

Moving to a single,
comprehensive regime for
whistle-blower protection

Ireland's Protected Disclosures Act

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The 2014 Protected Disclosures Act



What it is –

- ✓ A legislative framework for the protection of workers who are threatened with or suffer detriment at the hands of their employers for having made a disclosure in accordance with the provisions of the legislation.
- ✓ An adjunct to labour law.

What it is not -

- ✓ It is not a replacement for existing mandatory reporting regimes.
- ✓ It is not a wide ranging permissive authority for workers to recklessly make allegations of wrongdoing.

INTERNATIONAL CONTEXT



- Council of Europe Civil Law Convention (art 9)
- Recommendation from Council of Europe 2014
- GRECO evaluations (on public officials)
- ECHR (art 10, *Guja v Moldova* case)
- UN Convention Against Corruption (art 33)

NATIONAL CONTEXT



2011 Programme for Government – “We will introduce Whistleblowers legislation.”

Tribunal of Inquiry into Planning and Payments – 2012 Report

Recommendation: The Tribunal urges the government to reconsider its approach to whistle-blower protection and to bring in a general law protecting all whistle-blowers at the earliest opportunity.

Government Position: A single, comprehensive regime for whistle-blower protection to supplant the previous sector-by-sector approach.

Development of the legislation



Submissions from interested parties, including:

- Trade Unions
- Business and Employers
- Transparency International (Ireland)
- Irish Human Rights Commission

Influenced by legislation in other jurisdictions, including:

- UK - Public Interest Disclosure Act 1998
- New Zealand - Protected Disclosures Act 2000

Other influences—

- Public Concern at Work (influential UK Advocacy body)
- UN Convention Against Corruption (Articles 8, 13 and 33)
- OECD Anti-Bribery Convention, 2009
- Council of Europe Civil Law Convention on Corruption
- Academic papers on whistleblowing

OUTLINE OF THE NEW REGIME



- Provides a single overarching framework protecting whistleblowers in a uniform manner.
- Applies to both the public and private sectors.
- Provides redress for worker who are penalised for making disclosures
- Provides immunity against civil and criminal liability relating to the disclosure
- The burden of proof will rest with the employer and not the discloser

HIGHLIGHTS OF THE LAW



- The definition of a “worker” drawn very widely
- No type of information is excluded
- Categories of wrongdoings that can be disclosed are very wide
- Stepped Disclosure regime: first to the employer; then to a prescribed person; then externally
- Prohibition on retribution and provisions made for redress
- Qualified privilege in defamation law
- Protection for related persons including prohibition on blacklisting
- Strong rules in relation to confidentiality

BROAD DEFINITION OF “WORKER”



The definition of “worker” in the Act encompasses all those in an employer/employee type relationship

Four main classes of worker are specifically recognised:

- Employees
- Contractors
- Agency workers
- People gaining work experience

The Police Force and the Defence Forces are covered (subject to special rules in relation to redress)

A “worker” can be currently in an employer/employee type relationship or have been in such a relationship in the past.

WIDE CATEGORIES OF RELEVANT WRONGDOING



- Offence/breach of legal obligation/miscarriage of justice
- Health and safety issues
- Damage to the environment
- Unlawful/improper use of public body funds
- Oppression/discrimination/gross negligence by public body
- And, concealment of information in relation to the above

The wrongdoing is not necessarily limited to the jurisdiction, nor does it need to have occurred after the legislation coming into effect

– there is a retrospective element

'Stepped' Arrangements for Disclosure

A worker may communicate his or her concerns to -

- An employer; (i.e. an internal disclosure)
- Externally to a “Relevant Body” (prescribed by the Minister)
- Externally to a Minister of the Government; (in the case of a worker in a State Body)
- Externally to others; (e.g. the media or a Member of Parliament)
- To any of the external recipients in the case of an exceptionally serious matter.

To attract the protections available a worker must have a **reasonable** belief in the truth of the allegations made.

In the case of an external disclosure - worker must have a reasonable belief in the **substantial** truth of the information.

DISCLOSURE TO THE EMPLOYER IS FAVOURED



The stepped disclosures regime is designed to encourage internal disclosure in the workplace in the first instance.

The law covers not only disclosure to a worker's employer but also disclosure to another person where the disclosure concerns the conduct of a person other than the employer or a matter for which another person has legal responsibility - for example:

- a nurse employed by an agency who, in the care home where he or she works, raises a concern about malpractice.
- a worker in an auditing firm who raises a concern with the client.
- someone who works for a local authority roads contractor raising a concern with the local authority that the performance of the contract exposes the local authority to negligence claims from injured pedestrians.

But the legislation is not intended to be a substitute for existing grievance procedures and mechanisms

THEN DISCLOSURE TO A “RELEVANT BODY”



A ‘Relevant Body’ is an existing public body with statutory responsibilities in relation to the subject matter of the disclosure – 102 Relevant Bodies/persons are currently prescribed by the Minister under the legislation.

Examples of the “relevant bodies” that have been prescribed

- Central Bank
- Competition Authority
- Comptroller and Auditor General
- Data Protection Commissioner
- Environmental Protection Agency
- Health and Safety Authority
- Information Commissioner
- National Consumer Agency
- Ombudsman
- Standards in Public Office Commission
- Revenue Commissioners

And such other body or person that the Minister may prescribe by order

Slightly higher evidential burden – worker must believe the allegations contained in the disclosure to be *substantially* true.

EXTERNAL DISCLOSURE TO OTHER RECIPIENTS



Disclosure may also be made externally to other recipients such as the media or members of parliament.

However -

If the protections are to be attracted then **stronger qualifying criteria** must be met

- a) the worker must have reasonably believed that he/she would be victimised if the matter had been raised either internally or with a “Relevant Body”;
- b) where there was no prescribed regulator and the worker reasonably believed that the evidence was likely to be concealed or destroyed if the disclosure was made to the employer;

or -

- (a) the concern had already been raised with the employer or a prescribed relevant body and that the worker reasonably believed that no action had been taken.

In determining whether it is reasonable to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made and the seriousness of the wrongdoing.

WORKERS IN PUBLIC BODIES



- Workers in Public Bodies have access the same initial disclosure channel as every other worker i.e. to their employer
- If they are not satisfied with the response they receive (or if they consider that direct disclosure to their employer is not appropriate) they can report their concerns to the Government Department responsible for the public body
- Legally, disclosure to a Minister will include disclosure to a Government Department
- The expectation is that the disclosure of possible wrongdoing would in turn be raised by the Government Department with the organisation concerned.

PROTECTIONS UNDER THE ACT

- ✓ Unfair dismissal and interim relief - In the case of dismissal a worker will have access to Unfair Dismissals Act - None of the existing restrictions in that Act apply, all protections are available on a day one basis.
- ✓ Right of tort
- ✓ Identity protected
- ✓ Protection against adverse legal proceedings

PROTECTIONS UNDER THE ACT



Protection from retribution by an employer

“An employer shall not penalise or threaten penalisation against a worker, or cause or permit any other person to penalise or threaten penalisation against a worker for having made a disclosure”

If a contravention of the prohibition is alleged a worker will have access to –
A Rights Commissioner / The Labour Court / The Circuit Court

Immunity from Civil Liability

“A person shall not be liable in damages, or subject to any other relief in civil proceedings, in respect of the making of a protected disclosure.”

Protection from victimisation by a third party

“If a person causes detriment to another person because the other person or a third person made a protected disclosure, the person to whom the detriment is caused has a right of action in tort against the person by whom the detriment is caused”

PROTECTIONS UNDER THE ACT (2)

Immunity from criminal proceedings in certain circumstances

“In a prosecution of a person for any offence prohibiting or restricting the disclosure of information it is a defence for the person to prove that the disclosure is, or is reasonably believed by the person to be, a protected disclosure.”

Other protections preserved

The legislation will not limit any existing protection, privilege, immunity, or defence, {whether statutory or otherwise) relating to the disclosure of information.

PRESERVING CONFIDENTIALITY



Section 16(1) – Absolute duty to maintain confidentiality

“A person to whom a protected disclosure is made, and any person to whom a protected disclosure is referred for the purposes of the performance of that person’s duties, shall not disclosing to another person any information that might identify the person by whom the protected disclosure was made.”

Section 16(2) – Circumstances where absolute duty does not apply

The burden of proof to show that the duty does not apply falls on the recipient or holder of the disclosed information

Section 16(3) – You can be sued for failure maintain confidentiality

If a person suffers loss as a consequence of your failure to comply with 16(1) he/she may take an action against you.

**A SIGNIFICANT BURDEN ON THE DISCLOSURE RECIPIENT OR
OTHER HOLDER OF DISCLOSED INFORMATION!**

CONCLUSION – NOTABLE FEATURES OF THE LAW



- Motivation of the Discloser irrelevant – There is no good faith requirement
- Past disclosures can be covered
- There is no public interest test
- Unknowingly false disclosures are not penalised

THANK-YOU
FOR YOUR ATTENTION!

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