DÁIL ÉIREANN

SELECT SUB-COMMITTEE ON PUBLIC EXPENDITURE AND REFORM

Dé Céadaoin, 14 Bealtaine 2014

Wednesday, 14 May 2014

The Select Sub-Committee met at 2 p.m.

MEMBERS PRESENT:

Deputy Sean Fleming,	Deputy Mary Lou McDonald,
Deputy Brendan Howlin (*Minister for Public Expenditure and Reform*),	Deputy Dara Murphy,
Deputy Heather Humphreys,	Deputy Arthur Spring.

DEPUTY LIAM TWOMEY IN THE CHAIR.

Protected Disclosures Bill 2013: Committee Stage

Acting Chairman (Deputy Liam Twomey): I welcome the Minister for Public Expenditure and Reform, Deputy Brendan Howlin, and his officials. The Protected Disclosures Bill 2013 was referred to the select sub-committee by Dáil Eireann on 26 February 2014.

Before we commence, I remind members and those in the Visitors Gallery that all mobile phones must be switched off completely to avoid interference with the broadcasting of proceedings. The meeting is scheduled to finish at 9 p.m. unless we complete the consideration of the Bill before that. I propose that we suspend the sitting at 6 p.m.

Sections 1 and 2 agreed to.

NEW SECTION

Deputy Sean Fleming: I move amendment No. 1:

In page 5, between lines 23 and 24, to insert the following:

"3. The Ombudsman shall, not later than 12 months after the enactment of this Act and each year thereafter, carry out a review of the protected disclosure process following which he or she shall, issue a report to the Minister on the said process as to whether or not the process is found to be operating in a consistent manner across all bodies which come within the remit of the Act and if reasonable practices have been established by such bodies.".

The essence of my amendment is that the protected disclosure process will be available across all employment, be it in the public or private sectors. There is a perception that once legislation has been enacted the job of the Oireachtas is done, but if we have learned anything from the experience of recent years, it is that the people who have been entrusted to do a job do not always do it. It is not the job of the Oireachtas to micromanage these issues. Sometimes we put regulators in place but the question is asked regularly "Who regulates the regulators?".

We will have procedures in place for protected disclosure right across the entire country. To instill public confidence in the system of protected disclosure it is reasonable that people would believe there is a consistent approach. If one makes a complaint to the local authority in Kerry or makes a complaint against the Department of Justice and Equality, there should be similar type protections, not just specified in law but being interpreted and implemented. It is similar to the point we addressed when we discussed the freedom of information legislation. There is training for people across the public service to ensure there is a consistent approach to all these matter.

In my amendment I call for a procedure whereby a year after the enactment of the legislation, the Ombudsman, or a designated person, if the Minister considers that somebody other than the Ombudsman should do it, should carry out a review of the protected disclosure process, following which the Ombudsman or other person shall report to the Minister on whether the said process is operating in a consistent manner across all bodies which come within the remit of the Act.

To repeat, we often hear that new rules and regulations are not implemented because the body does not have the resources to do so. It is fine to have the legislation, but we need to know

it will be applied in a consistent manner in every organisation to which it applies. To ensure that the legislation is working, we must conduct an annual review. I ask the Minister to accept the principle of the need for a review to ensure the legislation is working in practice. The Minister will probably tell us several times that this new legislation has groundbreaking procedures and is a major reform. That counts for nothing unless it is applied on the ground after the legislation has been passed.

Minister for Public Expenditure and Reform (Deputy Brendan Howlin): There is nothing in what Deputy Fleming has said that I would disagree with in principle. It is now standard practice, and it is in the rules of the House, that we review legislation annually. It is an appropriate job of work, particularly for the Oireachtas committee to look at the operation of the legislation.

I have three difficulties with the amendment tabled by Deputy Fleming. I think a period of 12 months is too short for such "groundbreaking" legislation to borrow the phrase he used. I do not think the typical pattern of cases will be built up in 12 months time that could then be reviewed. That is why, in the Bill itself, I have said there will be a statutory obligation on the Minister for Public Expenditure and Reform to formally review the Bill after five years and to cause a report on that review to be presented to the Oireachtas. After five years, I believe we will have a significant variety of cases across both the public and private spheres in order to be able to fundamentally see how the Bill is operating.

I have a difficulty with the timeline. I also have a difficulty in regard to giving the role to the Ombudsman, as I do not believe that is the appropriate person. The Ombudsman, under the legislation we enacted in 2012, has been given a very extended and broad remit, which is, in essence, to look into complaints whereby members of the public - citizens - have been unfairly treated by public bodies. This is quite a different set of issues because it involves both the public and private spheres. I believe it would intrude on and not gel well with the Ombudsman's work.

I believe we are in a good place, as a Department, to be able to pull together the information after five years and make a reasonable analysis of it, and to make a presentation to see if it is working well. Of course, at any time over the intervening period the Oireachtas itself can review the legislation, and it will be obliged to look at it after a year under the new protocols we have established for ourselves in the Houses of the Oireachtas. In legislative terms, if difficulties manifest in terms of the technical operation of the Act, we will be able to deal with that at any time those become obvious to us.

Deputy Sean Fleming: I will come back with a revised amendment on Report Stage which will perhaps suggest a three-year review. I accept that one year is a bit short, but five years is a bit long.

Amendment, by leave, withdrawn.

SECTION 3

Deputy Mary Lou McDonald: I move amendment No. 2:

In page 7, lines 25 to 27, to delete all words from and including "whose" in line 25 down to and including ", or" in line 27.

I welcome the fact we are finally on Committee Stage of this legislation. Certainly, recent events have underscored how important it is. I hope the amendments I present are taken in the spirit of getting the legislation right.

Deputy Brendan Howlin: For once, the gap between Second Stage and Committee Stage has fundamentally improved the Bill.

Deputy Mary Lou McDonald: Yes. The amendment seeks to ensure that external advisers or professionals who may be contracted into a particular organisation - for example, auditors - would enjoy the full protection of the legislation. I have a concern that the legislation as currently worded would exclude not just auditors but accountants, financial advisers and professional advisers from those protections in the course of their work in circumstances in which they may uncover wrongdoing, which is not implausible by any means given other events that are further back but still in the recent history of the State. I believe such contracted persons should be protected and taken account of in this legislation to ensure they enjoy the same protections as others from, for instance, any form of retaliation that could emerge should they come forward with information of wrongdoing. It is not hard to imagine circumstances in which there would be a fairly limited number of people in different disciplines that provide certain types of professional support, analysis or advice to different organisations. That is the purpose of the amendment.

Deputy Brendan Howlin: I thank Deputy McDonald for tabling the amendment. I want to acknowledge from the start that my approach is exactly that - namely, to see how we can jointly, as a committee, work to improve the Bill.

The effect of the amendment put down by Deputy McDonald would be to delete that part of subsection (b)(i) of the definition of "worker" relating to contractors which excludes from the definition of persons "whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual". As I explained during Second Stage, it has been my intention at all times to include within the definition of "worker" the widest possible range of persons who interact in the workplace. In this regard, I am anxious to ensure that contractors come fully within the ambit of the legislation.

I have asked my officials to look very carefully at the amendment the Deputy has put forward. Having considered the proposed amendment, for the purposes of getting greater certainty in regard to the achievement of this objective - that is, to achieve the widest possible inclusion of workers - I have asked the Office of the Attorney General to consider a redrafting of the definition of "worker" so as to provide for a simpler definition of "contractor" than that currently set out in the Bill in parts (b)(i) and (b)(ii) concerning the definition of "worker".

I hear what Deputy McDonald is saying. I ask her to bear with me in this regard because I propose to bring my own amendment on Report Stage which should not only meet the Deputy's concern, which she has ably voiced today, but also provide greater clarity in regard to the position concerning contractors. To be truthful, we lifted this from the UK legislation and it has worked very well there. However, the Deputy makes a good point, and I want to have greater clarity. If she bears with me, I will get the Attorney General to craft something that I hope we will both find fit for purpose.

Deputy Mary Lou McDonald: I thank the Minister. I am more than happy with that so, at this stage, I will withdraw the amendment. I will have another look at my own wording and I will reintroduce my amendment on Report Stage, although I anticipate the Minister will have

something of far superior quality to my simple amendment.

Deputy Brendan Howlin: There is no guarantee of that.

Amendment, by leave, withdrawn.

Deputy Mary Lou McDonald: I move amendment No. 3:

In page 8, between lines 2 and 3, to insert the following:

"(e) works on a voluntary basis, as a volunteer for no pay,".

The idea here is to ensure that the legislation captures also those persons who work in a voluntary capacity for organisations. The Minister will know, while it is perhaps not so much the case across private industry, that public bodies rely in some instances quite heavily on the efforts of volunteers and voluntary staff. I believe it would be logical and wise to include volunteers in that definition. Therefore, I suggest the insertion of a new subsection, to read: "(e) works on a voluntary basis, as a volunteer for no pay,". I believe these people should be afforded the same protections and remedies as envisaged in the legislation.

Deputy Brendan Howlin: We debated this at some length in the other House. As I said in response to the Deputy on the last amendment, the basis of this legislation is to afford workers protection against harm, if one likes, in terms of their employment status, so that nobody can demote them, ensure they would not get proper remuneration, fire them or exclude them from promotion. None of that applies to volunteers.

The idea, in essence, is to ensure that people can out wrongdoing without detriment to themselves. The problem with volunteers is that there is no contractual relationship and, as they are not paid, they do not fall into the normal definition that would require the sort of supports and protections the Bill sets out for workers in the broadest possible way. Normal workers have a role in employment within an organisation. If they have information on which they want to blow the whistle, they should be able to do that without detriment to themselves. That applies to a volunteer. There is no financial or employment consequence an employer can impose on a volunteer in that context. I have examined international best practice in this area and it shows that volunteers are not generally included in this type of legislation. I do not see a compelling case for their inclusion in these provisions. Moreover, it would be very difficult for a volunteer to find a mechanism that would fit him or her within the architecture of this protection system. Seeking a restitution of position, pay or anything like this from the Labour Court would not apply. Having said that, I am interested in hearing the Deputy's views on how this might work.

Deputy Mary Lou McDonald: The Minister is right that, by definition, a volunteer does not face detriment in terms of pay or promotion prospects, as would arise for a worker. It is also true to say, however, that many people who volunteer for organisations within the charitable sector, including, for instance, section 38 and 39 organisations, do so on the basis that they have a personal vested interest in the work being carried out by that organisation. In the case of a parent or sibling of somebody with a profound disability who volunteers with a particular organisation, to give an example, that person is not being paid, but he or she is still doing work on behalf of the organisation. That work is an important part of the person's life and an important commitment he or she has made to the organisation. Let us then imagine a situation where this person, in the course of carrying out his or her voluntary efforts, encounters substantial wrongdoing. Should he or she not have access to the whistleblowing mechanisms and associated pro-

tections, not so much in respect of loss of pay or promotion prospects but in a context where an individual could potentially be unceremoniously told his or her efforts were no longer required? While this would not represent a loss of income, it would represent something traumatic and very unjust for the individual in question. That is what I am getting at in this proposal.

Deputy Brendan Howlin: I understand entirely and the Deputy makes a very valid point. The problem lies in the practicality of organising a structure that would accommodate these types of scenario. It seems that a volunteer who sees wrongdoing in an organisation for which he or she is working is very likely to expose it. There would not be great pressure on such an individual not to do so in terms of damage to promotion prospects or anything like this. Giving volunteers access to the Labour Court would not be of great advantage to them or confer great additional protection. What could volunteers hope to achieve from such an appeal other than confirmation that they are still entitled to be a volunteer?

I assume that for a volunteer in a charitable organisation, the people to go would be the charitable organisers who would be scandalised if the organisation were to take action against a volunteer simply for pointing to wrongdoing. The difficulty with the Deputy's proposal lies simply in the practicality of finding a set of remedies that would fit into the scheme of remedies operated by the Labour Court. Is there detriment for volunteers akin to unfair dismissal or discrimination in the workplace? It seems that volunteers do not fit readily into that architecture, which is also the view taken internationally.

Deputy Mary Lou McDonald: I disagree with the Minister in as much as I remain of the view that there could potentially be a very clear and measurable penalty exacted on a volunteer in circumstances where he or she comes forward with information on wrongdoing. I simply cannot assume that a person, in the absence of a channel for securing protections, would necessarily come forward with that type of information. Having dealt in recent months, as part of my work on the Committee of Public Accounts, with a number of people who have significant experience in volunteering for different organisations, many of them in receipt of substantial State funding, I can say there would be a view among volunteers, many of whom, as I said, have a personal vested commitment to particular organisations, very often for personal family reasons, that a reluctance to come forward could be an issue.

The Minister might be right that this is not the legislation in which this issue should sit. On the other hand, perhaps I am right and it should sit in it, but we need to find remedies other than through the Labour Court. I accept the Minister's logic that the Labour Court is not the right place for the people about whom I am talking to seek a remedy, but we are not at odds on the issue of volunteers. Will the Minister give the matter further consideration?

Deputy Brendan Howlin: I will certainly do so. We are bringing forward this legislation in tandem with the freedom of information legislation as part of an overarching development of policy. The whistleblowing legislation has to be understood by people. One of the criticisms I have made during the years of the sectoral approach of previous Governments is that the more variance there is, the less likely it is that individual workers will understand how whistleblowing provisions should operate and what protections apply on a uniform basis. That is why this overarching legislation is important. The issue the Deputy has raised relates to this concern of requiring that policy to be understood. Within the public sector, under the legislation, we can determine public policy on whistleblowing, which must be followed by any organisation, including voluntary organisations, in receipt of State funding. I will reflect further on how this can manifest more clearly such that people will know, as a matter of policy, that there must be a channel for whistleblowing in any organisation that receives State moneys and - again, as a

matter of policy - that there can be no detriment for people who utilise that channel. However, fitting volunteers into the architecture of a legal structure where they would be seeking a monetary award or have their status restored is not, in my judgment, possible.

Deputy Mary Lou McDonald: I will reconsider where I have placed this provision in the legislation. I would like to see everything to which the Minister has referred in terms of policy expectations, identifiable channels and so on being put in place.

Deputy Brendan Howlin: Training could be included also.

Deputy Mary Lou McDonald: Yes. However, it would be preferable for that necessity to be expressed in primary legislation.

Deputy Brendan Howlin: We will see if we can find a suitable slot for it. The Deputy might do the same.

Deputy Mary Lou McDonald: I will.

Amendment, by leave, withdrawn.

Section 3 agreed to.

Section 4 agreed to.

SECTION 5

Deputy Mary Lou McDonald: I move amendment No. 4:

> In page 8, line 35, after "obligation" to insert "or obligation arising from a professional code or workplace code of practice".

The legislation envisages scenarios where there are failures to comply with legal obligations. My amendment proposes to extend this coverage to take into account breaches of professional or workplace codes of practices, which would amount to a softer law. As the legislation is expressed, what would happen to a person exposed to deliberate wrongdoing with regard to adherence to a code of practice for the governance of State bodies, for instance, or, say, a code of conduct for councillors? How would that person be protected? The public, customers and employers often rely on non-legally binding codes or guidelines to protect them from risk and harmful practices such as mismanagement, conflicts of interest, the misuse of charitable donations, improper staff recruitment and breach of public sector codes.That is the intention of the amendment.

Deputy Brendan Howlin: Again, I have given careful consideration to this amendment. I am concerned that the implications might be somewhat different from what the Deputy intends. A failure on the part of a person to comply with a legal obligation is listed as one of the relevant wrongdoings in section 5(3)(*b*). Therefore a breach of the statutory code would represent a breach of such a legal obligation and may fall under one or more of the relevant wrongdoings depending on the issue and the substance of the matter. The Deputy seeks to include breach of a "workplace code of practice". Many workplace codes of practice and even professional conduct are designed to protect the house, not to allow for the exposition of wrongdoing within the house. I recall doctors being concerned about a contract that would require them not to speak adversely about the policy of a one state institution. There are examples where such in-house rules would work to the detriment of other workers who wished to out wrongdoing. I think

there is another way of going about this and it is not unrelated to our last discussion. I have been speaking to my officials as to where we could slot in the initial point the Deputy made. Perhaps the Chair will indulge me to refer to the previous discussion. Let us look at Part 5, section 21, of the Bill. We may be able to include volunteers in the internal procedures for protected disclosures made by workers employed by public bodies, where they are required, under section 21, to establish and maintain procedures for dealing with protected disclosures made by workers who are or were employed by a public body. We could potentially include volunteers. I have not discussed this with the Attorney General yet. Perhaps we could have regard in the code of conduct to professional codes also. Obviously, I do not want to accept anything that would diminish the capacity of people to disclose wrongdoing.

Deputy Mary Lou McDonald: I appreciate what the Minister has said and neither would I. I appreciate his point on the law of unintended consequences. As the legislation is currently framed, is the Minister satisfied that, say, the code of practice for the governance of State bodies or the code of conduct for councillors, is captured by the legislation?

Deputy Brendan Howlin: That is a statutory code. I am not sure, off the top of my head, whether there is a legal underpinning of the code of conduct for councillors. I am informed that the Local Government Act 2012 does underpin that for councillors. It is a statutory basis for a code of conduct; in other words, the code of conduct flows from a statutory enactment.

Deputy Mary Lou McDonald: Then it is captured.

Deputy Brendan Howlin: Yes.

Deputy Mary Lou McDonald: But if it is not, it is not.

Deputy Brendan Howlin: If it is a local shop rule, it is not.

Acting Chairman (Deputy Liam Twomey): How stands the amendment?

Deputy Mary Lou McDonald: I withdraw it as I want to reflect on the discussion we have had with the Minister and I may return to it at a later Stage.

Amendment, by leave, withdrawn.

Section 5 agreed to.

Section 6 agreed to.

SECTION 7

Acting Chairman (Deputy Liam Twomey): Amendments Nos. 5 and 8, in the name of Deputy McDonald, are related and may be discussed together, by agreement.

Deputy Mary Lou McDonald: I move amendment No. 5:

In page 10, to delete lines 10 and 11.

This amendment hinges on the issue of substantially true versus reasonable belief. To cut to the chase, reasonable belief is a sufficient threshold for this legislation. To ratchet that up to substantially true places an undue burden on the person coming forward as the whistleblower and is unnecessarily high. The kind of prudent approach is already captured in the concept of reasonable belief which is expressed throughout the legislation. That is the rationale for tabling

both amendments.

Deputy Brendan Howlin: The Deputy has encapsulated the position. It is a graded level of disclosure. While I believe, and it should be encouraged, that the vast bulk of the initial reporting of wrongdoing should be to the employer within the workplace, there should be a mechanism to allow a whisteblower to go beyond that, either if he is not listened to or if no action is taken on foot of it. The whole structure is a graduated scheme. I believe there is a relatively low threshold of reasonable belief in respect of disclosing matters without any particular burden of proof being required. To go further to an external disclosure - this is the model used in the UK and elsewhere - one ratchets up slightly the requirement that one believes it to be substantially true. It is not a high threshold that one believes it to be substantially true. To match the gradation required of the legislation, it is important that there is a stepped approach as one broadens the accusation, because it will not always be true, but certainly one should believe it to be substantially true before taking it outside the workplace. Although our entire focus, rightly, is on ensuring that somebody who perceives wrongdoing is fully protected, we must provide for a situation where malicious harm cannot be encouraged. A requirement simply to enjoy the protections of the Bill, that one believes it to be substantially true, is a relatively low threshold to bring a charge of some description, outside the remit of one's employer.

Deputy Mary Lou McDonald: I do not accept that, not least because the Minister is bringing forward this legislation in a culture and environment in which it is exceptional for people to come forward and to blow the whistle. The most recent high profile example of that is within the Garda Síochána. Let it be said that the Garda is by no means unique in this regard. One is not starting from a position of widespread practice or acceptance. In the public sector we have seen that writ large and one can only surmise that extends into the private sector for people coming forward. I accept the Minister's point that he does not want to encourage anything that would be malicious or vexatious and the legislation adequately provides for that. The moment one puts it to somebody coming forward, who may not necessarily be an expert in reading legislation, whatever the Minister says about gradations, that it has to be substantially true, an undue burden is placed on the individual complaining. It places an undue burden on the individual complaining. A better formulation would be "reasonable belief". Should someone come forward with a reasonable belief and it turns out that, in fact, it was a malicious or vexatious act, of course, the legislation caters for this.

Deputy Brendan Howlin: I have carefully examined this structure. Last year I held discussions in London with colleagues there with long experience of this type of legislation. In fact, I was asked to make a presentation on our legislation, which is now regarded as cutting edge. I made several changes to the original draft on foot of these discussions and the experience in the United Kingdom. Deputy Mary Lou McDonald may be surprised to learn that one such change was to remove the good faith requirement which was included in the original UK legislation. A person could have a malevolent motivation, but if the accusation is true, the motivation does not enter into it. I have personal experience of this in the case of the Morris tribunal. One of the most egregious discoveries was revealed because a spouse was not best pleased with the actions of her husband and she exposed certain things. The UK legislation would not have catered for this because it was not a disclosure in good faith. The fact that something is true, or that the person believes it to be true, is enough.

I also removed the public interest requirement. Something need not even be in the public interest. Based on experience in the UK system, the argument goes that this requirement was too high a hurdle and cases that were demonstrably true were defeated in the courts because

they did not pass the public interest test. As a result, I removed this requirement also.

There are low thresholds to avail of the protections included in the Bill. If we reflect on it, the threshold caters for believing what a person is saying publicly is not true, although he or she believes it to be substantially true. There are two caveats. One is that the person believes it to be substantially true. We need not believe all of it is true. If the person believes the bulk of it is true, he or she is sheltered by the protections included in the Bill. By any international comparison, that is a low threshold.

Deputy Mary Lou McDonald: I disagree, but I do not believe we will agree on this.

Amendment put and declared lost.

Section 7 agreed to.

Section 8 agreed to.

SECTION 9

Acting Chairman (Deputy Liam Twomey): Amendments Nos. 6 and 7 form a composite proposal and will be discussed together.

Deputy Mary Lou McDonald: I move amendment No. 6:

In page 10, line 32, to delete ", solicitor or trade union official" and substitute "or solicitor".

This is to clarify the position on disclosures to a legal adviser or a trade union official. In practice, we presume a trade union official has legal credentials or some scope to advise an individual or guide him or her. The amendment provides for a workers' representative, whether a trade union official or someone assigned within the organisation to deal with protected disclosures.

Deputy Brendan Howlin: I have examined the two amendments in which the Deputy proposes to delete the words "trade union official" from the definition of a legal adviser and create a new area for the giving of advice. I thank her for the amendments and realise this matter was raised on Second Stage.

The Deputy is aware that under section 9, as drafted, a worker has the protections provided by the legislation in circumstances where he or she makes a disclosure or charge to out the wrongdoing while obtaining legal advice from a barrister, a solicitor or a trade union official. I understand from my good trade union colleagues that they give legal advice because people come to them to ask how they should advance in unfair dismissal cases or how to deal with bullying in the workforce and they explain the law to them. I am advised by the Attorney General that this amounts to giving legal advice, which is why I have crafted the section in this way. Its purpose is to provide a safe place for a potential whistleblower to allow him or her to determine the basis of informed and expert advice on where he or she would stand if he or she progressed to making a disclosure to his or her employer or otherwise. In particular, potential whistleblowers may wish to assess with their chosen advisers, either legal advisers or trade union representatives, whether their disclosures would meet the conditions set out in the legislation for them to be protected disclosures and if they would be provided with the safeguards inherent in the legislation. I have sought to ensure the legislation is as clear and straightforward as possible, which is important. However, I appreciate, given the complexity of the issues likely to

be involved, the potential implications and impact of the steps a potential whistleblower would be taking, that it is likely to be the case in many instances, particularly where a worker is apprehensive that he or she might be penalised or suffer detriment for his or her actions, that external expert advice would be required.

The effect of amendment No. 6 would be to restrict the protection provided in section 9 to cases in which legal advice had been obtained from a barrister or a solicitor only. If we were to take out the reference to a trade union official, legal advice from a solicitor or a barrister only would have protection under the Bill. I do not believe that is what the Deputy intends in respect of a worker taking the advice of a trade union official or a person authorised by a worker's employer on a disclosure in accordance with the procedure prescribed by the worker's employer. The nub of the issue, therefore, is whether advice given by a trade union official is legal advice. While reflecting on the amendment, it occurred to me that we needed to avoid a situation where a potential whistleblower could not or would be afraid to take expert or informed advice on account of a concern on the part of a trade union official that he or she was not offering what would be regarded in a strict legal sense as legal advice commensurate with that provided by a solicitor or a barrister. Deputies will be aware of this dilemma from their constituency work. I have rehearsed some of the instances I have encountered in discussions with my officials. There are times when I proffer advice on the law, although I am not a lawyer. To safeguard myself I always advise people that they may wish to take independent legal advice on a matter but that in my experience a given approach is the way to go. That is what trade unions officials and shop stewards sometimes do as a matter of routine, especially those familiar with the Unfair Dismissals Act. As a matter of routine, they represent clients or members before tribunals and so on, a matter in which they would be expert. Are they giving legal advice or do they have to be a barrister to give it? My advice is that a person need not be a barrister to give legal advice.

The definition of what constitutes legal advice is important. In the light of the foregoing and subject to the committee's approval, I propose to consider the amendments further with a view to clarifying the position on the giving of formal legal advice. When I went through the provision in detail this morning with my officials, from the perspective of Deputy McDonald's proposal, the concern arose that there might indeed be some confusion in our placing advices given by a trade union official together with legal advice. It might be a worry for officials to think they are giving actual legal advice. I hope I am not being too lawyerly in my explanation.

Deputy Mary Lou McDonald: No, the Minister is not. Of course, in workplaces that are organised, shop stewards and so on do advise on the law, but I am not sure that they give legal advice.

Deputy Brendan Howlin: They are very expert in the law and, in fact, the advice I have from the Office of the Attorney General is that their advice actually does constitute legal advice. That is probably also true in respect of what the Deputy does in her clinics, which is something for us all to think about from our own perspectives.

Deputy Mary Lou McDonald: I will not comment on that. Does the Minister agree that my amendment No. 7 caters for the trade union issue?

Deputy Brendan Howlin: That is what I intend to examine. I do not want to disadvantage workers who go to their trade union for advice which falls into the legal definition of legal advice but is not formally catered for in the Bill. Deputy McDonald's amendment No. 6 would exclude trade union representatives from giving such advice because it would not be captured in the definition. The Deputy proposes to remedy this, in amendment No. 7, by inserting a general

proviso regarding advice. Whether that solves the first issue is something on which I need to reflect.

Deputy Mary Lou McDonald: I am arguing that it does solve the issue. As the Minister knows, legal advice through trade unions is given by solicitors who are retained by the union. I do not know any trade union official who would, unless he or she is legally trained, claim to give advice on the law. I do not wish to nitpick here, but it is a valid point.

Deputy Brendan Howlin: There is a complexity attached to this issue. I have been operating out of a trade union house for the past 30 years. This particular union employs a firm of lawyers, but the client is the trade union, not the individual union member. That is to say, the client relationship is with the union itself, not with any individual who is a member of the union.

Deputy Mary Lou McDonald: Therein lies the dilemma.

Deputy Brendan Howlin: It is part of the dilemma.

Deputy Mary Lou McDonald: My amendment No. 7 proposes to insert the following provision:

> **"10.** A disclosure is made in accordance with this section if it is made by the worker in the course of obtaining advice from a trade union official or a person authorised by the worker's employer in accordance with a procedure prescribed by the workers employer.".

Can I take it that the Minister will reflect further on this provision before Report Stage?

Deputy Brendan Howlin: That is what I propose to do. I have stress-tested the argument from the Deputy's perspective, but I remain to be convinced. I need to have another discussion with the Attorney General about what constitutes legal advice, who can impart legal advice and who should be protected by this provision.

Deputy Mary Lou McDonald: I will withdraw the amendment on that basis, but I may return to it on Report Stage.

Amendment, by leave, withdrawn.

Section 9 agreed to.

Amendment No. 7 not moved.

SECTION 10

Deputy Mary Lou McDonald: I move amendment No. 8:

> In page 10, to delete line 36, and in page 11, to delete line 1.

Amendment put and declared lost.

Deputy Brendan Howlin: I move amendment No. 9:

> In page 11, to delete lines 27 to 29.

The effect of this amendment is to delete subsection 10(3)(*d*) of the Bill as published. Subsection 10(1) sets out the circumstances under which a disclosure made to a person other than

an employer, a prescribed person or a Minister will attract the protections of the Bill. One of the circumstances listed is where, in all the circumstances of the case, it is reasonable for the worker to make the disclosure.

Subsection 10(3) sets out a number of matters to which particular regard must be had in determining whether it was reasonable for the worker to make the disclosure. Subsection 10(3)(*d*) specifies as one of these matters the question of whether the disclosure was made in breach of a duty of confidentiality owed by the worker's employer to any other person. As many whistleblowing reports will, by their very nature, involve a breach of a duty, disclosures made under section 10 may not qualify as protected disclosures on account of this element of the reasonableness test. Since this provision is, therefore, likely to discourage the use of the legislation, as a breach of this duty may arise or be perceived to arise, I am proposing to remove subsection 10(3)(*d*). As a result of this change, while the test of reasonableness required under subsection 10(1) may take matters such as breaches of a duty of confidentiality into account, there will be no specific or mandatory requirement to do so.

Amendment agreed to.

Section 10, as amended, agreed to.

SECTION 11

Acting Chairman (Deputy Liam Twomey): Amendments Nos. 10, 11 and 18 form a composite proposal. Amendments Nos. 13 and 14 are consequential on amendment No. 18. Amendment No. 19 is a logical alternative to amendment No. 18. Amendments Nos. 20 and 22 are physical alternatives to amendment No. 18, which is to say they affect the same piece of text. Amendments Nos. 10, 11, 13, 14, 18 to 20, inclusive, and 22 will be discussed together.

Deputy Sean Fleming: To clarify, if the Minister's amendment No. 18 is passed, does it mean I cannot move my amendment No. 19, which the Acting Chairman has described as a logical alternative?

Acting Chairman (Deputy Liam Twomey): That is correct. All the amendments in this group can be discussed, but if amendment No. 18 is agreed to, amendment No. 19 cannot be moved.

Deputy Sean Fleming: If amendment No. 18 is agreed to, may I move amendments Nos. 20 and 22, which the Vice Chairman referred to as physical alternatives?

Acting Chairman (Deputy Liam Twomey): No.

Deputy Sean Fleming: In other words, if amendment No. 18 is agreed to, my amendments Nos. 18, 20 and 22 are gone?

Acting Chairman (Deputy Liam Twomey): That is correct.

Deputy Brendan Howlin: Physically and practically.

Deputy Sean Fleming: Physically and logically. The Minister will understand that I wanted to understand the sequence in respect of what will happen to my amendments depending on how the others are dealt with. We are ready to roll.

Deputy Brendan Howlin: I move amendment No. 10:

In page 12, line 21, to delete "(f)" and substitute "(e)".

These amendments go to the heart of the changes we want to make. At the conclusion of the Second Stage debate, I indicated that work involving officials from my Department and their counterparts from the Department of Justice and Equality was under way in order to determine how best to ensure that the legal framework for Garda whistleblowers under the 2005 legislation is fully aligned with the principles enshrined in this new and overarching Bill in order that we might provide comprehensive protection for such individuals. As I indicated, the priority must be to ensure that the legal framework is fully effective, that it works, that it protects members of An Garda Síochána and that it is consistent with the general principles of the Bill before us. Those principles apply to all workers. I am, therefore, pleased to propose amendments, the combined effect of which will be to provide for what I term the mainstreaming of An Garda Síochána for the purposes of the Bill.

There are three distinct elements required in order to bring members of An Garda Síochána fully within the ambit of the protected disclosures legislation. The first of these is the ending of the separate and distinct arrangement provided for in the Garda Síochána Act, the purpose of which is to allow for the making of confidential reports. The change required in this regard is addressed in amendment No. 18. The second element is ensuring that members of the force have access to the same redress provisions as all other workers in the State. This is addressed in amendments Nos. 11 and 12. The third element involves the making of any consequential amendments arising and this is addressed in amendments Nos. 13 and 14.

In light of the sequence I have just outlined, it might be helpful for me to address amendment-----

Acting Chairman (Deputy Liam Twomey): Did the Minister refer to amendments Nos. 11 and 12?

Deputy Brendan Howlin: I did.

Acting Chairman (Deputy Liam Twomey): Amendment No. 12 is not relevant to this group of amendments.

Deputy Sean Fleming: I suspect the Minister should actually have referred to amendments Nos. 10 and 11.

Deputy Brendan Howlin: Yes, it should be Nos. 10 and 11.

As I was saying, I am of the view that it would be of assistance if I began by addressing amendment No. 18. This amendment will bring to an end the separate arrangements put in place in the Garda Síochána Act in respect of members of the force. Amendment No. 18 relates to section 19 of the Bill as it currently stands. As originally envisaged, section 19 proposed to amend section 124 of the Garda Síochána Act 2005 - which allows for the making of regulations relating to confidential reports by members of the force - by adding a further subsection requiring the Minister for Justice and Equality to make new regulations to provide for the making of protected disclosures by officers in accordance with the provisions of the protected disclosures legislation and for the putting in place of redress arrangements for officers. This is the *status quo*. The effect of that to which I refer would have been to retain the confidential reporting arrangement and the redress provisions relating to members of the force within the ambit of the Act in question. I am now proposing to replace section 19 in its entirety and to

make provision for a completely new regime.

The proposed new section 19(1) will provide for the Garda Síochána Ombudsman Commission, GSOC - under section 7 of the Bill before us - to be prescribed as a suitable body to accept disclosures. As a result, GSOC will be the new recipient of disclosures from gardaí. The sub-committee will be aware that the former Minister for Justice and Equality announced his intentions in respect of this matter some time ago. These intentions have been reiterated by the new Minister. From the perspective of mainstreaming, I ask the sub-committee to note the proposed new subsections (1)(b) and (2) of section 19. The purpose of the latter is to repeal the existing arrangements within An Garda Síochána in respect of confidential reporting and to revoke the associated regulations, which, as the sub-committee will recall, provide for matters such as the acceptance of disclosures by a confidential recipient, so-called. The effect of this will be to terminate all separate and distinct arrangements relating to confidential reporting within An Garda Síochána and to bring all members of the force fully within the ambit of the legislation with which we are dealing. In the context of the findings of the Guerin report in respect of the operations of the confidential recipient for whistleblowers, this is a significant and appropriate reform. Acceptance of amendment No. 18 will involve removing the existing section 19 and replacing it with a new section.

Amendment No. 10 relates to unfair dismissals. As matters currently stand, the effect of section 11(1)(c) would be that if a person who is currently excluded from the Unfair Dismissals Act is dismissed for having made a protected disclosure, he or she may make a claim under that Act. Two categories of person remain excluded from this provision - namely, those listed under subsections (2)(e) and (2)(f) of the Unfair Dismissals Act. I refer here, of course, to members of the Defence Forces and An Garda Síochána. Arrangements in respect of the Defence Forces will be dealt with under section 20 of the Bill. However, in order to ensure that members of An Garda Síochána will be entitled to access the Unfair Dismissals Acts in the context of protected disclosures, all that is required is a reference in the Bill to section 2(1)(e) of the Unfair Dismissals Act, so the reference "(f) to (k)" will now become a reference to "(e) to (k)". This will ensure that An Garda Síochána will be brought within the ambit of the Unfair Dismissals Act for the purposes of protected disclosures. The effect of the change to which I refer will be to allow members of the force to make claims under the Unfair Dismissals Act in respect of dismissals in the wake of the making of protected disclosures.

Amendment No. 11 relates to access to the standard industrial dispute resolution mechanisms. The purpose of section 12(4), as it currently stands, is to exclude members of the Defence Forces and An Garda Síochána from the possibility of accessing standard industrial relations resolution mechanisms such as the Rights Commissioner service. It is now proposed that members of An Garda Síochána will have access to those mechanisms for the purposes of making claims of penalisation following the making of protected disclosures. It is therefore proposed to reverse the exclusion relating to gardaí in this regard. In order to achieve this, it is necessary to delete the phrase "or (e)" from section 12(4). The effect of this will be to allow members of the force access to normal industrial resolution mechanisms such as the Rights Commissioner service.

Amendments Nos. 13 and 14 are minor in nature and they arise as a consequence of amendment No. 18. One of the original intentions behind the existing section 19 was to insert a new section 124A into the Garda Síochána Act 2005 in order to provide for the making for new regulations under that Act in respect of the making of protected disclosures by members of the force in accordance with the provisions of the Protected Disclosures Bill and for the securing

of redress for such members if they were penalised for having made such disclosures. On foot of the evidence relating to the operation of the confidential recipient regime, it is not now proposed to put in place any power which allows for a separate regulation to be made in respect of the making of protected disclosures by members of An Garda Síochána. As amendment No. 18 proposes to repeal section 124 of the Garda Síochána Act, the reference in section 13(2)(iv) to "section 124A of the Garda Síochána Act 2005" will no longer be required. This deletion - and the necessary consequential tidying up - is effected by amendments Nos. 13 and 14.

I hope I have set out the position fairly clearly. Should the sub-committee be prepared to accept amendment No. 18, the effect of which will be to end the separate and unique arrangements relating to An Garda Síochána in respect of whistleblowing and replace the existing section 19 in its entirety, then acceptance of amendments Nos. 10, 11, 13 and 14 would logically follow. As amendments Nos. 19, 20 and 22 each refer to section 19 as it currently stands, they will fall. The proposal is simple. Finally and rightly, we should bring an Garda Síochána into the normal regime, with the proper body to receive whistleblowing reports being GSOC and with members of the Garda having exactly the same redress mechanisms as any other worker in the public or private sphere.

Deputy Sean Fleming: In my view, this is the key issue for this legislation, as evidenced by the three amendments I have submitted on section 19. I do not have a copy of the speech I made on Second Stage, but I strongly opposed section 19 at the time because it removed whistleblower protection from members of An Garda Síochána and attempted to create a separate procedure which involved regulations being made by the Minister, having consulted with the Minister for Justice and Equality, the Garda Commissioner, the Garda Síochána Ombudsman Commission and the inspectorate. Thank God we changed that section, although I have issues with how the Minister has dealt with it. Can the Minister imagine the situation if that same section was still part of the Bill today and if the former Minister, Deputy Shatter, and former Commissioner Callinan were in place? There would be no protection for anybody.

I am pleased the Government has agreed to make some changes, but I am not satisfied with those the Minister has made. In the context of section 19 as proposed on Second Stage, there are now a number of amendments to it, some of which are in the name of the Minister. I will refer to the amendments in my name first because they follow logically on the position on Second Stage and will then move on to the Minister's amendment. I am pleased the Minister agreed with my contribution on Second Stage, that section 19 should not be the position and that gardaí are entitled to the same level of protection, under the Protected Disclosures Bill as every other worker in the country. The Minister has agreed now that gardaí should be part of the mainstream and in line with everybody else. He has agreed this in principle, but I do not believe he has achieved it in the amendment he has put forward, amendment No. 18.

If the Minister's amendment, No. 18, is passed, I will not be able to move my amendments because they are logical alternatives to the Minister's amendment and are part of the same grouping. Therefore, I will put forward my views now. Having looked at all the amendments being discussed in this grouping, amendments Nos. 10, 11, 13, 14, 18, 19, 20 and 22, I believe that amendment No. 19, in my name, is the right amendment, but I have no problem with technical adjustments that may be required to it. I am happy also with amendments Nos. 10 and 11. Amendment No. 10 allows the Garda Síochána and members of the Defence Forces access to legislation for unfair dismissals if they are dismissed and amendment No. 11 allows members of the Garda and the Defence Forces access to the standard industrial relations procedures, to rights commissioners and everything else. These amendments are a logical follow through and

we are happy with them.

Amendments Nos. 13 and 14 deal with tidying up the legislation once the section related to the discredited confidential recipient and the provision for the regulations proposed in the original section are removed. Therefore, I am happy to accept amendments Nos. 10, 11, 13 and 14.

I will move now to my amendment, No. 19. This amendment is simple, straight and direct and achieves what amendment No. 18 does not achieve. My amendment states:

> Any protected disclosures made by a member of An Garda Síochána shall be made directly to the Garda Síochána Ombudsman Commission.

This is what is required in the legislation if it is to have the public confidence.

The Minister's amendment deals with "ifs" and "mays" all of which might never happen. The first word in the proposed section is "If" and later it suggests the ombudsman commission "may" do something. This wording is weak and ineffectual and may never apply, because that "if" may never happen. On the other hand, my amendment is very clear. The essence of what the Minister wanted to and is trying to achieve is to ensure that a member of the Garda Síochána will be able to make a complaint or protected disclosure directly to the Garda Síochána Ombudsman Commission. That is what is proposed in my amendment, No. 19. This appears to be what the Minister is trying to tell us he wants to achieve with amendment No. 18, but I believe he knows in his heart it does not achieve that. In that context, amendment No. 19 is the superior amendment.

Amendment No. 20, in my name, proposes to make a change on page 18, line 19 - to delete "Ombudsman Commission and the Inspectorate" and make the substitution I have proposed. In the original legislation, the now discredited Minister and departed Commissioner were obliged to consult with the ombudsman commission and the inspectorate before drafting the separate regulations for the Garda. On Second Stage, I pointed out that this consultation should have included representatives from the Garda Representative Association, the Association of Garda Sergeants and Inspectors and a public interest group and suggested the Minister would have the latitude to decide on which public interest group it should be.

Given the Minister was going to draft regulations before he decided to mainstream the Garda Síochána, I had drafted my amendment before he came up with his amendment. I submitted my amendments a month ago and clearly I must have had some foresight not to trust the Minister and the commissioner who were *in situ* at that stage in seeking that they not be allowed go behind closed doors to draft regulations. I asked on Second Stage for the Garda Representative Association, Garda sergeants and inspectors and public interest groups to be involved in such regulation. The Minister has now avoided the need for this by his amendment, but what I am trying to achieve is far superior to what the Minister had in the legislation.

Amendment No. 21 has been ruled out of order. It related to the draft form of the regulations, but it is not necessary now because there will be no regulations. Amendment No. 22, again in my name, was also concerned with regulations and asked that they be passed within 30 days of the passing of the Act. We did not want to come back in a year and find that while the legislation was in place, the Minister for Justice and Equality had not implemented the regulations. That was the reason for the 30 day time limit I suggested, which was the correct thing to do at the time, as it was before the Minister proposed the amendments he has put forward today. The Minister can understand where I was coming from in that regard.

In regard to the Minister's amendment, I agree with two elements of it. First, I agree with the abolition of the confidential recipient process. This process has been a farce and a discredit to everyone associated with it. I also support the essence of what the Minister proposes here. I said plainly on Second Stage that I did not trust the then Minister for Justice and Equality to be allowed amend the Garda Síochána Act to make these regulations, as was proposed at the time. I said at the time that I would trust the Minister here today far more than I would trust the then Minister for Justice and Equality and asked for him to make the changes required in this legislation rather than allow the former Minister for Justice and Equality make the change. At least the Minister has taken an initiative in this regard. I am happy this initiative has been taken by the Department of Public Expenditure and Reform and that it will be in the primary legislation and we will not rely on the Department of Justice and Equality to deal with the issue. I welcome the fact the issue is being dealt with here rather than behind closed doors in the Department of Justice and Equality.

I want to examine the Minister's amendment now. It proposes to amend the Garda Síochána Act 2005 by inserting the following section after section 102:

"Protected disclosures relating to the Garda Síochána

102A.(1) If the Ombudsman Commission is prescribed under *section 7* of the *Protected Disclosures Act 2014 ...*

Again, the Minister uses the word "If".

Let us analyse this line by line. The legislation stands and falls on these few lines. The Minister has not even said today that GSOC will be a prescribed recipient under section 7. He used the word "if" with regard to prescription. We cannot accept the legislation on the grounds that he may decide to prescribe GSOC as a recipient if he feels like it. The use of the word "if" negates the entire section. As prescription might never happen, the reference might as well not be included. I would accept it if the Minister stated the commission "shall" be a prescribed body under section 7, but I will not accept the use of the word "if" because prescription might never happen.

The next line of the Minister's amendment is fatally flawed also. The proposed subsection states that if GSOC is prescribed under section 7 of the Protected Disclosures Bill 2014 in respect of disclosures relating to An Garda Síochána, it "may", if it appears to it desirable in the public interest to do so, investigate any disclosure. It is now the case that if the Minister decides to make GSOC a recipient for protected disclosures, it "may", if it believes it to be desirable in the public interest to do so, investigate any disclosure relating to it, even if the worker, within the meaning of the Bill, making the disclosure is a member of An Garda Síochána.

My amendment suggests any protected disclosure made by a member of An Garda Síochána shall be made directly to GSOC. The Minister's amendment-----

Deputy Brendan Howlin: Then what?

Deputy Sean Fleming: I refer the Minister to the rest of his amendment. It is very simple - we have to get rid of the word "if". The Minister can agree to prescribe the commission. If he has not yet decided on all the bodies that could be recipients and he has to prescribe them in some way by regulation under section 7, this issue will not be dealt with for the likes of Sergeant McCabe or any other such individual whose case may arise in the future. Members of

the Committee of Public Accounts, including me and Deputy Mary Lou McDonald, have met Mr. McCabe and can testify to his character and good standing and the reasonable approach he took in all cases. We met him for hours at a meeting of the committee. However, I am referring to future cases. Such persons will have zero protection under this legislation until such time as GSOC is prescribed as a public recipient of complaints. Stipulating that the Minister may prescribe it if he feels like it will not pass muster.

In the light of everything that has happened, the Minister would do well to make one exception. He was leaving the Garda out of this legislation altogether. He has agreed with my suggestion on mainstreaming, but he should go the full distance. If GSOC is to be the first body to be prescribed as a public recipient, he will have done a good day's work. He can do this. He can agree to the principle today or on Report Stage, but leaving the big decision until sometime down the road will not be bought by the public. He might see the merit in what I am saying. The Minister for Transport, Tourism and Sport, Deputy Leo Varadkar, says he gets it and I hope the rest of the members of the Government do so too. Telling us that the Government will put the legislation through without putting what I suggest in place represents a bad day's work. The Minister needs to make an exception.

The commission, if it appears to it to be desirable to do so, "may" investigate a complaint. We need to find a word other than "may". I acknowledge that the commission might receive frivolous or trivial complaints — that is an issue — but there ought to be a mechanism whereby people can be assured the decision to investigate will not just be at the whim of the commission. The word "may" is too weak.

Ministers have been tripping over one another in recent days. Not only have they lost confidence in the Department of Justice and Equality and many others, they have also stated GSOC needs a root and branch review. Giving the body discretion as to whether it should carry out an investigation when there is a lack of confidence in it among members of the Government does not represent a sufficiently strong approach.

Let me refer to a comment made by GSOC's director of investigations, Mr. Ray Leonard, who I believe attended a meeting of the justice committee this morning. He issued a press release and a statement. Some time ago GSOC or some other body sought submissions on the operation of GSOC. Mr. Leonard made a personal submission and reiterated that position in the Oireachtas today. He has condemned GSOC, although he is its director of investigations. He has condemned it as "not fit for purpose" in his personal submission to the justice committee. He claims the Garda oversight body lacks effective independence and that the Minister still has too cosy a relationship with GSOC on occasion and that this has been unhelpful. He states — this should interest the Minister for Public Expenditure and Reform — GSOC does not represent value for money for the taxpayer based on the way it is doing its business. This is a serious condemnation and the body needs to be strengthened quickly. Therefore, I cannot be happy with the Minister not giving a commitment on who the recipient will be and how that recipient might deal with complaints, when received.

Subsection (2) of the proposed new section states: "The provisions of this Part relating to investigations and reports apply with the necessary modifications in relation to a relevant wrongdoing...". The Minister might explain what "with the necessary modifications" means. I am a layman, not a legal practitioner, and do not understand it. The Minister will have to give us examples of what precisely he means.

If the legislation is passed today with the Minister's amendment intact, there will be no

protection for a future Maurice McCabe because there will be no guarantee that GSOC, bad as it is and much as it needs reform, will be a confidential recipient. The Minister went out of his way not to provide for this. He issued a press release last week, on 6 May, stating, "This change builds on that earlier secured by the Minister on 24 February 2014, which allowed members of An Garda Síochána to make protected disclosures to the Garda Síochána Ombudsman Commission." It does not. The press release is not true. It will allow members to make protected disclosures only if the Minister decides to make the commission a recipient. One week after he issued that statement, there is no suggestion he will decide to make it a recipient.

I am happy the Minister has gone the distance with me since Second Stage by agreeing to mainstream An Garda Síochána in the legislation, but he needs to go a step further and implement the recommendation made in his press release last week. He stated the members of An Garda Síochána would be able to make protected disclosures. However, this is not included in the legislation. It may be his intention to do so some time in the future, but it will not satisfy this side of the House if it is not written in the legislation.

The Minister's press release states: "The separate and unique arrangements applicable to An Garda Síochána under the Garda Síochána Act of 2005 will no longer apply upon enactment of the Bill and members will, at that stage, report in a similar manner to and have the same protections as every other worker". I agree to mainstreaming. This is my first intervention and I will have a second response for the Minister. I want him to respond to it, as the political issue and the people on the stand constitute the broad issue.

After we have discussed this aspect of the Bill, I want the Minister to tease out how the amendment will work. The amendment refers to section 91 of the Garda Síochána Act 2005 which affects sections 95 and 98. The Minister must explain to us step by step how the amendment to which he asks us to agree fits in with the rest of the Garda Síochána Act. I will come to the specifics of that legislation and the way in which the proposed change tallies with it separately.

In general, I will be happy if amendments Nos. 10, 11, 13 and 14 are made. I presume amendment No. 18 will go through. I am disappointed that I cannot move my three amendments, but there is a fundamental problem with amendment No. 18 in the Minister's name.

Acting Chairman (Deputy Liam Twomey): Can Deputy Mary Lou McDonald ask her questions at this stage?

Deputy Brendan Howlin: It would help the flow of the debate if I could answer those questions first, or I will lose track.

Deputy Mary Lou McDonald: The point I wish to make has not been made.

Deputy Brendan Howlin: I am in the hands of the committee. I just thought I would be able to do this. If I lose anything, members can come back to me.

Deputy Mary Lou McDonald: The Minister might deal with the concern about the conditionality explicit in the legislation, step by step, where somebody comes forward. What will happen?

The point I want to raise is related but slightly different. The Minister has said one of the changes he made, in addition to removing the good faith notion, was related to the public interest notion. I notice that is not the case in respect of An Garda Síochána. Not alone may the

investigation be made, the provision also provides for it to happen if it appears to it to be desirable in the public interest.

Deputy Brendan Howlin: That is the investigation procedure GSOC already applies.

Deputy Mary Lou McDonald: I know, but it is premised on the notion of the public interest.

Deputy Brendan Howlin: That applies to the investigation, not the making of the disclosure or the protections that flow from it. I apologise. I should not be answering questions yet.

Acting Chairman (Deputy Liam Twomey): Is that it?

Deputy Mary Lou McDonald: Yes.

Deputy Brendan Howlin: I will deal with those matters first as they are the simplest ones to deal with. The public interest reference relates to the investigation by GSOC of a complaint it receives where it appears to that body to be in the public interest to carry one out. That is the way it deals with complaints. The reference I have made to the public interest refers to affording the protections under the legislation for workers. It does not have to be in the public interest to make the declaration, nor would the declaration have to be in the public interest for a garda to avail of the protections. It is the next step involving an investigation GSOC undertakes that has a public interest aspect. There is not a different regime for gardaí. They will have the same protections when making a disclosure to GSOC as those set out in the Protected Disclosures Act.

I turn to the general points made by Deputy Sean Fleming. I do my best not to be discordant on these issues, but it is very difficult, having crafted whistleblower legislation twice and having had it voted down by the Deputy as completely unnecessary. The Minister, Deputy Pat Rabbitte, did the same. It was stated the way to go was sectoral application. I remember the rows we had with the Deputy and his party when the original 2005 Bill was going through in attempting to provide for whistleblowing in the Garda. It was just incredible. I proposed the establishment of a Garda authority in 2002 and fought for nearly two years to have the Morris tribunal open an investigation into wrongdoing in County Donegal, allegations about which had been given to me. While we managed to have a tribunal of inquiry, Fianna Fáil insisted, despite my best efforts, on the Department of Justice and Equality and its Minister being excluded from the terms of reference. On many of the things we now need to find out and which we could have found out a decade ago we were resisted by Fianna Fáil. In that historic context, it is difficult when people are genuinely coming to the issue with positivity and openness to have history rewritten. It is like Pol Pot talking about Year Zero as if nothing happened before and as if Fianna Fáil did not resist tooth and nail greater openness on these matters for the 14 years it was in office.

Let me deal with the specifics. I do not accept the Deputy's point that his amendment is better. It is a very simple one to provide that any protected disclosure made by a member of An Garda Síochána should be made directly to the Garda Síochána Ombudsman Commission. That is it, "thank you very much, Ma'am." It does not state what should happen to it, whereas my amendment provides for how it should be investigated. If I were to accept the Deputy's amendment, it would be discordant with the entire regime. My ambition from the beginning has been to have every worker in the public and private spheres subject to the same regime. We often make legislation in the context of the latest news round, but we should do this in terms of what is the ideal and right way to go, which is to make An Garda Síochána subject to the

same regime as everybody else. There should be a clear recipient for protected disclosures and clear protections analogous to those available to every other worker afforded to members of the Garda. That is what the amendment I have set out will achieve.

I have regard to the other strong point the Deputy made on the phrase, "If the Ombudsman Commission is prescribed". This is an amendment to the 2005 Act and it must be consistent with its language, as introduced by the Deputy's party in government. There is a formal Government decision and the Deputy is wholly wrong, as he knows, to say the statement issued is wrong. It is intended to bring GSOC into the position of being the recipient of protected disclosures from members of the Garda. That is the formal position. I have regard to what the Deputy says, as well as to what Deputy Mary Lou McDonald said on phrasing. Sometimes we can be wrong in understanding things. If it is possible to put a different phraseology in place to the effect that GSOC will be prescribed, I commit to doing so on Report Stage. I must check to see if that is proper with the Office of the Parliamentary Counsel and the Attorney General. It is absolutely our full intention and there is already a formal Government decision to that effect. If there is any element of doubt, I will address it.

The other point of discord the Deputy made was related to the word "may". If one establishes an independent investigative body, it must be given the necessary discretion to be independent. One does not say it shall do something. It may do something if it determines that it is right and proper to do so. The broader sense of the refurbishment of the Garda Síocána legislation does not fall to me. I was anxious to include the Garda in this legislation as we should not make fish of one and fowl of another. They are all public sector workers and I fought hard to achieve this. We made some progress in the initial draft, but we have made enormous progress in this draft to get to where we are now. The other refurbishment of the Garda Síochana Act, including the structure of GSOC's powers to strengthen them, is another matter. I do not want to speak out of turn or rule in commenting on other legislation, but GSOC has pointed to this and the Government wants to facilitate it. The Deputy is almost adopting a twin approach. He says we should give it all the powers in the world, but, by the way, it is not fit for purpose.

Deputy Sean Fleming: A Minister said that.

Deputy Brendan Howlin: The Deputy was quoting somebody else, but I am mindful of what Mr. Guerin said about GSOC.

If it is going to be the recipient for this, we must all be confident that it is the right place and that it is properly equipped and structured to do the job. That is another day's work. I agree strongly with Deputy Fleming that crafting the legislation does not mean the job is done.

The other point relates to amendments to the Garda Síochána Act 2005 and section 19. The proposed new section 102A states:

> The provisions of this Part relating to investigations and reports apply with the necessary modifications in relation to a relevant wrongdoing to which a disclosure referred to in subsection (1) relates as though it were the subject of a complaint referred to in section 91.

This is wording that was given to us by the Attorney General. It aims to ensure that when a raw complaint is received, it can be shaped in a way that makes investigative sense. That is what I understand it to be and that is what was explained to me. One could have flows of consciousness. Somewhere in there is a real issue that needs to be addressed. It is aimed at enabling investigation of a complaint that is not, shall we say, particularly well-structured but at its heart

has something that is worth investigating. I think I have answered the questions.

Deputy Sean Fleming: I am pleased the Minister has agreed to look at the wording of the provision. Even if he made an exception and it came with one definitive prescribed body, it would be in the country's interests.

Deputy Brendan Howlin: It might be stand out like a sore thumb for the rest of it, but-----

Deputy Sean Fleming: So be it.

Deputy Brendan Howlin: So be it.

Deputy Sean Fleming: I think it would make a mark. I am not going back over the history, but I know the Minister said there was a concern about drafting amendments based on the latest media story. My amendments have been there for about two months. They were tabled immediately after Second Stage, long before the recent episodes. They have been there for so long that I had to double-check whether I had even sent them in. My amendments are not based on last week's events.

I accept what the Minister is saying. My statement was simple. I did not talk about the investigation to be carried out by GSOC and I will refine my amendment to take that into account and make the Minister's wording more definitive. I am sure the Minister will have a similar type of amendment when we get to Report Stage. If that is the case and they will have the same immediate effect-----

Deputy Brendan Howlin: Some of the Deputy's colleagues would not be too keen on his amendment because it would rule out whistleblowers going directly to him or to some of his colleagues.

Deputy Sean Fleming: I might give the Minister a pass on this one because he is not the Minister for Justice and Equality. We are amending the Garda Síochána Act and it is only right that Parliament have in front of it officials who can answer everything relevant. I do not know whether officials from the Department of Justice and Equality are here. I accept the principle of the Minister's response that he will go away and look at it again.

Deputy Brendan Howlin: I can do that.

Deputy Sean Fleming: I am happy with that. The Minister can see that I was very keen that there be some amendment on this issue. My questions are technical in nature and relate to the amendment rather than the broad sweep of the legislation. The Minister is amending section 91 of the Garda Síochána Act. What does this section talk about? I know the Minister might not have the answer here, but if we are amending section 91 of the Garda Síochána Act, it is desirable that the Oireachtas knows what we are amending. Section 91 is about a complaint. We are talking about GSOC here. This is the issue.

Deputy Brendan Howlin: To clarify matters, we are not amending section 91 of the Garda Síochána Bill.

Deputy Sean Fleming: We are not amending section 91 but we are referring to it. Is that what the Minister is saying?

Deputy Brendan Howlin: Correct.

Deputy Sean Fleming: It is important that we on this side of the House understand what that means if we are being asked to pass the legislation. We are referring to section 91 in this amendment but we are not amending the section. It is important that we know what the amendment refers to. I will proceed with section 91. It states that if a complaint concerns the death of or serious harm to a person as a result of Garda operations or while in the custody and care of the Garda Síochána, the Garda Ombudsman shall immediately direct a designated officer to examine the complaint under sections 95 and 98 to examine, report and, if the Garda Ombudsman Commission so decides, to conduct an investigation. This leads on to sections 95 and 98. It is interesting that in the Garda Síochána Act we have the exact wording. Section 91 states that the Garda Ombudsman shall immediately direct a designated officer to examine the complaint.

Deputy Brendan Howlin: In a case of death.

Deputy Sean Fleming: So it applies in very serious cases. It is not set out that there shall be an absolute-----

Deputy Brendan Howlin: One would not capture-----

Deputy Sean Fleming: One might have trivial stuff.

Deputy Brendan Howlin: It could be a complaint about sick leave.

Deputy Sean Fleming: There could be trivial stuff. What is interesting is that section 91 refers to the death of a person in Garda custody. The Minister just said that some of us might not be happy with these amendments because they would prevent people from coming to us. I am speaking for myself. I have heard about different issues from other Members. Since all these issues arose concerning the file presented by Deputy Micheál Martin to the Taoiseach on 20 April 2014, the Garda McCabe case, the stories that flowed from that and the stories that were in the media prior to that, many members of the public have come to us as public representatives with other issues of complaint. One such family came to me. They were the wife, mother and father of a person who died in Garda custody.

Deputy Brendan Howlin: I do not think that is-----

Deputy Sean Fleming: I am not mentioning any names. I considered it carefully and passed it directly to the Taoiseach because he seemed to be the man taking charge of these issues. He bypassed the Department of Justice and Equality as far back as then, even though he only did it formally last week. I received an acknowledgement. The family wanted to make a complaint about the death of the family member in Garda custody to GSOC at that stage, but they were told by the gardaí that if they did so, the coroner would not be able to proceed with the inquest while an investigation was being carried under section 91 of the Garda Síochána Act 2005. The people then refrained from lodging a complaint with GSOC. They told me that after the inquest took place, they were out of time in respect of lodging a complaint about the incident because the time for lodging a complaint had then passed. Could the Minister tell me or send me a note - or ask the Department of Justice and Equality to send me a note - explaining whether the lodging of a complaint with GSOC prevents the coroner from holding an inquest? This case came to my desk and is directly relevant to the sections in question.

Deputy Brendan Howlin: I will check that for the Deputy.

Deputy Sean Fleming: I have sent details of the complaint to the Taoiseach. Due to the fact that the Minister is willing to look at the wording of amendment No. 19, I have specific

questions which I will pass on for now.

Deputy Mary Lou McDonald: I think everybody is of one mind on this issue. I think this has been the case for the past number of months, although it was belated in respect of Sergeant McCabe and former Garda John Wilson. We can find ourselves in a situation in which GSOC needs to be strengthened. That is not within the gift of this committee - or, indeed, the Minister - so it places us in a slightly unusual position in which we know this is going to happen. I presume that having clarified and taken out the conditionality around the Garda Ombudsman and prescribed it in more concrete terms, it will chime with whatever legislative form the reform and strengthening of GSOC takes. I presume there will be a mirroring exercise. I applaud not just the efforts of this Government, however belated, but also of the State to mainstream an Garda Síochána in respect of these whistle blowing protections and procedures. It is long overdue.

I want to come back to this notion of "the public interest". The Minister said correctly that this is the tipping point for the investigation of the matter. However, that does not really answer my concern. I want to know what the Minister means by "the public interest". Where is that defined? Who decides what is in the public interest? The Bill affords a level of discretion to the commission to decide what is or is not in the public interest. I would like the Minister to respond to that point. I ask him to confirm what is obviously Deputy Fleming's understanding, namely that he is going to look at the wording here with a view to making it more concrete and taking any sense of conditionality out of it.

Deputy Brendan Howlin: There are two questions there and I will answer the second one first, in the affirmative. I have said that the new insertion into the 2005 Act is crafted to be in tandem and consistent with the Bill as drafted, which is why it is drafted in that way. It is our intention - there was a formal Government decision on this - to make GSOC the recipient of complaints or disclosures. If I can formalise that, even if it is discordant with the rest of the Act, I will do so. I just want to get the advice of the Attorney General first.

On the second point made by Deputy McDonald about the public interest, I have removed that as a hurdle to be overcome before anybody, whether a worker in the public or private sphere, can avail of the protections in the Protected Disclosures Bill. That will apply to gardaí in the same way as to everybody else. The public interest test in terms of what should be investigated by GSOC is from the Garda Síochána Act, save for the exception which Deputy Fleming read out, where GSOC "shall" do it where there is a death or serious injury.

Deputy Mary Lou McDonald: I am assuming the Minister has that legislation in front of him now. Does he?

Deputy Brendan Howlin: I do not have it in front of me, no.

Deputy Mary Lou McDonald: Can the Minister confirm-----

Deputy Brendan Howlin: Deputy Fleming has it in front of him.

Deputy Sean Fleming: I only have a copy of the relevant sections here.

Deputy Brendan Howlin: It is available online.

Deputy Mary Lou McDonald: I am curious and I do not know for sure, but is "the public interest" concept defined in that legislation?

Deputy Brendan Howlin: I will check that out.

Deputy Mary Lou McDonald: I am not nitpicking here but am raising this issue because confidence in the system for serving gardaí and the public will hinge not just on the capacity to investigate but also a willingness to investigate. That comes back to this notion of the public interest, what it is and who decides. Obviously there will be a discretionary element to it. We go to the trouble of defining all manner of things at the beginning of this legislation, including "employee", "employer" and "educational establishment" which are in common parlance, so ---

Deputy Brendan Howlin: We use the term "public interest" often but I do not think I have ever seen it defined in legislation, either British or Irish, because it is very hard to nail down what we mean by it. However, we do know what the concept means. In essence, we want to have a robust, investigative body. I must be careful in what I say but I do not think we can be confident at this very minute that we have one. I think I am safe in saying that. We need to refurbish the legislative capacity of GSOC and probably more than its legislative capacity but that is not a job for us in this committee or for me in my Ministry but GSOC is an important part of the protected disclosures regime. Indeed, GSOC is a body which will be pivotal to that regime and we will all have something to say about that as it develops.

If a member of an Garda Síochána passed on a piece of evidence or a disclosure that was fully protected under this regime but it was not properly investigated, he or she could then legitimately bring it to a Deputy to have it aired elsewhere. It is not as if we are putting it into a cul-de-sac that ends it.

Deputy Mary Lou McDonald: It is extremely important that such a facility is still available but I would appreciate it if we could find, somewhere, a definition of what we mean by "the public interest".

Deputy Brendan Howlin: We will have a go at finding that.

Deputy Mary Lou McDonald: I raise this with the Minister because there was, and still is, a feeling among the public, whose interests we serve, that sometimes institutions of the State might have a biased belief that the stability and reputation of those institutions would trump all other matters and that this was in the public interest. The Minister made a point, quite rightly, of removing it in terms of a threshold for protections for bringing disclosures forward but still it finds an echo here so I would like to get to the bottom of that. The Minister's assistance in that regard would be gratefully received.

Amendment agreed to.

Section 11, as amended, agreed to.

SECTION 12

Deputy Brendan Howlin: I move amendment No.11:

In page 13, line 10, to delete "or (e)".

Amendment agreed to.

Section 12, as amended, agreed to.

SECTION 13

Deputy Mary Lou McDonald: I move amendment No. 12:

In page 14, to delete line 12 and substitute the following:

"(b) in respect of the same matter, make or present against the same person an action for discrimination, disadvantage or adverse treatment in relation to the same employment—".

The idea here is to give additional protections to whistleblowers who have come forward and made a disclosure to prevent them from suffering any damages that might arise from harassment, threat, injury or loss of opportunity with a prospective employer in the event that the previous employer against whom they made a protected disclosure impeded their future employment. Aside from damage to the individual that may occur within his or her current employment setting, the idea is to extend protection and to allow for those additional legal sanctions and protections for the worker.

Deputy Brendan Howlin: I was unclear as to exactly what the Deputy was trying to achieve with this amendment but I am now clearer as to her intention. It would be very difficult to do what the Deputy has talked about. An employee has clear rights and protections in terms of employment when he or she is *in situ* , anchored in the workplace. In section 13, subsection (3), the word "detriment" is defined and includes "discrimination, disadvantage or adverse treatment in relation to employment (or prospective employment)". I believe that captures the point the Deputy is making.

Deputy Mary Lou McDonald: That is right. I thank the Minister for that.

Amendment, by leave, withdrawn.

Deputy Brendan Howlin: I move amendment No. 13:

In page 14, line 14, after "*Schedule 2*," to insert "or".

Amendment agreed to.

Deputy Brendan Howlin: I move amendment No. 14:

In page 14, lines 16 to 18, to delete all words from and including "2004, or" in line 16 down to and including "2005." in line 18 and substitute "2004.".

Amendment agreed to.

Section 13, as amended, agreed to.

Sections 14 and 15 agreed to.

SECTION 16

Acting Chairman (Deputy Liam Twomey): Amendment No. 15 is in the name of Deputy Mary Lou McDonald. Amendments Nos. 15 and 16 are related and will be discussed together.

Deputy Mary Lou McDonald: I move amendment No. 15:

In page 15, to delete lines 7 to 9.

This amendment deals with protecting anonymity. I am concerned that the onus is placed on the whistleblower to make it known that he or she wishes to remain anonymous. That is the

wrong way round. The presumption should be that there is anonymity and the onus should be on the person to whom the disclosure is made to treat as confidential the identity of the person making the disclosure. That is where the balance should lie. That is the intent and purpose of the amendments.

Deputy Brendan Howlin: I have reflected further since the Deputy made this point previously. The effect of amendment No. 15 would be to remove section 16(2)(a) which states the requirement to protect the identity of the maker of the disclosure set out in section 16(1) does not apply if "the person to whom the protected disclosure was made or referred reasonably believes that the person by whom the protected disclosure was made does not object to the disclosure of any such information". The effect of amendment No. 16 would be to remove section 16(2)(b) which states the requirement to protect the identity of the maker of the disclosure set out in section 16(1) does not apply if:

> the person to whom the protected disclosure was made or referred reasonably believes that disclosing any such information is necessary for -
>
> (i) the effective investigation of the relevant wrongdoing concerned...

Having reflected again and reread the Second Stage debate, my understanding is that amendment No. 15 reflects the Deputy's concern that section 16(2)(a) effectively provides a holder of protected disclosure information with unrestricted permission to allow the identity of the maker of the disclosure to be revealed. I am also taking it that amendment No. 16 reflects the same concern.

Section 16(1) imposes a duty on the recipient of a protected disclosure and any person to whom the protected disclosure is referred in the performance of his or her duties - I underscore this point - to "take all reasonable steps to avoid disclosing any information that might identify the person by whom the protected disclosure was made". It is extremely important to point out that the imposition of such a duty could never, from a practical or pragmatic perspective, be made absolute.

Section 16(2) sets out the necessary practical and pragmatic circumstances under which the duty to protect the identity of the maker of the disclosure does not apply. Bearing in mind that whistleblower complaints will require investigation by the employer, it must be recognised that, as a matter of practicality, such an investigation will, in many cases, result in circumstances where the duty to maintain the identity of the maker of the protected disclosure becomes unreasonable if a valid investigation is to happen. The simplest and most pragmatic reason of all for revealing the identity of the maker of the protected disclosure is on the basis that the recipient or other handler of the information that is disclosed has a reasonable belief the original maker of the disclosure does not object to the revelation of his or her identity. The recognition of these circumstances should not be taken, however - this is the point I want to underscore for the Deputy - to mean that the holder of the disclosure information is given *carte blanche* to disclose the identity of the maker of the protected disclosure. He or she must, by law, under section 16(1), take all reasonable steps to avoid disclosing any such information. With this in mind, section 16(3) makes it clear that a failure to comply with a duty to protect the identity of the maker of the protected disclosure "is actionable by the person by whom the protected disclosure was made if that person suffers any loss by reason of the failure to comply". Not only is there a legal obligation to avoid disclosure, there is a mechanism for the person to take action against the person who discloses his or her identity.

I am satisfied that these provisions will provide a significant brake on any view that might be taken that it is simple or frivolous to divulge the identity of the maker of a protected disclosure. It could, of course, almost go without saying the simplest way for the recipient or other handler of the protected disclosure to determine how the revelation of the identify of the maker of a protected disclosure of information would affect that person is simply to confirm it directly with the person involved. The handler could simply ask the question.

While I do not propose to accept the amendments, I acknowledge that the issue of the protection of identity is central. Recent whistleblowing scandals have highlighted it as a central issue. We need to separate as far as possible the messenger and the message. The provision in relation to confidentiality included in the Bill has been the subject of a substantial amount of work designed to strike that really difficult balance between safeguarding the identity of a whistleblower and other significant public interests and to ensure the issues are properly ventilated and examined. I wish, however, to take the opportunity before the passage of the Bill and in the light of the points made by Deputy Mary Lou McDonald to consider the issue of confidentiality further. Again, it is one of those issues I have thought about long and hard, but I do not know how to improve the balance. I will consider it further between now and Regard Stage, if the Deputy so wishes.

Deputy Mary Lou McDonald: I would like the Minister to reconsider it. Rather than proposing simple deletions, I will go back and look at a different wording. I think we agree on the objective which is not to stymie action.

Deputy Brendan Howlin: Correct

Deputy Mary Lou McDonald: I appreciate that, but at the same time-----

Deputy Brendan Howlin: One does not want to have a situation where one can be precluded from taking action. Because it might suit them not to take action, they could say they cannot do it because it would disclose information.

Deputy Mary Lou McDonald: I appreciate that point, but I am sure the Minister will appreciate equally that this piece is absolutely central in the day-to-day real life working of these provisions. In terms of people coming forward, this is absolutely key. I am happy to withdraw both amendments on the basis that the Minister will give the matter further consideration. I will bring forward amendments.

Deputy Brendan Howlin: If the Deputy wishes to discuss it with my officials, I will happily arrange this, too.

Deputy Mary Lou McDonald: That might be helpful; I thank the Minister.

Amendment, by leave, withdrawn.

Amendment No. 16 not moved.

Section 16 agreed to.

Section 17 agreed to.

SECTION 18

Deputy Sean Fleming: I move amendment No. 17:

In page 17, to delete lines 29 to 34.

Section 18 applies to a disclosure of information if it might reasonably be expected to affect adversely the security, defence international relations and intelligence of the State. These disclosures are not protected. I am not arguing the point if it adversely affects the security or defence of the State. However, in regard to adversely affecting international relations, it could go too far. There is no protection under the legislation for a person acting on behalf of the Government, as well as another government, or a person acting for that government, if he or she makes a disclosure. Let us think of international corporation tax regimes. It is reasonable that people acting on behalf of the Government, another government or other bodies and institutions at an international level should be able to discuss a broad range of issues affecting our international relations, whether positively or negatively. Sometimes it could be in the public interest for a person to make a disclosure and it would be very wrong if he or she were to be excluded from protection under the Bill. We will have a banking inquiry. There are letters from the European Commission that are being withheld. They have landed in the Department of Finance and probably been seen by umpteen people. At the end of the day, it would be wrong if a senior official in Ireland with access to these letters decided to make a protected disclosure under the legislation and yet had no protection under it because somebody deemed it affected our international relations with other countries. I will elaborate, but I think the Minister understands the point I am making.

Deputy Brendan Howlin: I raised this point previously with the Deputy. Everything is covered by the Bill and nothing is excluded. It is just that because of the sensitive nature of this small subset of information, there is a unique channel for this, although I suppose that is a word I have to be careful of nowadays, as a disclosure recipient. There is no difficulty with whistleblowing, but one just cannot blow the whistle on matters that impact on State security or interaction between Governments in the normal way. It is through a discrete, narrower channel.

Deputy Sean Fleming: Is that the disclosure recipient appointed by the Taoiseach, as covered in Schedule 3?

Deputy Brendan Howlin: Yes.

Deputy Sean Fleming: I have no problem with that. They can make a disclosure-----

Deputy Brendan Howlin: It is important to say there is no class of information that is excluded because of its unique status. It is just that the range of persons who can receive the complaint is narrowed for that very small class.

Deputy Sean Fleming: Does the person have protection?

Deputy Brendan Howlin: Yes - full protection.

Deputy Sean Fleming: I am happy to hear that. Therefore, if somebody in the Financial Regulator's office decides to make a protected disclosure which might affect our international relations with, say, Germany, they must make that disclosure to the person nominated by the Taoiseach to receive these disclosures.

Deputy Brendan Howlin: The disclosure recipient, yes.

Deputy Sean Fleming: If the word gets out - although I am not saying the person would do that - but if it emerges in due course-----

Deputy Brendan Howlin: If it is properly investigated, it probably would.

Deputy Sean Fleming: Yes. This means action cannot be taken against that person in their employment as long as they went through this special channel, as we may call it.

Deputy Brendan Howlin: That is correct.

Deputy Sean Fleming: I will withdraw the amendment.

Amendment, by leave, withdrawn.

Section 18 agreed to.

NEW SECTION

Deputy Brendan Howlin: I move amendment No. 18:

In page 18, between lines 13 and 14, to insert the following:

"**Amendments of Garda Síochána Act 2005**

19. (1) The Garda Síochána Act 2005 is amended—

(a) by inserting the following section after section 102:

"**Protected disclosures relating to the Garda Síochána**

102A.(1) If the Ombudsman Commission is prescribed under *section 7* of the *Protected Disclosures Act 2014* in respect of disclosures relating to the Garda Síochána, it may, if it appears to it desirable in the public interest to do so, investigate any disclosure so relating that is made to it, even if the worker (within the meaning of that Act) making the disclosure is a member of the Garda Síochána.

(2) The provisions of this Part relating to investigations and reports apply with the necessary modifications in relation to a relevant wrongdoing to which a disclosure referred to in subsection (1) relates as though it were the subject of a complaint referred to in section 91.",

and

(b) by repealing section 124.

(2) The Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007 (S.I. No. 168 of 2007) are revoked.".".

Acting Chairman (Deputy Liam Twomey): The amendment has already been discussed with section 10. Is it agreed that the new section be there inserted?

Deputy Mary Lou McDonald: This is the Minister's amendment No. 18 - the big one. Am I not right in saying the Minister was going to look again at the wording of this amendment?

Deputy Brendan Howlin: Yes; I will do that for Report Stage.

Deputy Sean Fleming: Will the Minister withdraw the amendment and come back with the right one?

Deputy Brendan Howlin: No, because it is very important. If I withdrew the amendment, then the *status quo* would prevail and, we would be back to the confidential recipient and all that malarkey.

Deputy Mary Lou McDonald: The legislation will not take effect until it has gone through the whole legislative process.

Deputy Sean Fleming: We will sort it out on Report Stage. There are a couple of good amendments there.

Deputy Brendan Howlin: I am going to make the amendment now. If I can, I will refine it later.

Deputy Sean Fleming: I cannot agree to that.

Deputy Brendan Howlin: Then we will vote.

Deputy Mary Lou McDonald: That puts me in a difficult position also. I want to support the Minister in this, because he is doing the right thing.

Deputy Sean Fleming: So do I.

Deputy Brendan Howlin: It is very important that we signal what is the case with regard to GSOC, and we do not want any ambivalence about that.

Deputy Sean Fleming: There is nothing ambivalent.

Deputy Brendan Howlin: It will be because of a formal Government decision. I am telling the committee formally, on behalf of the Government, that it will be. Unless the Deputies are going to accuse me of bad faith, that is what I am telling them.

Deputy Mary Lou McDonald: I do not want to accuse the Minister of anything. I had just assumed he would hold his fire until he had-----

Deputy Brendan Howlin: I am going to put the amendment now and I am going to get advice to see-----

Deputy Sean Fleming: So we will amend the amendment on Report Stage rather than coming in with a clean amendment?

Deputy Brendan Howlin: Yes.

Deputy Mary Lou McDonald: We will come back to this on Report Stage.

Deputy Sean Fleming: We will fight the Minister on Report Stage if we are not happy.

Amendment agreed to.

Acting Chairman (Deputy Liam Twomey): Amendment No. 19 in the name of Deputy Sean Fleming cannot be moved.

Amendment No. 19 not moved.

SECTION 19

Amendment No. 20 not moved.

Acting Chairman (Deputy Liam Twomey): Amendment No. 21 in the name of Deputy Sean Fleming is out of order.

Deputy Mary Lou McDonald: Why is that?

Acting Chairman (Deputy Liam Twomey): It is in conflict with the principle of the Bill. In addition, amendment No. 22 cannot be moved.

Amendments Nos. 21 and 22 not moved.

Question proposed: "That section 19 stand part of the Bill."

Acting Chairman (Deputy Liam Twomey): Before I put the question, I wish to draw the attention of members to the fact that I am required by Standing Orders to propose that section 19 stand part of the Bill. I note that the Minister's amendment, which inserts a new section 19, envisages that the existing section 19 would be deleted. Accordingly, a member who wishes to have the existing section 19 deleted will declare against the question.

Question put and declared lost.

Section 19 deleted.

Sections 20 and 21 agreed to.

NEW SECTION

Deputy Mary Lou McDonald: I move amendment No. 23:

In page 19, between lines 15 and 16, to insert the following:

"**22.** Not less than two years and every 12 months thereafter following the commencement of this Act, all public bodies shall prepare and submit to the Minister a report relevant to the Act including but not limited to—

(a) guidelines developed,

(b) training conducted with employees,

(c) data collected on the number of disclosures, detected or alleged wrongdoing contained therein and type of action taken in response to disclosures made to the public body pursuant to this legislation and the action taken, and

(d) any other information as shall be requested by the Minister.".

The amendment is to do with accountability and the application of this legislation by public bodies. One of the extraordinary things that happened, among a whole series of extraordinary things, on one occasion when the former Garda Commissioner presented before the Committee of Public Accounts was that he was asked by myself and others in a general sense to outline for us the number of disclosures to the then confidential recipient. While we were not asking for the detail or anything like that, he refused on that occasion to answer the question and said he did not regard it as an appropriate question to be asked, much less answered.

That turn of events underscores a need for a couple of things, the first of which is for the system to know the volume and extent of reports being made and also to have some level of oversight in terms of the treatment of those reports when they come forward. The idea is not for the Minister to scrutinise or immerse himself in every twist and turn of every report that is made but for there to be oversight in respect of the activity happening under the protection of this legislation. Given the sea change that is required in many institutions in order for whistleblowers to come forward and for matters to be dealt with in a way that is transparent and satisfactory to the Minister and the general public, that will require oversight and reporting mechanisms such as the one I have set out in this amendment.

Deputy Brendan Howlin: Again, I appreciate the intent behind the Deputy's amendment. As she rightly said, these are matters normally dealt with by my Department on an administrative basis. The Deputy can be sure we will be keeping a watching brief on this as it is one of our flagship pieces of legislation. However, I do not want to take this prescription. I was thinking in terms of amending the normal public body reporting procedures, which are covered in Part 5. As technology improves, it will be easier to gather and publish the data, and we could make that part of the regime. I ask the Deputy to let me see how I will address the issue without being as prescriptive as the Deputy is suggesting in this amendment.

Deputy Mary Lou McDonald: What does that mean? Does it mean the Minister will take this idea and-----

Deputy Brendan Howlin: I am not going to take the prescriptive 12-monthly reporting in the way it is laid out in the amendment. I would look for a way to ensure that, for example, the information the Deputy requested from the former Garda Commissioner would be in the public domain in any event. We should know how many disclosures or usages of the legislation happened in each public body. I will see if I can find a mechanism for that to be part of the normal reporting measures.

I do not know whether Deputy McDonald had the chance to look into any of last year's Open Government Partnership, OGP, Conference. I am wedded to the notion of moving to a regime of open data. We should be in a position where access to information is as open as possible. This would obviate the need for freedom of information requests, as all of these data sets would be available. There is a technological challenge and, in many instances, an institutional resistance to this, but we must address those.

It is in the context of the reporting of legal obligations as a matter of course that I will determine whether I can address the issue. I am sorry to be long-winded about it, but that is how I would like to do it. It would be an amendment to Part 5 of the Bill, as published.

Deputy Mary Lou McDonald: Does the Minister propose to table that amendment on Report Stage?

Deputy Brendan Howlin: If I can find a suitable slot and wording for it. I do not want to give a commitment on which I cannot deliver, but I will address this issue if I can before Report Stage.

Deputy Mary Lou McDonald: On that basis, I will withdraw my amendment for now, but this issue needs to be remediated.

Amendment, by leave, withdrawn.

Sections 22 and 23 agreed to.

SCHEDULE 1

Deputy Brendan Howlin: I move amendment No. 24:

In page 20, line 9, to delete "7 days" and substitute "21 days".

We discussed interim relief at length in the House. I believed it to be important to have interim relief and I got the Government's agreement. However, the time limit for seeking interim relief as set out in the Bill is seven days. I am now advised that, in practice, it might take longer to make such an application, get legal advices and so on. I want to prolong the period for making an application from seven days to 21 days.

Deputy Sean Fleming: Obviously, a seven-day period was tight. I have two questions about interim relief under Schedule 1. Why is the Circuit Court as opposed to the District Court used? It is easier to access the latter, given the cost involved in accessing the former.

Deputy Brendan Howlin: The quantity of sums is-----

Deputy Sean Fleming: What the court could award.

Deputy Brendan Howlin: Yes.

Deputy Sean Fleming: If people-----

Deputy Brendan Howlin: As the Deputy knows, the interim relief awards can be significant.

Deputy Sean Fleming: Up to two years' salary.

Deputy Brendan Howlin: One should not access a court that cannot award a quantity-----

Deputy Sean Fleming: The relevant award. During the closed season, it is easy to get special sittings of other courts. Is there always a facility for the Circuit Court to return?

Deputy Brendan Howlin: The Circuit Court sets its own time.

Deputy Sean Fleming: Attending the Circuit Court imposes quite a cost.

Deputy Brendan Howlin: No, not really.

Deputy Sean Fleming: One must normally have a senior counsel.

Deputy Brendan Howlin: No.

Deputy Sean Fleming: Only a few solicitors do this business.

Deputy Brendan Howlin: Barristers would do this business regularly.

Deputy Sean Fleming: That is what I meant - senior counsels.

Deputy Brendan Howlin: No, BLs as opposed to SCs.

Deputy Sean Fleming: I know of a number of cases - I will deal with them under the next Schedule as well - in which people have not been given documentation when leaving a job and where there are some bad feelings. Often, they have trouble getting that documentation even

within 21 days. We all know of people who were let go, fell out with their old employers and still had not received their P45s a year later, etc. It can be difficult for a person to prove a quantum of loss within 21 days. Has the Minister any general advice for people who find themselves in that situation? Should they just lodge their cases?

Deputy Brendan Howlin: Yes, lodge cases. Their lawyers will get discovery of whatever they want.

Amendment put and agreed to.

Deputy Brendan Howlin: I move amendment No. 25:

In page 21, line 1, to delete "that".

This is a minor technical amendment to the first line on page 2 to correct a typographical error.

Amendment put and agreed to.

Deputy Mary Lou McDonald: I move amendment No. 26:

In page 23, after line 16, to insert the following:

"(8) Payments made under the interim relief order are not recoverable.".

This is an addition to make payments made under interim relief orders non-recoverable. In circumstances where an employee has been on an interim relief order for a time and the unfair dismissal claim is not upheld on whatever grounds, the employer could seek to recover the moneys paid. Our amendment proposes to protect the employee in that scenario.

Deputy Brendan Howlin: An order for interim relief may provide for reinstatement, re-engagement or continuation of the employee's contract of employment. I am advised by the Office of the Attorney General that, in all cases, there is a continuing contract of employment in place pending the determination of a case for redress. The employee will continue to be employed until the final determination of the substantive case.

I am further advised that moneys paid pursuant to the contract that, in turn, are paid pursuant to any order for interim relief are irrecoverable regardless of the outcome of the substantive case. For such moneys to be anything other than irrecoverable would need to be specifically provided for in law. We do not need to take any action to meet the Deputy's request.

Deputy Mary Lou McDonald: I thank the Minister.

Amendment, by leave, withdrawn.

Schedule 1, as amended, agreed to.

SCHEDULE 2

Question proposed: "That Schedule 2 be Schedule 2 to the Bill."

Deputy Sean Fleming: The Minister might not be able to deal with my question, as it may pertain to another Minister. This Schedule deals with the rights commissioners, but there is a tremendous backlog of cases in that regard. I know of cases in Laois and Kildare that have been waiting for two years.

Deputy Brendan Howlin: That has nothing to do with me.

Deputy Sean Fleming: I know, but I am making the point about the two years, given this large section on redress.

Deputy Brendan Howlin: As the Deputy knows-----

Deputy Sean Fleming: This is not the Minister's area, but it is covered by his legislation.

Deputy Brendan Howlin: It is my area, inasmuch as it is part of the reform agenda published in 2011.

Deputy Sean Fleming: Will I speak to the Minister in that context?

Deputy Brendan Howlin: Okay.

Deputy Sean Fleming: We are dealing with the rights commissioners.

Deputy Brendan Howlin: The merging of all of the labour rights bodies to make them more efficient.

Deputy Sean Fleming: I have no issue with that if commensurate resources are provided to allow them to do their job.

Matters of redress for contraventions under section 12 must go to the rights commissioners. What does this mean? There are pages on end. I know of cases that went to the Labour Court for supplementary provisions and the Circuit Court enforced the decisions, but when the sheriff arrived, the employer had disappeared and the person who took the case was left swinging. People cannot get their P45s. As the Minister is responsible for the public service, it is important that he be aware of this situation. In Laois and Kildare, the waiting list for a hearing with a rights commissioner can be as long as two years. I have submitted parliamentary questions to establish waiting times, but I have been told that they cannot really be established. For example, ten cases could be cleared when hearings are held in a hotel and that county might be okay for another year or two.

I have encountered cases in which, just a day before a hearing by a rights commissioner into a person's dismissal, the employer telephoned to say that he or she was abroad, leading to the appointment being postponed for nine or ten months. I know of a case in which a rights commissioner could not adjudicate because a person was unable to prove to a mortgage provider's satisfaction that he or she had been dismissed. The person had been paying mortgage protection, which provided cover in the case of loss of employment. As the person could not get an appointment with a rights commissioner and the employer gave him or her the two fingers, the person could not get independent evidence of being out of work even two years later. In the meantime, the person was unable to draw down mortgage protection insurance to cover loss of employment because that loss could not be proven. The bank told the person to sell the house due to a lack of income from work or mortgage protection insurance. The rights commissioners service stated that it would take two years to adjudicate on the case. The person was told to sell his or her home. All of this happened because he or she was unable to get an oral hearing with a rights commissioner. I know this is not the subject of the Bill before the committee. It is useful for the Minister, who is responsible for the public service, to hear about the actual knock-on consequences of what is happening. People are losing their houses because they cannot get appointments with public bodies to prove their cases. I will put that to the Minister, for what

it is worth, and ask him to think about it. The Minister should not waste our time by talking about amalgamating bodies if he does not have the budget for it. These measures must work for the people.

Deputy Brendan Howlin: I would like to say two things in response to the Deputy. First, I am alarmed to hear that there was a delay of the magnitude he suggested. Part of the reform agenda involves the introduction of more efficiencies in this area. Obviously, that is a matter for my colleague, the Minister for Jobs, Enterprise and Innovation. Second, the case mentioned by the Deputy once more underscores the importance of providing for interim relief, which is not the norm in labour related legislation. It should be possible to go and get interim relief for people. I was anxious to provide for that as a unique feature of this Bill. It was pointed out by those who were resistant to such a provision that it is not the norm in legislation on labour matters.

Question put and agreed to.

SCHEDULE 3

Deputy Sean Fleming: I move amendment No. 27:

In page 30, line 9, after "year." to insert the following:

"The details of such report shall be published in such manner as would not in any way identify a person who has made a protected disclosure.".

I intend to table a further amendment to this Schedule on Report Stage. The first subsection of this Schedule provides that: "The Taoiseach shall appoint as the Disclosures Recipient a person who is a judge or retired judge of the High Court." The second subsection of the Schedule provides that: "The Taoiseach may remove the Disclosures Recipient from office, but only for stated misbehaviour or for incapacity." I will propose on Report Stage that the appointment of this person should be subject to approval by the Oireachtas. In addition, I think the grounds for removing this person from office should not be so narrow. If we provide that the recipient can be removed "only for stated misbehaviour or for incapacity", it might not be possible to remove the recipient if he or she has lost the confidence of the Government or the Parliament. An attempt to remove the officeholder in such circumstances might not fit into the categories that are listed in the Bill as it stands.

I will propose an amendment to try to give the Oireachtas a role in the appointment of the recipient. I do not think the Taoiseach would have a problem with a 15 minute debate like that held when a new Ombudsman or freedom of information commissioner is being appointed. Indeed, I think it would help the process. I do not think any member of the public knew about the existence of the Garda Inspectorate or the presence of a confidential recipient within the force. It is now proposed to provide for a disclosures recipient who can only be appointed by the Taoiseach and who will report only to the Taoiseach. There will be no public notice of his or her appointment and no annual published report. It will be another mystery. It seems that the Government is looking for trouble. All I am saying is that it should be a little more open about this matter.

Deputy Brendan Howlin: We will examine the Deputy's second set of proposals on Report Stage. It is not before us now. The amendment before the committee relates to the details

of the narrow level of reporting that is provided for. We might be able to capture it on a statistical basis. For example, we might be able to provide information on the number of people who have made a report to the confidential recipient. I said in response to Deputy McDonald that I would consider providing for some mechanism for reporting. I will have a look at that. I would certainly not be in favour of the disclosure of any of the detail.

Deputy Sean Fleming: I did not ask for that to be disclosed.

Deputy Brendan Howlin: I appreciate that. I just wanted to make my position clear.

Deputy Sean Fleming: Is the Minister accepting this amendment?

Deputy Brendan Howlin: I am not accepting it, no.

Deputy Sean Fleming: I will push it because I think the principle is right. I accept that the Minister has said he will come back to it.

Amendment put and declared lost.

Schedule 3 agreed to.

SCHEDULE 4

Deputy Brendan Howlin: I move amendment No. 28:

In page 31, to delete lines 10 to 27.

This technical amendment is necessitated by recent legislative developments. Schedule 4 to the Bill consists of a list of amendments to a number of sectoral Acts containing protected disclosure-type provisions. This amendment merely updates that list.

Deputy Sean Fleming: I was actually going to raise this particular section with the Minister when we came to Schedule 4. Can he give us the specifics now of what this is about? If not, I would welcome them if they were to come through the committee well in advance of Report Stage. I do not know what is behind this, but I am troubled by the title of what I see in front of me.

Deputy Brendan Howlin: Can the Deputy explain his difficulty to me?

Deputy Sean Fleming: Amendment No. 28, in the name of the Minister, proposes "to delete lines 10 to 27".

Deputy Brendan Howlin: Yes.

Deputy Sean Fleming: Yes. It does not arise until the next section along. I have no problem with that amendment. I have an issue with the next line of this Schedule.

Deputy Brendan Howlin: I am sorry. I have lost the Deputy. What does he have a difficulty with?

Acting Chairman (Deputy Liam Twomey): Does the Deputy have a problem with amendment No. 29?

Deputy Sean Fleming: No. I have a problem with the Schedule, but not with this amendment.

Amendment agreed to.

Deputy Brendan Howlin: I move amendment No. 29:

In page 38, between lines 20 and 21, to insert the following:

“

17	Further Education and Training Act 2013 (No. 25 of 2013)	Section 34	After subsection (3) insert—“(4) This section does not apply to a communication that is a protected disclosure within the meaning of the Protected Disclosures Act 2014.”.

”.

Amendment agreed to.

Question proposed: “That Schedule 4, as amended, be Schedule 4 to the Bill.”

Deputy Sean Fleming: I ask the Minister to explain an aspect of Schedule 4, as set out on page 31 of the Bill. The Schedule amends various Acts. The section of the Schedule that begins on line 28 proposes the insertion of three new subsections in the Protections for Persons Reporting Child Abuse Act 1998, one after section 3(2) of the Act, one after section 4(1) and one after section 5(1). Essentially, it is the same addition in each case.

Deputy Brendan Howlin: Yes.

Deputy Sean Fleming: It seeks to ensure the relevant section or subsection will “not apply to a communication that is a protected disclosure within the meaning of the Protected Disclosures Act 2013”. I would like the Minister to explain that to us. Is he in some way eliminating some other lines of disclosure, or requirements for disclosure, under the Protections for Persons Reporting Child Abuse Act 1998? Is he not saying that they will no longer apply because they will come in under this legislation? I ask him to explain what this is about.

Deputy Brendan Howlin: The amendments to various Acts provided for in this Schedule will simply ensure a discloser or whistleblower is given the generally stronger protections that are available under this legislation. At the same time, they will ensure the protections available in the sectoral Acts will be unaffected in the unlikely event that the disclosure does not fall within the meaning of this legislation. We are not dislodging the sectoral protections that were built up and inserted in legislation over the years. We are superimposing on top of them the stronger protections of this Bill.

Deputy Sean Fleming: The Minister is replacing those protections. I do not think he is superimposing this protection on top of them. This Bill clearly states that “this section does not apply”. That section will not apply. It sounds as if the Minister feels this protection is a stronger one, so he is putting it in and the other one will not apply. I do not understand it.

Deputy Brendan Howlin: I will try to make it clear. What I have said is accurate. I can say it again. In essence, the weaker protections will not apply if the stronger protections of this Bill apply. If the stronger protections do not apply, for whatever technical reason, the sectoral protections that are implicit in the existing Acts will apply.

Deputy Sean Fleming: The Minister is saying that it is a belt and braces job.

Deputy Brendan Howlin: Correct.

Deputy Sean Fleming: There will be a double protection. Does it depend on the legislation under which the person makes his or her disclosure?

Deputy Brendan Howlin: No. The default position is this Bill. This is it. If this Bill does not apply for some technical reason, the other one will apply.

Deputy Sean Fleming: Right. Is the Minister happy that he has captured all-----

Deputy Brendan Howlin: That is the intent. I have been told that is the legal position.

Deputy Sean Fleming: This covers all the different Departments.

Deputy Brendan Howlin: Yes.

Deputy Sean Fleming: The Minister has captured all of the possibilities of weakness.

Deputy Brendan Howlin: Yes.

Deputy Sean Fleming: That is fine. When I saw the reference to that legislation, I was worried that it might go through here on the nod without being teased out by somebody.

Deputy Brendan Howlin: I am glad the Deputy asked the question. It is important.

Question put and agreed to.

Title agreed to.

Deputy Brendan Howlin: I take the opportunity to inform members that I propose to address the following matters on Report Stage: the alignment of employer types with worker types in the definition; a closer alignment of the description of the different types of employer set out in the definition of that term with the definition of the different types of worker set out in the definition of that term in the Bill and a re-examination of section 5(9) with a view to providing greater clarity in how this provision might operate.

I thank members for their careful consideration of the Bill. If there are technical matters on which they need advice between now and Report Stage, I am happy for my officials to provide it.

Deputy Sean Fleming: I ask the Minister not to forget to ensure the information from the Department of Justice and Equality on the inquest is forwarded to the committee.

Deputy Brendan Howlin: My officials have taken note of the matter.

Acting Chairman (Deputy Liam Twomey): I thank the Minister and his officials for attending.

Bill reported with amendments.

Message to Dáil

Acting Chairman (Deputy Liam Twomey): In accordance with Standing Order 87, the following message will be sent to the Dáil:

The Select Sub-Committee on Public Expenditure and Reform has completed its consideration of the Protected Disclosures Bill 2013 and has made amendments thereto.

The select sub-committee adjourned at 4.45 p.m. *sine die*.