

# Teething problems flagged with protected disclosures reporting regime

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**The Protected Disclosures Commissioner, in his first annual report, has raised significant operational issues for dealing with reports of relevant wrongdoing/protected disclosures, such as organisations trying to avoid dealing with reports and the ‘incredibly short time limits’ his Office has to manage reports it receives.**

The frankness of the first annual report of the Office of the Protected Disclosures Commissioner (OPDC), highlighting the many challenges it has faced, might not be an outcome the Department of Public Expenditure & Reform would have desired – but it also speaks volumes about the complexity of dealing with protected disclosures.

Established in January 2023 (under the 2022 Protected Disclosures Amendment Act), it is led by the Protected Disclosures Commissioner, Ger Deering, and Director General, Elaine Cassidy. Mr Deering is the Ombudsman and Information Commissioner and was previously head of NERA (before it amalgamated with other bodies to become the WRC).

## *Organisations were relying on narrow interpretations to avoid dealing with reports*

The Commissioner stated in the 2023 annual report of the OPDC that in its first year of operation “we experienced some situations where organisations were relying on narrow interpretations of the legislation to avoid dealing with reports.”

“Organisations who receive reports ought to be mindful of the fact that by following up reports of wrongdoing, they are not only upholding their legal mandate, but fostering and encouraging a culture of accountability, integrity and transparency, and improving the common good. Ignoring or avoiding reports of wrongdoing, and potentially allowing wrongdoing to continue, on the basis of a technicality is not, in my view, either good governance or management”, he added.

The Protected Disclosures Commissioner received 283 reports in 2023, from workers and others alleging wrongdoing in the workplace. During 2023 it sent 267 of the reports to organisations who were “best placed” to deal with the allegations, with the OPDC dealing with 14 of the reports itself.

Mr Deering noted the new protected disclosures regime for Ireland, “having many actors and steps, is not straightforward and thus is open to being misunderstood. This can include a misunderstanding of the role of the OPDC and its limitations. Our role has been misunderstood by both those who make reports, and those who receive them.”

The OPDC is a ‘last resort’ body to deal with reports of relevant wrongdoings if no prescribed person/body or suitable other person can be identified. Not having a prescribed person or suitable other person was a particular problem in the care sector and private health sector.

## **TIGHT TIMELINES**

The Commissioner also identified the problem of “incredibly short time limits set out in our governing legislation in relation to the statutory deadlines within which we are required to respond to reports.”

The OPDC has seven days to record and acknowledge receipt of a report. It then has 14 days to find the prescribed person or suitable other person to transmit the report to.

It has to consider whether transmitting the report to a prescribed body would create the risk of serious penalisation or a risk that evidence would be concealed or destroyed. If that is the case, it has to find a suitable other person to transmit the report to. If it cannot find this person, it handles the report itself for follow-up.

A recipient body can object to dealing with the report sent to it by the OPDC but a reporting person has no right to object to a decision made by the OPDC.

The 14-day transmission period is actually 10 working days – this can shorten to 8 or 9 days if public holidays are involved.

It was acknowledged by the Commissioner that there is still a learning curve for the OPDC to understand to whom it can send reports to, noting there were 29 objections to transmission in 2023, in which many cases recipients demonstrated “complex and multi-faceted” issues – the recipient “has a more detailed knowledge of the sectoral landscape and legislation than it has been possible for [the OPDC] to develop”.

The Commissioner advised that the mandatory deadlines it has to work with “should be amended to ensure that our Office can continue to work to the highest standards with the resources we have to hand.”

## **SECTORAL ISSUES**

It is also apparent from the 2023 annual report that there is uncertainty around responsibility between government departments and the OPDC for dealing with reports of wrongdoing.

The OPDC received 26 reports from the Department of Defence, 26 from Justice, 25 from the Department of Education and 17 from the departments of Transport and Taoiseach each.

The Office itself transmitted 24 reports to Defence, 23 to Education, 10 to Justice and 8 to the departments of Housing and Enterprise each.

Particular concern was expressed with the number of reports (12) falling under the remit of education and training boards (ETBs). Three cases were remitted back to an ETB while the remainder were sent to the Department of Education.

Where reports do not concern senior personnel at an organisation it is considered appropriate to send the report to the body in question but where senior management are alleged to be involved in wrongdoing it is sent to another body, in this case, the Department of Education. The fact that most of these reports involving ETBs had to be sent to the Department is revealing.

The OPDC, using the same principle of having to send reports to another body where senior management are implicated in allegations, noted it transmitted eight reports to the Department of Housing and Local Government – not to the local authorities. The Department objected to six of these transmissions – an objection not accepted by the OPDC.

## **MISCONCEPTIONS**

The Commissioner listed the misconceptions users have with the functions of his Office.

- The Commissioner is not an appeals body: the Office does not function as an appeals body either for investigations that have been undertaken or of decisions by bodies not to formally investigate allegations.
- The Commissioner does not have the function of assessing (or “screening”) reports: there is a perception “by some that the Commissioner will ‘screen’ reports before transmitting them to an appropriate recipient, for example by determining whether the reporter is a ‘worker’ or whether the allegations meet the definition of ‘relevant wrongdoing’ under the Act.”
- The Commissioner does not have continuing oversight of a report once it has been transmitted to an appropriate recipient: it is clear, the Commissioner said, that “some reporters expect that our Office will have a supervisory or oversight role in relation to their reports, particularly if they feel that the recipient has not followed up, or has not adequately addressed the allegations included in the report.”

## **GAP IN REGULATION**

The report also highlights gaps in regulation in certain sectors, which means that any wrongdoing may not be properly addressed. The Commissioner said he would highlight to the Government where these gaps are, adding that the Government “should then carefully consider how these regulatory gaps should be filled, implementing legislative change where necessary.”

The majority of gaps in regulation are in the care sector, and “in particular in private congregated residential settings (other than private nursing homes), private hospitals and for non-medical issues in private medical and dental practices.”

The OPDC received 11 reports containing allegations of wrongdoing in ‘private congregated residential settings’. Neither HIQA nor the HSE has specific statutory responsibility for these facilities. Eight of these reports were first received by HIQA “but because the allegations did not fall within their remit, they transmitted them to [the OPDC], as is provided for in the Act.”

These allegations involve poor conditions in a drug rehabilitation centre, abuse of service users, and theft from organisations. The OPDC identified the HSE as the most appropriate recipient for some of these reports concerning these types of allegations in light of its oversight role for the health sector as a whole, and it transmitted some of these reports to it, yet the HSE does not have specific statutory responsibility for these areas which means it “is not as well placed to follow-up on the allegations as would be the case if it, or another appropriate body, was given that responsibility together with the powers necessary to investigate and follow-up on such reports.”

## **DENTAL COUNCIL CASE**

There were 29 objections to the OPDC transmitting reports to other recipients, but just six of which were subsequently accepted as valid objections by the OPDC (including one by the Private Security Authority). This means 80% of objections were not accepted by the OPDC. But because the Office has no remit to follow-up or enforce these matters it is very likely those reports will not have been acted upon.

In one case mentioned, the Office received a report from a dentist employed in a private dental practice. The dentist alleged that (1) unnecessary dental and cosmetic procedures were being carried out in an attempt to maximise fee per hour per dentist as opposed to dealing with patients’ best interests; (2) clinical and treatment notes were not recorded and (3) diagnoses were not being made and treatments not recorded.

The dentist, along with a colleague, also alleged there was (1) overcharging for their work; (2) inadequate taking of notes and medical histories and (3) a failure to carry out proper examinations prior to procedures at their current practice.

Taking the view that the core of the allegations was about the standard of dental care provided to patients, the OPDC sent the report to the Dental Council, which objected to handling the report on the basis that, as the allegations were about how a dental practice is

managed rather than about the professional conduct of named dentists, they fall outside the scope of the Dentists Act 1985 which means the Dental Council cannot examine them.

The Protected Disclosures Commissioner accepted the objection for those aspects of the report which relate to management of the dental practice but did not accept the objection regarding the allegations relating to the conduct of dentists as, in his view, those allegations are of professional misconduct, and therefore fall within the remit of the Dental Council under SI 367/2020.

Accordingly, the objection in relation to those aspects of the report was not accepted and the allegations relating to the conduct of dentists remained with the Dental Council for follow-up.

The Dental Council responded to the OPDC that they did not accept the Commissioner's position and would not act on the allegations that were transmitted to them. The Commissioner "reminded the Dental Council that his decision on whether or not to accept objections to transmission of reports is final. However, the Council repeated its refusal to accept any part of the report."

## **INFORMATION DEFICIT?**

While teething problems of the kinds mentioned in the OPDC report might be not surprising, the current of the annual report is clearly focused on pressing for changes in the system.

The Office, mostly acting as a 'forwarding' body in 2023, can identify where the main challenges in the reporting regime currently lie.

The innate difficulty in dealing with some aspects of protected disclosures can be appreciated. For example, following up with an anonymous report might not be possible in the circumstance where more information is required from the anonymous reporter.

Some reporting persons submit multiple reports – one individual submitted 36 reports to the OPDC, another submitted 35 – making the job of dealing with reports of alleged wrongdoing harder.

There may be an information piece required for reporting persons but also for recipients of reports. Around 60% of reports received by the Office (171) were from government departments. This would suggest that departments use the OPDC as a default body to send reports to, rather than to the prescribed person (the many of which are identified on a gov.ie webpage, and which were updated in 2023.)