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USING STATUTORY GUIDANCE AND CODES OF PRACTICE TO BUILD ON WHISTLEBLOWING LEGISLATION: THE IRISH EXPERIENCE.

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INTRODUCTION

Section 21(1) of Ireland's Protected Disclosures Act 2014 (PDA 2014) states that, "Every public body shall establish and maintain procedures for the making of protected disclosures by workers who are or were employed by the public body and for dealing with such disclosures".¹ Section 21(4) goes on to provide that, "Public bodies shall have regard to any guidance issued under subsection (3) in the performance of their functions under subsection (1)".² In March 2016, the Government published Guidance,³ pursuant to section 21(3),⁴ designed to assist public bodies in the performance of their statutory duty by providing advice and information on how they should design and operate their procedures.

Additionally, in 2015 the Irish Workplace Relations Commission (WRC), an independent, statutory body, produced a statutory code of practice on protected disclosures which is intended to impact on employers in the private and non-profit sectors.⁵ The Code sets out best practice to help employers, workers and their representatives understand the law with regard to protected disclosures and how to deal with such disclosures. Although it is not as detailed, the provisions of the Code overlap to some extent with those contained in the Guidance. It is important to note that section 42(4) of the Industrial

¹ Protected Disclosures Act 2014, s 21(1).

² Protected Disclosures Act 2014., s21(4).

³ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) < <http://www.per.gov.ie/en/protected-disclosures-act-2014/>> accessed 21st June 2016.

⁴ This provides that "The Minister may issue guidance for the purpose of assisting public bodies in the performance of their functions under *subsection (1)* and may from time to time revise or re-issue it."

⁵ Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464 < www.workplacerelations.ie/en/GoodWorkplaceRelations/codespractice/COP12/> accessed 21st June 2016.

Relations Act 1990 provides that a Code of Practice is admissible in evidence in proceedings and any provision of the code which appears to be relevant to any question arising in the proceedings will be taken into account in determining that question.⁶ Thus, the importance of this Code should not be understated.

The purpose of protected disclosures procedures is primarily to incentivise internal reporting. Internal reporting allows employers to respond swiftly to wrongdoing and thus limit any potential damage and it reduces the risk of confidential information being leaked to external recipients. Further, implementing protected disclosure procedures promotes a workplace culture where workers are encouraged to disclose information about wrongdoing in the knowledge that they will not be penalised for having done so. It also encourages workers to come forward with such information in the expectation that their disclosure will be acted on. This should improve the trust, confidence and morale of workers.⁷

THE CONTENT OF THE GUIDANCE AND CODE

Given the wide range of public bodies in Ireland, the Guidance is not prescriptive in nature but sets out the main principles which each public body must take into account when establishing appropriate procedures for the making and receiving of disclosures. The Guidance gives a detailed analysis of these main principles beginning with the issue of who should have the overall responsibility for the procedures. It provides that overall responsibility should rest with the relevant Board of the public body or the Management Board of a Government Department (or the equivalent person or body).⁸ The Guidance then addresses the issue of who the day-to-day responsibility lies with and advises that it is a matter for each public body to consider. However, it is recommended that a function with the appropriate level of knowledge and

⁶ Industrial Relations Act 1990, s 42(4).

⁷ See generally Brown, A, Lewis, D, Moberly, R, Vandekerckhove, W eds.) 2014. *The International Whistleblowing Research Handbook*. Cheltenham, Edward Elgar. E-ISBN 978 1 78100 679 5.

⁸ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 2.

expertise to operate the procedures is selected.⁹ The Guidance proposes that each public body should include a policy statement that confirms the organisation's commitment to creating a workplace culture that encourages workers to make protected disclosures.¹⁰

Unsurprisingly, the Guidance proceeds to address issues that reflect the provisions of PDA 2014. It provides that the procedures should set out to whom they will apply and recommends that their coverage should reflect the definition of "worker" under PDA 2014. It also suggests that the procedures can go further than the legislation in that they can include volunteers.¹¹ In the authors' view, it is entirely appropriate to use guidance (and Codes of Practice) to invite employers to consider extending the scope of their whistleblowing arrangements beyond the statutory minimum. The Guidance then sets out what a protected disclosure is, as defined under PDA 2014, and provides that the procedures should explain the meaning of terms included in this definition, e.g. "relevant wrongdoing"; "reasonable belief"; "in connection with their employment"; etc.¹²

The Guidance gives advice on what information should be included in the procedures in relation to how a worker should make a protected disclosure. Although the procedures are intended to increase the likelihood that a worker will make their disclosure internally to their employer, the Guidance stipulates that procedures should make it clear that alternative channels for making disclosures are provided for under PDA 2014 and that these should be outlined i.e. a prescribed person, a Minister for the Government, a legal advisor, other external recipients under Section 10 PDA 2014, and disclosures in the area of law enforcement, security, defence, international relations and intelligence¹³

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 3.

¹² Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 3-5.

¹³ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the

The Guidance underscores the principle that a worker who makes a disclosure in accordance with the provisions of the PDA 2014 must not suffer penalisation.¹⁴ It advises that procedures should include a commitment that penalisation of workers for making a protected disclosure will not be tolerated and that complaints about reprisals will be assessed and investigated, and appropriate action taken where necessary. The Guidance provides that the definition of penalisation under section 3(1) PDA 2014 should be included in the procedures.¹⁵ The definition of penalisation in PDA 2014 is very comprehensive and including it in the procedures should ensure that there is no uncertainty as to what acts are prohibited.

The Guidance also addresses the important issue of confidentiality/protection of identity. It asserts that procedures should confirm that there is an obligation on recipients of disclosures under PDA 2014 to protect the identity of the worker but that this protection is not absolute and that certain exceptions apply. For example, where the revelation of the discloser's identity is necessary for the investigation of the alleged wrongdoing; to prevent a crime; where it is necessary in the public interest; etc.¹⁶ Related to the issue of confidential disclosures is the issue of anonymity. Anonymous disclosures are not specifically provided for in PDA 2014 but the Guidance asserts that procedures should draw a distinction between confidentiality and anonymity and that public bodies should give a commitment to act on information disclosed anonymously. This advice is clarified further by a recommendation that the procedures should include a statement that investigations of such disclosures may be restricted and that, in the event of

purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 5-7.

¹⁴ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 2.

¹⁵ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 7.

¹⁶ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 7-8.

retaliation against the discloser, it may be difficult or impossible to provide protection if anonymity is maintained.¹⁷

Importantly, the Guidance addresses the important difference between a personal concern and a protected disclosure.¹⁸ PDA 2014 only protects disclosures of relevant wrongdoings as statutorily defined and not personal employment complaints. The Guidance advises that the procedures should confirm the distinction between these types of concerns but the WRC Code goes further by suggesting that examples are given.¹⁹ The Guidance also deals with the problem of motivation. PDA 2014 states that motivation is irrelevant when determining whether or not a disclosure falls within its provisions.²⁰ The Guidance reiterates this and provides that all public bodies must deal with protected disclosures irrespective of the worker's motivation in making their disclosure. However, the Guidance goes further by stipulating that a disclosure made in the absence of reasonable belief may result in disciplinary action against the discloser.²¹ Given the problem of deciding when motives are to be assessed and whether to use objective or subjective tests of reasonableness, we think the WRC Code is more helpful in this regard by suggesting that the focus of attention should be on identifying deliberately false disclosures.²²

The Guidance deals with the assessment and investigation of concerns and sets out detailed advice as to how these should be carried out. It deals firstly with a screening process that forms part of the initial investigation. The purpose of this process is to determine if the disclosure should be treated as a protected disclosure and whether the disclosure is wholly or partly a personal concern. The Guidance then suggests that the risk assessment of the alleged wrongdoing should include a

¹⁷ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 8.

¹⁸ *ibid.*

¹⁹ Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464 at para 31.

²⁰ Protected Disclosures Act 2014, s 5(7).

²¹ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 8-9.

²² Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464 at para 13.

consideration of whether an investigation should be initiated and if so, what should be its nature and extent. The Guidance is firm in advising that public bodies should consider carefully whether the procedures should include a detailed and prescriptive investigative process or specific investigative timeframes which may ultimately limit the public body's flexibility in responding to each individual disclosure. Thus, the Guidance suggests that a general framework for investigation procedures, with a set of guiding principles, should be included in order to ensure consistency of approach.²³

The Guidance also deals with the protection of the rights of alleged wrongdoers (for some reason referred to in this document as respondents!) by advising that appropriate protection is provided to such persons and that natural justice and fair procedures are respected. It gives detailed advice with regard to balancing these rights with that of the discloser not to have their identity disclosed.²⁴ Further, the Guidance addresses the issue of what level of feedback should be given to the discloser. It provides that the overall requirement is that no information is communicated that could prejudice the outcome of the investigation or any action that ensues. The Guidance recommends that, subject to this consideration, periodic feedback should be provided in confidence relating to any progress or outcome. However, this need not be a complete account of steps being undertaken but merely assurances that the disclosure is receiving attention. With regard to any action taken, the Guidance directs that feedback should only be given to the effect that appropriate action is being taken and the discloser is not entitled to know what that action is.²⁵ In our opinion, the provision of statutory guidance is a useful mechanism for getting employers to think about the data protection, privacy and trust and

²³ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 9-10.

²⁴ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 10.

²⁵ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 10-11.

confidence dilemmas that can arise in whistleblowing situations.

The Guidance states that consideration should be given to strategies for providing advice and support to a discloser and that information regarding these matters should be supplied in the procedures.²⁶ It also provides that public bodies should implement a system of review with regard to the following:

- (i) Any decision made to disclose the identity of the discloser (except in exceptional cases);
- (ii) The outcome of any assessment/investigation undertaken in respect of the protected disclosure;
- (iii) The outcome of any assessment/investigation in respect of any complaint of penalisation.

It is suggested that this review should be undertaken by an individual who was not involved in the initial assessment, investigation or decision and that procedures should ensure that there is no entitlement to two reviews in respect of the same issue.²⁷ The Guidance recommends that every public body consults with management and staff representatives when developing their procedures.²⁸ This will indicate to workers that the establishment of arrangements is not just a 'tick-box response' to the public body's obligations. It is worth noting that the WRC Code goes further than this by urging that the whistleblowing policy should be agreed with all staff.²⁹ The Guidance also discusses the obligation on public bodies under PDA 2014 to provide workers with written information about the procedures and suggests that, in addition to providing workers with a copy of them, the public body communicates their

²⁶ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 11.

²⁷ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 11.

²⁸ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 11-12.

²⁹ Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464 at para 38.

existence "appropriately".³⁰ Clearly, this recommendation could be more robust. Previous versions of the Guidance had included suggestions as to how this could be done and it is arguable that the requirement to communicate them "appropriately" could mean that some workers will not be made aware of the existence of procedures.

The Guidance suggests that public bodies who have a substantial amount of work carried out by contractors should consider engaging with them in order to encourage them to establish protected disclosures procedures.³¹ It would be expected that the contractor's procedures would then be in line with those of the public body. The Guidance gives scant advice on the issue of training and merely provides that "general awareness training" should be provided to workers, including those who may be dealing with protected disclosures. It is left up to each public body to determine the scope and nature of this training.³²

With regard to the issue of mandatory reporting, the Guidance advises that, although there is no duty under PDA 2014 to make a protected disclosure, this legislation does not absolve any worker from any pre-existing mandatory reporting obligations. It is suggested that such reporting obligations should be dealt with where necessary and appropriate in separate and distinct policies and procedures.³³ A draft set of procedures was included in earlier versions of the Guidance but this was eventually shelved.³⁴ A list of minimum details that should be included in a disclosure is appended to the Guidance instead and it is recommended that a similar list is included in any

³⁰ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 12.

³¹ *ibid.*

³² *ibid.*

³³ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 13.

³⁴ Draft Guidance for public bodies on the performance of their functions under section 21(1) of the Act <<http://www.per.gov.ie/en/public-consultation-guidance-for-public-bodies-on-the-performance-of-their-functions-under-the-protected-disclosures-act/>> accessed 21st June 2016.

procedures.³⁵ By way of contrast, the WRC Code includes a sample/model policy.³⁶

The Guidance assists public bodies in complying with their statutory duty to produce an annual report detailing the number of protected disclosures received in the preceding year and any action taken in response to those disclosures.³⁷ It also advocates a system whereby each public body establishes a contact for co-ordination of information and case management so that information on protected disclosures can be collected and managed.³⁸

CONCLUSION

It is prudent for all employers to put in place protected disclosures procedures as it is likely that a Court or Adjudication Officer will consider this a factor in legal proceedings and especially in relation to whether or not it was reasonable for a worker to have made a disclosure to any external recipients, such as the media. Thus, a worker will more likely be protected in making a wider public disclosure if the employer did not have a disclosures procedure or if the worker had not been made aware of the disclosure arrangements.

In our opinion, the Guidance represents best international practice with regard to protected disclosures. It is devised on the premise that a one-size-fits-all approach is not appropriate given the different nature and scope of public sector bodies. Nevertheless, the Guidance provides the

³⁵ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 14.

³⁶ Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, SI 2015/464 at 15.

³⁷ Protected Disclosures Act 2014, s 22(1) provides that, "Every public body shall prepare and publish not later than 30 June in each year a report in relation to the immediately preceding year in a form which does not enable the identification of the persons involved containing information relating to the matters specified in *subsection (2)*." Protected Disclosures Act 2014, s 22(2) includes the following: "(a) the number of protected disclosures made to the public body, (b) the action (if any) taken in response to those protected disclosures, and (c) such other information relating to those protected disclosures and the action taken as may be requested by the Minister from time to time."

³⁸ Government Reform Unit, Department of Public Expenditure and Reform, 'Guidance under section 21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act' (2016) at 12.

fundamentals of a good set of procedures. As regards the WRC Code, although it is designed to be the private sector model for protected disclosures procedures, the sponsoring Minister at the Department for Public Expenditure and Reform has emphasised that it is intended that the procedures operated in the public sector will be viewed by all employers as the standard to achieve. Therefore, in order to ensure comprehensive and effective procedures, employers in the private and non-profit sectors should consult both the Guidance and the Code when formulating their own protected disclosures arrangements. In the authors' opinion, the Irish experience demonstrates how statutory guidance and Codes of Practice can be valuable methods of explaining how the law is intended to operate as well as encouraging best practice which goes beyond the minimum statutory floor of rights.