected Disclosures Office with significant powers to investigate disclosures and to require other person to investigate disclosures is a new development. It will take time to understand and to work out what this will mean in practice and what implications it will have for the HSE.

7.7.2 The Ombudsman and Director within the Ombudsman’s Office will now be a prescribed person to receive protected disclosures. The Director will follow up on a disclosure made directly to the prescribed person and will refer it to a suitable authority or to some other suitable person whom the Director believes is an appropriate recipient.

7.7.3 This Director will now have a role in relation to Protected Disclosures made to Government Ministers in terms of screening, referral of the disclosure to a suitable authority or where such a suitable authority cannot be identified the Office shall carry out any follow up required.

7.7.4 Powers have been provided to this office to investigate disclosures it receives. Requirements are outlined also as to how persons who receive disclosures from this office shall follow up on these disclosures.

7.7.5 The extent of the role and involvement of this Protected Disclosures Director within the Ombudsman Office in terms of Protected Disclosures related to the HSE, regardless of whether or not they were made initially to the HSE, is unclear as likewise is their potential role and involvement in Protected Disclosures which relate to all matters including clinical matters.

7.8 Protection of identify ‘person concerned’

7.8.1 The General Scheme provides for a new obligation on those who receive and deal with protected disclosures to protect the identity of what is known as a *“person concerned”*. This is any individual referred to in a protected disclosure as someone who is involved in, or associated with, the wrongdoing report. This is a very significant change as it mirrors the existing obligation to keep the identity of the whistle-blower confidential.

This will pose an even greater challenge for HSE staff during the investigation process if they now must maintain confidential the identity of the “*person concerned*” as well.

8. The Health Act and Protected Disclosures Act

Provisions in the Health Act related to Protected Disclosures remain in force. The dual legislative arrangements for protected disclosures have continued to cause confusion. This matter has been raised on a number of occasions with the Department of Health and with DPER and DPER has now requested the views of the HSE in relation to the abolition of the relevant provisions in the Health Act. A considered response by the HSE is due to be finalised over the coming weeks.

9. The HSE becoming a prescribed body

DPER have previously requested the views of the HSE on a proposal that the HSE would become a prescribed person for funded agencies. This proposal was examined by a Group comprising representatives across relevant Divisions and Services as well as representation from the Department of Health. A report of their recommendations was furnished to senior management in August 2019. The report recommended that the HSE would not become the prescribed person for funded agencies.

**Office of the Chief Strategy Officer
HSE
July 2021**