Submission from the Department of Justice and Equality 20 October 2017

Review of Protected Disclosures Act

The Department of Justice and Equality wish to submit a number of points in response to the Department of Public Expenditure and Reform (D/PER) request for submissions to the consultation on the Protected Disclosures Act 2014. The key points addressed relate to the absence of a **Public Interest test**, and the effect of Section 5(5) in relation to An Garda Síochána, which points are related. The Department has also submitted some observations to the specific questions asked by D/PER in the consultation document.

Absence of Public Interest test:

At present the Protected Disclosures Act 2014 contains neither a public interest nor a good faith test. The Public Interest Disclosures Act 1998 (UK) is an Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.

In the UK a public interest test was added to the Public Interest Disclosures Act (PIDA) in 2013 as a result of a widening of the breadth of the legislation through case law to encompass private interest issues. For example, employees began to argue that making a complaint about a breach of their own employment contract, or their treatment by their employer, amounted to a complaint regarding breach of a legal obligation and could therefore constitute a qualifying protected disclosure.

This trend began with *Parkins v Sodexho [2002] IRLR 109* in which the Employment Appeal Tribunal ("**EAT**") held that a complaint about a breach of the worker's own contract of employment could constitute a qualifying protected disclosure. The *Parkins* decision widened the scope of whistle-blowing claims for workers, and was followed by similar cases. Subsequent cases found that a complaint concerning a failure to deal with race discrimination; reporting an alleged failure to follow an equal opportunities policy; and complaining that an employer had refused to honour the pay rates promised at a job interview, all constituted qualifying protected disclosures. There were concerns that the *Parkins* line of cases provided an opportunity for workers who suspected they were about to be dismissed (or who were considering resigning) to make "tactical disclosures" to link any subsequent action on behalf of their employer to their complaint,, particularly where a disgruntled employee did not have sufficient length of service to qualify for ordinary unfair dismissal rights (which only apply after two years' service).

Accordingly, from 20 June 2013 onwards PIDA was amended to the effect that protected disclosures must be in the public interest. It was intended that this condition would prevent employees making complaints about their own employment contract as this type of disclosure would not generally be held to be in the wider public interest.

Section 5(5) of Protected Disclosures Act 2014

The Irish legislation aims to exclude personal issues through an exception outlined in Section 5(5) of the 2014 Act which states that a matter is not a relevant wrongdoing if it is a matter which is the function of the

worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer.

The intention of this exception is clear and worthwhile, as otherwise routine internal reports in organisations such as the Garda Síochána, relating to the suspected commission of offences by members of the public, could unintentionally come within the remit of the Protected Disclosures Act. It would be worth examining, however, whether this exception might in some respects be too narrow and in others too broad.

For the exception to the definition of "relevant wrongdoing" to apply (and therefore for the Act to be disapplied), two conditions must be satisfied. The relevant wrongdoing must be a matter which it is the function of the worker or the employer to detect, investigate or prosecute.

Example 1: A civil servant working in internal audit would come within this part of the exception. It is part of his or her function to detect wrongdoing. However, the second condition for the exception to apply is that the matter must not consist of or involve an act or omission on the part of the employer (which in the case of a civil servant includes his or her Department). If we keep to the example of a civil servant in internal audit, this condition would not appear to be met if an internal audit report found that the Department had engaged in relevant wrongdoing, for example by committing an offence or failing to comply with a legal obligation. Such a report would, therefore, on the face of it come within the definition of "relevant wrongdoing", potentially making the report a protected disclosure. It would not of course be intended as such, but subsection (7) provides that the motivation for making a disclosure is irrelevant as to whether or not it is a protected disclosure.

Example 2: In the case of the Garda Síochána, the exception to the definition of "relevant wrongdoing" could have the opposite effect. "Employer" is defined, in relation to members of An Garda Siochana, as the Garda Commissioner. The first condition of the exception would again be met in the case of a report by a Garda to GSOC (as a prescribed body) of evidence of widespread wrongdoing by other members of the Force, as it does seem to be a function of a member (and certainly is of the Garda Commissioner) to detect and investigate such wrongdoing. However, if the matter reported did not consist of or involve an act or omission on the part of the Garda Commissioner, this would appear to have the result that it would also meet the second condition of the exception and would not come within the definition of "relevant wrongdoing", and therefore would not come within the remit of the Act, (even though in this case the Garda clearly would mean the report to be a protected disclosure).

These are just two hypothetical examples of how the exception to the definition of "relevant wrongdoing" could have unintended consequences, and it might be worthwhile to consider whether it needs fine-tuning.

Submission from the Department of Justice and Equality 20 October 2017

The use of a purposive approach by the courts rather than a plain meaning approach could ensure that the original intent of Section 5 (5) is met; however, it may be preferable to legislate to achieve the desired purpose.

Even though there is a Public Interest test in the UK legislation since the case of *Chesterton Global Limited and Another v Murmohamed [UK EAT/U335/14] and other cases,* the public interest test does not necessarily mean that it is no longer possible to make a protected disclosure linked to an individual's terms and conditions of employment or own interests at work. In *Underwood v Wincanton Plc [UK EAT/0163/15]* the employee had complained about unfair allocation of overtime. The Employment Tribunal originally rejected the contention that this was a qualifying protected disclosure (as it related to private interest regarding working conditions). The EAT overturned this, again noting that a disclosure may still meet the public interest test even if it is only potentially in the public interest of a sub-set or specific category of the public. It also noted that a complaint relating to terms and conditions of employment could still be in the public interest in certain circumstances and should not automatically be assumed to be of private interest only.

In July 2017 the UK Court of Appeal Underhill LJ of the Court of Appeal held that the correct approach was that in a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other interest of a personal character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The question is one to be answered on a consideration of all the circumstances of the particular case, subject to the note of caution that while the number of employees whose interests the matter disclosed affects may be relevant, this may not be sufficient to convert an interest which remains essentially private into one which is public within the meaning of that term as deduced (though not defined) from the broad intent behind the insertion of the public interest test.

The fourfold classification of relevant factors was paraphrased by the UK Court of Appeal as follows:

1. the numbers of the group whose interests the disclosure serves;
2. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
3. the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
4. the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest, although this should not be taken too far.

The inclusion of a public interest test such as that in the UK would be useful to exclude matters which are relevant only to an individual and have issues that are of a minor operational nature.

Appeals body for public sector

Consideration might be given to designating/creating an independent appeals body to provide a final review of a disclosure where this is sought by the discloser, the findings of which shall be final and thereafter the disclosure is regarded as closed under the Act.

Submission from the Department of Justice and Equality 20 October 2017

Review of Protected Disclosures Act – in line with Consultation document.

1	**Q**	Is the Act operating effectively?
	A	The main objectives have been achieved in the 2014 Act. The Act is pan-sectoral and extends whistleblower protections to organisations and sectors not previously catered for. By legislating for protections for the discloser, it lessens the perceived risks to the welfare of workers in bringing wrongdoings to the attention of management. The legislation supports management in encouraging a flow of information on wrongdoings or potential wrongdoing. The protected disclosures policy and processes are a key part in the governance structure of this department.
2	**Q**	What appear to be the main challenges in the operation of the Act? In your view are there any unintended consequences from the operation of the Act which are not consistent with the objectives of the legislation?
	A	One of the key challenges in the current legislation is the potential for personal grievances/disciplinary issues to be incorporated into disclosures. While there are internal processes to deal with such grievances, it is extremely difficult to separate the genuine disclosure information from the personal matters where this exists. The introduction of a Public Interest test as is included in the UK legislation would ensure that personal grievances are excluded as they generally would not be held to be in the wider public interest. See above re Section 5 (5)
3	**Q**	Do you have any views on the protections contained in the Act (Sections 11 to 16)? Are the protections sufficient to encourage potential disclosers to speak up about wrongdoings or are further safeguards warranted?
	A	No observations
4	**Q**	Are there any of the definitions contained in the interpretation section (section 3) that it would be useful to reconsider, amend, replace, clarify etc.? For example, is the definition of "worker" too broad or too narrow or does it strike the right balance?
	A	The definition of penalisation in the act details unfair treatment twice. (e) **unfair treatment** (g) discrimination, disadvantage and **unfair treatment**
5	**Q**	Do the eight categories of wrongdoings provided for in section 5(3) of the Act capture all of the matters that should be captured in that definition? If not, are the categories too broad or too narrow? Should some of the categories (or wording contained in the categories) be clarified by way of further definition?
	A	It could be argued the categories are too broad at present, making interpretation difficult. The potential wrongdoings open up a broad range of issues which may have a minimal or significant implication for the organisation in question. The key point is the current act **has no materiality limits**[1]. For example, "that an unlawful or otherwise improper use of funds

[1] See Appendix 1

		or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur" means that a disclosure that alleges €1 improper use of funds is treated with the same level of importance as one for €10,000. The Comptroller and Auditor General request that Frauds and Irregularities with a monetary loss or potential loss exceeding €10,000 is reported to them. Similarly the European Funds Auditors and OLAF also require reporting of fraud or loss >€10,000. The Department of Justice and Equality and the Prison Service will continue to close off opportunities for small scale misappropriation/misuse of state resources however there would be a benefit in setting a threshold by means of a monetary limit in the act or to insert a public interest test. Section 5(3)(g) states "that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement". An allegation of "gross mismanagement" is subjective, particularly to the Discloser. It is suggested that the wording of the wrongdoings could be tightened and/or a public interest test included (see question 6).
6	**Q**	The Act does not contain any requirement that the disclosure is made in good faith or in the public interest as it was felt that this could act as a significant disincentive to potential disclosers coming forward in the first instance. However, should there be some threshold of seriousness applied in respect of wrongdoing, in order to reduce the disproportionate use of investigative resources? Could this potentially affect one of the aims of the legislation - to encourage workers to disclose relevant wrongdoings?
	A	The Department argues for the inclusion of a Public Interest test as some of the disclosures received to date may have been excluded had there been a public interest test in place. In addition the Department would argue that the inclusion of a Public Interest Test may act as a deterrent to the submission of purely private issues thereby allowing investigator and management time to be allocated to issues of operational and strategic importance.
7	**Q**	Are the evidential thresholds in the stepped disclosure regime (section 6 to 10) as reflected in the Act about right to encourage persons to disclose to the employer (internally) first where appropriate?
	A	No observations
8	**Q**	Are there any persons with regulatory or other functions who have not been prescribed for the purposes of the receipt of disclosures (section 7 and related statutory instruments) and whom in your view should be prescribed? If your answer is yes please advise whom and why?
	A	Possibly the Charities Regulatory Authority (now under the D/Rural and Community Development) and the Legal Services Regulatory Authority.
9	**Q**	Does the obligation to protect the identity of the discloser contained in section 16 represent a fair balance between the rights of the discloser and the need to follow up on the disclosure? Could this be improved and, if so, how? State your reasons for this view.

	A	The confidentiality provisions, which are of course there for the discloser's protection, have been particularly difficult in circumstances where the discloser makes the matter public him/herself or sends the details to numerous people/organisations. The Department has no power to respond to allegations (potentially unfounded) made in the public domain. It is not justifiable that Ministers should be faced with a situation where opposition Deputies and the media are questioning them on the details of a protected disclosure, but the Minister is prevented from saying anything lest they fall foul of the Act. The current exceptions in section 16(2) do not give sufficient reassurance. On a sector wide basis it is known that disclosers have sent correspondences to more than one recipient (i.e. Minister, An Garda Síochána and GSOC) in relation to the same issue, as disclosers have made mention of the bodies to which the disclosure was sent. Due to the confidentiality provisions the Department currently have no way of knowing if more that one investigation is occurring in relation to the same disclosure. This situation affects a) the accuracy of reporting (e.g. double counting), and b) the effective use of resources in duplicating work. The Department wishes to address this internally by having a person appointed on a sector wide basis to track the receipt of and progress on disclosures but this is not currently possible due to section 16. The Department would therefore request that this section be amended to explicitly allow for the collation of summary information for administrative purposes; and that consideration be given for amending the provisions of section 16(2) to address the situation outlined above.
10	**Q**	Should the Act require recipients to act on disclosures (for example, by providing an obligation to assess or investigate) or to communicate with the person making the disclosure?
	A	S21(1) obligates public bodies to establish and maintain procedures for the *"making of protected disclosures by worker….and for dealing with such disclosures"* The Department has interpreted this as implying an obligation to assess the disclosure and investigate or act as appropriate including periodic communication with the Discloser. It is worth considering, however, whether guidance is required in relation to how disclosures submitted anonymously should be dealt with.
11	**Q**	Should it be mandatory for businesses/firms with employees over a certain number (e.g. 100 employees) to have a Code of Practice/Internal procedures for the handling of protected disclosures?
	A	No observations.
12	**Q**	Should such business/firms (e.g. with over 100 employees) be required to report on protected disclosures in their annual reports and accounts – similar to the obligation on public bodies?
	A	No observations
13	**Q**	Do you have any views on how the Protected Disclosures Act 2014 interacts with the other protections for disclosers contained in sectoral legislation? Are there certain issues that need to be clarified in respect of the protections and obligations contained in the 2014 Act and those in sectoral legislation? If there are, how would this be best achieved?
	A	No observations

Submission from the Department of Justice and Equality 20 October 2017

Appendix 1: Concept of Materiality

In accounting, the concept of materiality allows you to violate another accounting principle if the amount is so small that the reader of the financial statements will not be misled.

A classic example of the materiality concept or the materiality principle is the immediate expensing of a $10 wastebasket that has a useful life of 10 years. The *matching* principle directs you to record the wastebasket as an asset and then depreciate its cost over its useful life of 10 years. The *materiality* principle allows you to expense the entire $10 in the year it is acquired instead of recording depreciation expense of $1 per year for 10 years. The reason is that no investor, creditor, or other interested party would be misled by not depreciating the wastebasket over a 10-year period.

Determining what is a material or significant amount can require professional judgment. For example, $5,000 might be immaterial for a large, profitable corporation, but it will be material or significant for a small company that has very little profit.

Appendix 2: Definitions of Gross Mismanagement/ Gross Negligence.

In search of a definition of the terms Gross mismanagement/gross negligence as used in the Protected Disclosures Act 2014, we identified a 2005 case, IDCL GCC Foundation FZ – LLC and Others –v- The European Computer Driving Licence Foundation Limited which gave limited guidance on the term Gross negligence.

In his dissenting judgement in this case, Mr Justice O'Donnell states:

"Gross" even after its appropriation by teenagers across the world is not some pallid or superfluous adjective. It seems to me to convey the sense of something flagrant, clear or obvious and perhaps offensively so".

In the same case, the High Court held that *"gross negligence*" meant "*a degree of negligence where whatever duty of care may be involved has not been met by a significant margin".*

The expression "gross mismanagement" is not defined in the Act of 2014 nor could we identify any statutory definition.

Ends.