



D 2.7 – Whistleblower Ireland

WP2 – Research and implementation assessments

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Whistleblower Ireland

<i>General principles</i>	3
<i>Objective field of application</i>	4
<i>Categories of subjects to whom the protection applies</i>	5
<i>Channels to report irregularities</i>	5
<i>Protection of the privacy of the reporter</i>	6
<i>Protection against retaliation, discrimination and mobbing</i>	6
<i>Sanctions</i>	6
<i>Burden of proof</i>	6
<i>Organizational measures</i>	6



Whistleblower Ireland

General principles

The *Protected Disclosures Act 2014* is the main piece of ‘whistleblower’ legislation in Ireland.¹ The Act was introduced in 2014 with the aim of protecting employees who raise concerns regarding wrongdoing in the workplace. The Act forms part of a wider set of legislative government reforms which aim to improve innovation and transparency in all areas of the public sector.² The purpose of the Act is to safeguard employees in public, private and not-for-profit sectors in making disclosures. The Act sets out redress measures for employees who are penalised or dismissed for raising concerns about possible wrongdoing in the workplace.

The Act defines a protected disclosure as a ‘*disclosure of information which, in the reasonable belief of the worker, demonstrates one or more relevant wrongdoings which came to the attention of the employee during their course of their employment.*’³ Such wrongdoings include:⁴

- (a) The commission of an offence;
- (b) The failure of a person to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services;
- (c) A miscarriage of justice;
- (d) A danger to the health and safety of any individual;
- (e) Damage to the environment;
- (f) An unlawful or otherwise improper use of funds or resources of a public body, or of other public money;
- (g) An act or omission by or on behalf of a public body that is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement; or
- (h) Information tending to show any matter falling within any of the preceding paragraphs (a) to (g) has been, is being, or is likely to be concealed or destroyed⁵

The Act provides protections to workers from penalisation by the employer. Examples of penalisations include; unfair treatment, demotion, suspension or dismissal, discrimination, threat of reprisal or transfer of duties. It is important to note that the Act does not cover employee grievances. Employee grievances refer to matters specific to employees, such as issues relating to working procedures or working conditions. Grievance complaints should be processed separately. This Act offers protection for an employee making a disclosure about a relevant wrongdoing which comes to the attention of the employee in the workplace. The Act requires all public bodies to have a ‘*Protected Disclosures Policy*’ in place, setting out proportionate procedures for employees making protected disclosures. This obligation does not extend to private-sector employers, although all employers are highly recommended to introduce accessible policies.

¹ The Protected Disclosures Act took effect from 15th July 2014.

² This is the most comprehensive piece of cross-sectoral legislation adopted by the State.

³ *Ibid*, section 5.

⁴ *Ibid*, section 5(3).

⁵ As paraphrased in the Government Reform Unit, Department of Public Expenditure and Reform. Guidance under section 21(1) of the Protected Disclosures Act 2014 (the ‘Act’) for the purpose of assisting public bodies in the performance of their functions under that Act. Section 5.



The introduction of the *European Union (Protection of Trade Secrets) Regulations 2018*⁶ amended section 7 of the Protected Disclosures Act. The amendment limits employees' rights to disclose information relating to trade secrets. In general, employees are not permitted to disclose information relating to a trade secret, unless the employee can demonstrate that the disclosure of the information is in the general public interest. If the employee cannot prove that the information disclosed was done in the general public interest, the employee can be liable for a criminal offence. Such an offence is punishable by a fine of up to €50,000 and up to three years in prison. This risk of potential punishment may deter workers from making a suspected disclosure relating to trade secrets.

A soft-law guidance document for public bodies supports the effective implementation of the Protected Disclosures Act.⁷ While the soft-law is not binding on public bodies, the public bodies '*shall have regard to*' the Guidance when establishing and reviewing protected disclosures procedures.⁸ The Guidance document offers support to public bodies in establishing suitable procedures for making and dealing with employee's complaints of wrongdoings.⁹

Prior to the enactment of the Act, there were a number of sector arrangements in place which covered members of the public. Some of these arrangements remain in place; however, the Act is applicable to all public bodies. Additional protections for whistleblowers are provided by:

- The Health Act 2004, as amended by the Health Act 2007
- The Protection for Persons Reporting Child Abuse Act 1998
- The Charities Act 2009

The *Health Act 2004*, as amended by the *Health Act 2007*, sets out protections for health sector employees and members of the public who report possible wrongdoing in the health care sector.¹⁰ The Act applies to workers employed by the Health Service Executive's funded agencies, such as residential centres. However, the protections set out in the Health Act do not apply directly to privately-funded health care facilities. Workers employed by private nursing homes can make protected disclosures to the '*Chief Inspector of Social Services*'. Workers employed by private mental health facilities can disclose alleged wrongdoings to the '*Inspector of Mental Health Services*'. The *Protections for Persons Reporting Child Abuse Act 1998* protects people reporting potential abuse of children from civil liability and victimisation. The *Charities Act 2009* sets out specific protections for people who report alleged breaches of the legislation to the '*Charities Regulatory Authority*'.

Objective field of application

The Protection Disclosures Act is the most comprehensive act to date and applies to all public and private-sector employees. The cross-sectoral nature of the Act is arguably one of the key benefits of the Act. A harmonised approach to whistleblower protection was called for by the Organisation for Economic Co-operation and Development (OECD) report for '*Better Regulation*'.¹¹ The former sectoral

⁶ The European Union (Protection of Trade Secrets) Regulations 2018 (the Regulation) came into effect in June 2018. It implements the Trade Secrets Directive 2016/943 (the Directive) in Ireland.

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

⁸ The Guidance, subsection 4.

⁹ The Guidance, subsection 3.

¹⁰ Health Act 2004 (No.42 of 2004, as amended in 2007), part 14.

¹¹ OECD. (2012). Better regulation in Europe – the EU 15 project, <http://www.oecd.org/gov/regulatory-policy/>



approach in Ireland caused undue complexity and irregularity.¹² Although, it should be noted that the Health Service Executive (HSE) and the Department of Health have expressed concerns over the implementation of the Act alongside sectoral legislation.¹³ The HSE and the Department of Health have expressed concerns regarding the definition of ‘worker’ under the Act compared with the definition of ‘employee’ set out under the *Health Act 2004* (as amended in 2007). This has caused confusion for the HSE in providing guidelines to all the staff employed by the body. In particular, the Health Act allows for employees of HSE funded agencies to make disclosures to the Executive, and this provision has not been included in the Act. Health-sector employees enjoy the wide protection of the Act and those employees who fall outside of the remit of the Act, may receive protection under existing sectoral legislation.

While the Act provides protections for all forms of employees, additional obligations are placed on public-sector employers. Public bodies are required to have a ‘*Protected Disclosures Policy*’ in place and to openly report information on the number and status of protected disclosures received annually. Private-sector employers are encouraged to introduce internal policies on protected disclosures.

Categories of subjects to whom the protection applies

All current employees or workers who were previously employed by the public or private body are protected under the Act.¹⁴ The Act is extensive and extends to; current and former employees, trainees, people working under a services contract, independent contractors, agency workers and people on paid work experience. Although it should be noted that the Act does not apply to volunteer workers. Employers at their discretion may investigate reports of wrongdoing from volunteers.

Channels to report irregularities

The Act introduced a tiered system of reporting. In the first instance, employees are encouraged to follow the reporting system set out of the employer. For these reports of ‘*first instance*’, the worker is only required to demonstrate a ‘*reasonable belief*’ that they have witnessed or engaged in a suspected wrongdoing in connection with the course of their work. At the second tier, the employee is required to disclose the alleged wrongdoing to a ‘*prescribed person*’, this is normally the regulator. The regulator, similar to the first stage, requires the employee to show a ‘*reasonable belief*’ that the wrongdoing is ‘*substantially true*’ and the disclosure falls within the public body’s remit. Employees may disclose the wrongdoing to a regulator in circumstances where they believe that they cannot disclose the alleged wrongdoing to their employer. The final tier of disclosure is a public disclosure, where the suspected wrongdoing is disclosed to the general public, through a media source or to a regulator that has not been prescribed. These forms of public disclosures are rarely used. The employee must be able to prove that they did not disclose the information to the public for individual gain and reasonably believed that they could not disclose the information to their employer or to the independent regulator. Every public body under the Act is required to ‘*establish and maintain*’ procedures for employees and former employees to report an alleged wrongdoing. The public bodies are required to provide written information setting out the procedures to all their employees.

betterregulationineurope-theeu15project.htm

¹² See D. Inverarity *Whistleblowing law to mean cultural shift for employers* (2014) 28 *Industrial Relations News* 24.

¹³ Department of Public Expenditure and Reform, ‘*Statutory Review of the Protected Disclosures Act 2014*’ (2018)

¹⁴ Protection Disclosures Act, section 21(1).



Protection of the privacy of the reporter

The Act sets out protection measures for a person to whom a protected disclosure is made, and any person to whom a protected disclosure is referred to in the performance of that person's duties. The person responsible for receiving and investigating alleged wrongdoings shall not disclose to another person any information that might identify the person by whom the protected disclosure was made. Although, there are exceptions to this rule, the protection of identity of maker of protected disclosure will not apply in circumstances where; failing to disclose the worker's name would hinder the effective investigation of the relevant wrongdoing concerned; where the non-disclosure would be a serious risk to the security of the State, public health, public safety or the environment; or where the non-disclosure would result in the prevention of crime or prosecution of a criminal offence.

Protection against retaliation, discrimination and mobbing

Protection is made available to all whistleblowers who are in any way penalised by their employer. Furthermore, this protection extends to any third party who has suffered a detriment from disclosing an alleged wrongdoing. The core protections range from; protected anonymity; protection from actual and threatened penalisation; and protection from civil and criminal immunity. Employees which have been penalised for making a protected disclosure can claim for redress through existing industrial dispute resolution mechanisms. In circumstances where the employee is dismissed, the employee can seek a claim for redress under the Unfair Dismissals Acts regardless of their length of employee service.

Sanctions

The Act sets out specific remedies for employees who are dismissed or penalised for making a protected disclosure. In cases where a worker has been dismissed for an alleged disclosure, the worker may apply to the Circuit Court to restrain the pending dismissal. The Court may order the re-engagement, reinstatement, or the continuation of the worker's contract.¹⁵ Whistleblowers can be awarded a maximum of five years' remuneration for dismissal on the grounds of having made such a protected disclosure.

Burden of proof

The onus of proof is placed on the employee. Section 5(8) of the Protected Disclosures Act provides that a disclosure is presumed to be a protected disclosure. In unfair dismissal claims, the burden of proof is placed on the employer to prove that the dismissal was fair and justified. In penalisation and tort claims the burden of proof is placed on the employee.

Organizational measures

Central government departments and local authorities have introduced policies for protected disclosures which were developed in line with the Act. The policies commonly set out; how staff members can make a disclosure; what happens when disclosures are made; and what the department does to protect the employees. Section 22 of the Act requires public bodies to transparently and openly publish information on received protected disclosures annually. The implementation of the Act was reviewed by the Department of Public Expenditure and Reform in 2018 and a number of measures

¹⁵ This is dependent on the outcome of an Unfair Dismissals review.



were agreed upon to ease concerns expressed by public bodies, interest groups and members of the public.

The Workplace Relations Commission (WRC) published a '*Code of Practice on Protected Disclosures Act 2014 (Declaration) Order 2015*'. The '*Code of Practice*' sets out principles for the public and private sector to implement. Transparency International provides free and independent legal services to potential whistleblowers through the Transparency Legal Advice Centre. Two framework agreements have been put in place to offer training supports to public bodies.