LAW SOCIETY
OF IRELAND

Mr Michael McGrath
Minister for Public Expenditure and Reform
Department of Public Expenditure and Reform
Government Buildings,
Upper Merrion Street
D02 R583
By email Minister@per.gov.ie

23 December 2021

Re: proposed amendments to the Protected Disclosures Act 2014 - protected disclosures, grievances and the public interest

Dear Minister,

In the context of your consideration of amendments to the Protected Disclosures Act 2014 (the "2014 Act") including in relation to the implementation of the EU Whistleblowing Directive (EU) 2019/1937, the Law Society wishes to draw to your attention the recent Supreme Court decision delivered on 1 December 2021 in Baranya v Rosderra Irish Meats Group Limited [2021] IESC 77.

We outline below the findings in that case in relation to protected disclosures, grievances and the public interest and highlight some extracts of the judgments in so far as they may be relevant in your considerations.

Given the complex legal issues involved here, we would welcome the opportunity for consultation on the proposed amending legislation at an appropriate time, whether that is before or after the publication of the proposed Bill. We understand that the Code of Practice will need to be amended to give guidance to employers and employees on this issue, given that the 2015 WRC Code was found to misstate the law.

In the Supreme Court decision of Baranya v Rosderra Irish Meats Group Limited, it was held that the Labour Court erred in ruling that a workplace personal complaint could not amount to a "protected disclosure" under section 5 of the 2014 Act. The case was remitted back to the Labour Court to be considered on its facts.

The appellant argued that he had been dismissed for making a protected disclosure in relation to his pain as a result of his work. The Labour Court held that the complaint "was in fact an expression of grievance and not a protected disclosure".

On appeal to the Supreme Court (after an unsuccessful appeal to the High Court), Mr Justice Gerard Hogan held that that "many complaints made by employees which are entirely personal to them are nonetheless capable of being regarded as protected disclosures for the purposes of the 2014 Act." It was held that complaints about the employee's own health or safety could fall within the remit of a protected disclosure.

The Court further held that the 2015 WRC Code of Practice misstated the law by providing conditions of employment were strictly personal grievances and outside the scope of protected disclosures under the 2014 Act. Hogan J stated:

"… the difficulty in the present case is that the 2015 WRC Code does not accurately reflect the terms of what the 2014 Act actually says. Specifically, the 2015 WRC Code introduces a distinction between "a grievance" and "a protected disclosure", even though no such distinction is drawn by the 2014 Act itself, which makes no reference at all to the concept of a personal grievance. Just as importantly, the 2015 WRC Code states that complaints specific to the worker in relation to "duties, terms and conditions of employment, working procedures or working conditions" are personal grievances which cannot amount to protected disclosures. I cannot avoid observing that in these two respects the 2015 WRC Code has thereby erroneously misstated the law. For all the reasons I have already ventured to explain, it is clear that purely personal complaints in relation to the issues of workplace health or safety can in fact be regarded as coming within the rubric of protected disclosures for the purposes of s.5(2) and s. 5(3) of the 2014 Act."

Hogan J stated that:

"…the Oireachtas envisaged that most complaints for which protection is sought [under the 2014 Act] would relate to matters of general public interest. But, as we shall presently see, the actual definition of what may constitute a protected disclosure for the purposes of the 2014 Act is not so confined. Indeed, the 2014 Act also extends (albeit with certain exceptions) to complaints made in the context of private employment which are personal to the complainant, so that in effect it must be assumed that the Oireachtas considered that the disclosure of those complaints was, in general at least, also a matter of public interest".

Hogan J further stated:

"… that legislation [protected disclosures legislation] was itself amended in the United Kingdom by the Enterprise and Regulatory Reform Act 2013, so that protected disclosures must now clearly relate to the public interest, even if it is also the case that some complaints in relation to private contractual matters can nonetheless also be considered to be in the public interest: see here the judgments of Beatson and Underhill L.JJ. in Chesterton Global Ltd. v. Verman [2017] EWCA Civ 979. There is, incidentally, no legislation equivalent to the 2013 Act in this jurisdiction."

Mr Justice Peter Charleton concurred with the judgement of Hogan J. In his judgment he sought "to add some observations as to how the state of the law clashes with common perceptions of what a whistleblower is".

Charleton J stated:

"…Hence, while Hogan J's analysis is unassailably correct, the thrust of the 2014 Act does not conform to what might ordinarily be considered to define a whistleblower as a public-minded individual deserving of special protection."

He further stated:

"… While the principal judgment of Hogan J is unassailable in the logic by which it is concluded that a worker in making a complaint internal to the workplace in relation to his or her own employment conditions them comes within the terms of the Protected Disclosures Act 2014, that situation does not conform with what the ordinary understanding of the protection of whistleblowers requires and, furthermore, it may not be sensible. The terms of s5(3)(b) of the 2014 Act suggest that the Oireachtas intended to exclude purely private matters, but if that is so it was clearly ineffective since that subsection only addressed contractual claims within the workplace and not issues raised as to personal health...

The 2014 Act does not use the term whistleblower. Instead the legislation refers to a person making a protected disclosure. That is a whistleblower. That concept is the pivot upon which Directive (EU) 2019/1937 of the European Parliament and of the

Council of 23 October 2019 on the protection of persons who report breaches of Union law turns. The recitals to the Directive reference as whistleblowers those who report illegal situations “harmful to the public interest” thus enhancing such matters of moment as transport safety, nuclear safety, protection of the environment, the fight against fraud and food safety. All of these are about public and not personal interests. Yet, as Hogan J rules, it is inescapable that personal interests are covered by the 2014 Act as well as situations of impact on the public interest. In the long title to that legislation, the provisions are introduced as being “to make provision for … the protection of persons from taking actions against them in respect of making certain disclosures in the public interest and for connected purposes.” While the long title might anticipate confining the protection of disclosures exclusively to those made with a public interest in mind,that is not what the 2014 Act does.

Even though a tendency to cut and paste from the legislation of the neighbouring kingdom has been noted, much less in recent generations, by McWilliam J in Breathnach v McC [1984] IR 340, 346, foreign legislative history and amendments introduced in consequence of court decisions are of dubious, or no, value in construing Irish legislation. A contrast may usefully be drawn between the 2014 Act and the history of amendment to a parallel enactment in that jurisdiction. In England and Wales, the original legislation was the Public Interest Disclosure Act 1998 in which s 43B(1) introduced into the Employment Rights Act 1996 concepts very similar to s 3 of the 2014 Act. An amendment was introduced through s 17 of the Enterprise and Regulatory Reform Act 2013 2013 Act, which required a qualifying disclosure, in other words a protected disclosure, to not only require a “reasonable belief of the worker making the disclosure” that the facts involved a breach of the criminal law or, as here relevant, a danger to public safety, etc, but also that the worker additionally reasonably believes that such a disclosure “is made in the public interest”.

The Society believes that it is important that the amending legislation brings clarity to this issue as to when complaints relate to a person’s own contract and are an interpersonal grievance and when they have a wider public interest element and should constitute a protected disclosure.

As lawyers who have been closely involved in operating the 2014 Act for the past number of years, we would welcome the opportunity to input into any amending legislation.

Yours sincerely,

Mary Keane

Mary Keane
Director General