

Public Consultation on the Review of the operation of the Protected Disclosures Act

2014

Submissions please by: Tuesday 10 October 2017

Email to: PDconsultation@per.gov.ie using the subject line “Review of Protected Disclosures Act”

Or post to: Seamus O’Reilly
Government Reform Unit
Department of Public Expenditure and Reform
7-9 Merrion Row
Dublin 2
D02 V223

Operation of the Protected Disclosures Act 2014

Review of the Act

Under section 2 of the Act, the Minister must commence a review of the operation of the Act not later than three years from when the Act was passed. The Minister must then report to each House of the Oireachtas within 12 months on the findings from the review and the conclusions drawn from the findings.

Consultation Process

As part of the review, the Department of Public Expenditure and Reform is inviting submissions from interested parties. Submissions can relate to any aspect of the operation of the Protected Disclosures Act and in considering this, respondents should advise on:-

- whether the legislation has been effective in line with its objectives; and
- how it might be improved.

The purpose of this consultation paper is to summarise the key elements of the Act and to identify some key issues relating to the operation of the Act which respondents may wish to address.

A broad consultation process will help ensure that in reviewing the Act the Minister and the Government in due course are advised and informed by the results of that process.

Please include in your submission

- specific examples where possible from your own experience which support your position where you are making points regarding operation of the Act, and
- reasons for any suggestions for changes or improvements to the Act and appropriate data/examples to support these suggestions.

Background

The Protected Disclosures Act 2014, enacted 8th July 2014, provides detailed and comprehensive statutory protections for workers in both the public and private sectors against penalisation by their employers in circumstances where they have raised concerns about potential serious wrongdoing in accordance with the requirements set out in the Act. The Act and related statutory instruments can be viewed at:

<http://www.per.gov.ie/wp-content/uploads/Protected-Disclosures-Act-20141.pdf>

<http://www.per.gov.ie/wp-content/uploads/SI-339-of-2014.pdf>

<http://www.per.gov.ie/wp-content/uploads/SI-448-of-2015.pdf>

<http://www.per.gov.ie/wp-content/uploads/SI-490-of-2016.pdf>

The legislation met the commitment in the Programme for Government 2011-2016 to introduce whistleblower legislation and addressed the recommendation contained in the Final Report of the Mahon Tribunal advocating the introduction of pan-sectoral legislation for whistleblower protection. It incorporates many of the recommendations in relation to whistleblower protection legislation made by international bodies such as G20, the OECD, the Council of Europe and Transparency International, and is consistent with best international standards of whistleblower protection. The legislation essentially replaced more limited protections provided for making protected disclosures in multiple sectoral Acts.

Since its enactment, the Protected Disclosures Act has been acknowledged as setting a benchmark internationally in promoting and supporting the role of whistleblowing in relation to anti-corruption measures.

Objective of the Act

The main objective of the Act is the protection of workers in all sectors of the economy – both public and private – against reprisals in circumstances where they make a disclosure of relevant information relating to wrongdoing that came to their attention in connection with their employment. As such it aims to encourage workers to disclose their concerns (i.e. those based on a reasonable belief), even if those concerns subsequently turn out to be incorrect, and provides redress for workers who may be penalised for making a protected disclosure.

The Act aims to minimise some of the significant potential disincentives towards reporting of concerns. For example, it contains no public interest or good faith test to be overcome by a potential discloser – tests which in other jurisdictions have resulted in workers correctly reporting wrongdoing but failing to attract the protections of the relevant legislation.

Workers

The Act seeks to protect a broad range of ‘workers’ with the definition of ‘worker’ in the Act including not only persons who are direct employees but also contractors, sub-contractors, agency workers, trainees, and members of An Garda Síochána.

Relevant Information

The Act also provides that a protected disclosure requires the communication of relevant information as defined in the Act (i.e. (a) in the reasonable belief of the worker, it tends to show one or more relevant wrongdoings, and (b) it came to the attention of the worker in connection with the worker's employment).

Disclosure channels

The Act provides for a "stepped" disclosure regime in which a number of distinct disclosure channels are available – internal, "regulatory" and external – which the worker can access to acquire important employment protections but which require different evidential thresholds. The various channels are to:

- the employer or a person authorised to receive protected disclosures on the employer's behalf.
- Prescribed persons, such as regulators and supervisory bodies, can receive protected disclosures related to the activities they regulate or supervise, provided certain conditions in the Act are met
- A Minister where the worker is or was employed by a public body in respect of which the Minister has statutory functions
- A legal adviser including a barrister, solicitor, trade union official
- External parties in certain circumstances as set out in section 10 of the Act

Specific conditions apply to disclosures relating to security, defence, international relations and intelligence matters.

The Act does not require disclosures to be made in writing nor does it prohibit the making of anonymous disclosures.

Wrongdoings

A wide definition of wrongdoings is included in the Act (see Appendix). In order to avail of the protections of the Act, a worker must have a reasonable belief that the information to be disclosed shows or tends to show the wrongdoing concerned. More stringent conditions apply in the case of external disclosures or disclosures to a prescribed person.

Protections

The Act provides significant protection for workers. The forms of protection available are:

- protection from the retributive actions of an employer (including dismissal and penalisation) with the possibility of claiming redress through the normal industrial dispute resolution mechanisms (the Workplace Relations Commission (WRC) and Labour Court on appeal) or in the case of dismissal a claim under the Unfair Dismissals Act (to the WRC or Labour Court on appeal) and potentially also an application to the Circuit Court for interim relief. Penalisation is widely defined and an employer is prohibited from carrying out any act or omission that affects a worker to the worker's detriment (e.g. suspension, demotion, transfer of duties, reduction in working hours, dismissal, disciplinary action).

- protection from civil liability (civil immunity from action for damages and a qualified privilege under defamation law) and from criminal liability in circumstances where at the time of the alleged offence, the disclosure was, or was reasonably believed by the discloser to be, a protected disclosure
- protection from victimisation by a third party (a right of action in tort against that person)
- protection against loss caused to a discloser by reason of a failure to comply with the obligation to protect the identity of that discloser (subject to the exceptions set out in section 16 of the Act).

Disclosures made under existing sectoral legislation are given “protected disclosure” status under the 2014 Protected Disclosures Act where they qualify under the (purposely wide) definition contained in that Act to ensure a uniform standard of protection to all workers.

In addition, there are strict confidentiality provisions safeguarding the identity of a worker making a protected disclosure.

The Act does not cover disclosures for personal gain made to an external actor (e.g. a journalist).

The thrust of the Act is to provide protection for the discloser and it does not specifically impose an obligation to investigate protected disclosures.

Obligations of Public Bodies and supports available

All public bodies are obliged under the Act to have procedures in place to receive and deal with protected disclosures and to make these procedures available to their workers. The Department of Public Expenditure and Reform published comprehensive Guidance for public bodies under Section 21(1) of the Act in February 2016 to assist in the development of these procedures. A copy of the Guidance can be viewed at:

<http://www.per.gov.ie/wp-content/uploads/Guidance-under-section-211-of-the-Protected-Disclosures-Act-2014-for-the-purpo.pdf>

In addition, the Workplace Relations Commission, in consultation with staff and employer representatives, developed a Code of Practice (which has a statutory basis) [S.I. No. 464/2015 - Industrial Relations Act 1990 \(Code of Practice on Protected Disclosures Act 2014\) \(Declaration\) Order 2015](#), providing guidance and setting out best practice to assist employers, workers and their representatives in understanding the Protected Disclosures Act and to assist in the practical implementation of the Act.

Public bodies are required under section 22 of the Act to publish an annual report containing the number of protected disclosures made to the body, the action (if any) taken in response, and such other information relating to the protected disclosures and the action taken as may be requested by the Minister from time to time.

The Department of Public Expenditure and Reform has procured a Framework Agreement for the provision of training to public bodies to aid their understanding of the Act and its

implementation. A Framework Agreement is also being prepared to enable public bodies to engage external expertise in relation to disclosures.

The Department of Public Expenditure and Reform has provided financial assistance to Transparency International Ireland to continue to operate its “Speak Up” helpline and to establish a Transparency Legal Advice Centre, which became fully operational in June 2016 and provides free, specialist legal advice to persons making protected disclosures. Legal advice is given, *inter alia*, to potential disclosers as to whether the information they wish to report can be disclosed under the Protected Disclosures Act.

Key issues for consultation

1. Is the Act operating effectively?
2. What appear to be the main challenges in the operation of the Act? In your view are there any unintended consequences from the operation of the Act which are not consistent with the objectives of the legislation?
3. Do you have any views on the protections contained in the Act (Sections 11 to 16)? Are the protections sufficient to encourage potential disclosers to speak up about wrongdoings or are further safeguards warranted?
4. Are there any of the definitions contained in the interpretation section (section 3) that it would be useful to reconsider, amend, replace, clarify etc.? For example, is the definition of "worker" too broad or too narrow or does it strike the right balance?
5. Do the eight categories of wrongdoings provided for in section 5(3) of the Act capture all of the matters that should be captured in that definition? If not, are the categories too broad or too narrow? Should some of the categories (or wording contained in the categories) be clarified by way of further definition?
6. The Act does not contain any requirement that the disclosure is made in good faith or in the public interest as it was felt that this could act as a significant disincentive to potential disclosers coming forward in the first instance. However, should there be some threshold of seriousness applied in respect of wrongdoing, in order to reduce the disproportionate use of investigative resources? Could this potentially affect one of the aims of the legislation - to encourage workers to disclose relevant wrongdoings?
7. Are the evidential thresholds in the stepped disclosure regime (section 6 to 10) as reflected in the Act about right to encourage persons to disclose to the employer (internally) first where appropriate?
8. Are there any persons with regulatory or other functions who have not been prescribed for the purposes of the receipt of disclosures (section 7 and related statutory instruments) and whom in your view should be prescribed? If your answer is yes please advise whom and why?

9. Does the obligation to protect the identity of the discloser contained in section 16 represent a fair balance between the rights of the discloser and the need to follow up on the disclosure? Could this be improved and, if so, how? State your reasons for this view.
10. Should the Act require recipients to act on disclosures (for example, by providing an obligation to assess or investigate) or to communicate with the person making the disclosure?
11. Should it be mandatory for businesses/firms with employees over a certain number (e.g. 100 employees) to have a Code of Practice/Internal procedures for the handling of protected disclosures?
12. Should such business/firms (e.g. with over 100 employees) be required to report on protected disclosures in their annual reports and accounts – similar to the obligation on public bodies?
13. Do you have any views on how the Protected Disclosures Act 2014 interacts with the other protections for disclosers contained in sectoral legislation? Are there certain issues that need to be clarified in respect of the protections and obligations contained in the 2014 Act and those in sectoral legislation? If there are, how would this be best achieved?

Next Steps

Submissions should be forwarded to PDconsultation@per.gov.ie using a subject line of “Review of Protected Disclosures Act” or by post to Seamus O’Reilly, Government Reform Unit, Department of Public Expenditure and Reform, 7-9 Merrion Row, Dublin 2, D02 V223 as soon as possible, but no later than 10th October 2017. Please include the following information with your reply:

- Name (organisation name or name of individual)
- Address
- Phone number
- Email address

Please remember to include in your submission

- specific examples where possible from your own experience which support your position where you are making points regarding the Act, and
- reasons for any suggestions for changes or improvements to the Act and appropriate data/examples to support these suggestions.

It should be noted that in general submissions received and reports of any meetings undertaken by the Department with any external parties in response to this consultation process will be published on the Department’s website and will be subject to Freedom of Information. However in view of the sensitive nature of the subject matter, if a person or body asks that a submission would not be published, then it will be treated as confidential and any aspects of it used in the analysis and report will be anonymised.

Appendix

Background Q&A material on the Protected Disclosures Act 2014

What is the Protected Disclosures Act 2014 intended to achieve?

The main objective of the Act is to provide for the protection of workers in all sectors of the economy, both public and private, against reprisals in circumstances where they make a disclosure of information relating to wrongdoing which came to their attention in connection with the worker's employment.

In this regard it promotes best practice corporate governance and risk management in both public and private sector organisations by encouraging workers to 'speak up' when they have concerns regarding possible wrongdoing.

Previously a partial, fragmented and inconsistent series of protections for workers existed across various sectors of the economy and this was identified as a significant gap in Ireland's legal framework for preventing corruption.

The Act met a commitment in the Programme for Government 2011-2016 to introduce whistleblower protection legislation and also met the recommendation contained in the Final report of the Mahon Tribunal for the introduction of pan-sectoral whistleblower protection legislation.

The Act reflects international best practice regarding whistleblower protection as recommended by, e.g. the UN, G20, OECD, Council of Europe and European Parliament.

What are the main provisions of the Act?

The Act seeks to safeguard the broadest possible range of workers from being subject to occupational detriment for having made a protected disclosure and also provides for immunity against civil liability. Disclosures made under existing sectoral legislation are given "protected disclosure" status, where they qualify under the (purposely wide) definition contained in the Protected Disclosures Act, to ensure a uniform standard of protection to all workers.

A "protected disclosure" is a disclosure of relevant information made by a worker in relation to wrongdoing that has come to his or her attention in the workplace, either before or after the date of the passing of the Act, in the manner specified in the Act.

What matters can be reported on?

The following matters are relevant wrongdoings for the purposes of the Act:

- (a) that an offence has been, is being or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail 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) that a miscarriage of justice has occurred, is occurring or is likely to occur,

- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged,
- (f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,
- (g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or
- (h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.

Who is protected?

The definition of ‘worker’ in the Act is broadly drawn and includes not only persons who are direct employees but also contractors, sub-contractors, agency workers, members of the police forces, members of the security forces and any person who interacts with the work place on a contractual basis.

In addition to persons who are defined as workers under the Act, protection is also made available to third parties who may suffer detriment as a consequence of a protected disclosure having been made by another.

What protections are available?

Workers who are direct employees are provided with access to the existing industrial dispute resolution mechanisms of the state. Employees such as trainees and apprentices who are currently excluded from those mechanisms are provided with access to the mechanisms if they have been penalised for having made a protected disclosure. In the case of all workers who are employees access to the mechanisms is granted on a day one basis without further restriction. In addition, the compensation payable under those mechanisms has been substantially increased in respect of persons dismissed or penalised for having made a protected disclosure.

In the case of workers who are not direct employees and who are operating under a contract for services, an action in tort may be taken against the person who caused them detriment. Similar provisions apply in respect of third parties who claim to have suffered detriment as a consequence of the making of a protected disclosure by another person.

How, and to whom, does a worker report his/her concerns?

The Act sets out a “stepped disclosure regime”.

The simplest form of disclosure, and the form which is ordinarily to be encouraged in the first instance, is to the employer, where all that is required is a reasonable belief that the information disclosed shows or tends to show that the wrongdoing is occurring. This is a deliberately low threshold designed to ensure that most reports are made to the person best placed to correct the alleged wrongdoing – the employer. In the case of worker in a public body that worker may choose to report to the relevant Minister.

A worker may choose to report to an external regulatory body with functions in the area which are the subject of the allegations. In such a case the threshold for protection increases to a

reasonable belief in the substantial truth of the matters reported. Prescribed persons to be the recipient of disclosures of relevant wrongdoings are set out by statutory instrument.

A worker may choose to report externally to a member of the Oireachtas or to another external source such as the media. Any person proposing to make such an external report, whilst at the same time attracting the protections of the Act must, however, satisfy a series of strictly drawn conditions set out in the Act.

Is there any restriction on the nature of the information that can be reported? Are there special provisions under the Act in relation to making a protected disclosure in certain areas?

Information which can be disclosed under the Act is “relevant information.” This must come to the worker’s attention in connection with his or her employment and the worker must have a reasonable belief that it shows or tends to show “relevant wrongdoing” as defined in the Act.

The Act does recognise that certain types of relevant information are more sensitive than others so that, for example, the external reporting of matters relating to law enforcement can only be made to a member of the Oireachtas. In the case of information that might reasonably be expected to adversely affect the security, defence, or international relations of the State, a specific disclosure route is set out which is designed to allow disclosure in a secure and confidential manner.

Does a disclosure have to be made ‘in good faith’ or in the ‘public interest’?

The Act does not contain a ‘good faith’ test. Experience elsewhere has shown that the inclusion of such a test could call into question the discloser’s motivation for coming forward. A disclosure not made in ‘good faith’ must have been made in ‘bad faith’ thus calling into question the motivation for the making of the disclosure in the first instance.

It was decided that, even if the matters reported on subsequently proved not to be correct, the discloser should be entitled to the protections of the Act provided he/she had a reasonable belief in the allegations made.

It was considered therefore that the potential for a discloser’s motivation to be questioned would act as a significant disincentive to potential whistleblowers coming forward in the first instance. Similar considerations were taken into account in relation to the imposition of a ‘public interest’ test and no such test is included. As a consequence, the Act specifically states that the motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure.

The only instance where motivation may become an issue relates to the award of compensation for penalisation following the making of a protected disclosure. In the event that the investigation of the wrongdoing concerned is found not to have been the sole or main motivation for making the disclosure, the amount of compensation awarded may be reduced by up to 25 per cent.

Is the discloser’s confidentiality maintained?

The Act imposes a burden of confidentiality on the recipient of a protected disclosure or any other person to whom the disclosure is referred in the performance of their duties.

While a failure to comply with this duty is actionable by the person who made the disclosure was made if he/she suffers any loss by reason of that failure, the Act also sets out a number of reasonable practical and pragmatic circumstances under which the duty does not apply. Among these are where the recipient reasonably believes that the discloser has no objection to being identified, or where the revelation of the identity of the discloser becomes necessary for the effective investigation of the complaint, to prevent the commission of a crime or to prosecute a criminal offence.

How does the Act compare with international standards and recommendations?

In formulating the legislation, consideration was given to the publications and recommendations of many international bodies in relation to the content of whistleblower protection legislation. Among these were the United Nations Convention Against Corruption, the G20 Anti-Corruption Plan and subsequent report of the OECD, resolutions of the European Parliament and recommendations from the NGO, Transparency International.

Significant efforts were made to ensure that the recommendations of these bodies were taken into account. As a result the Act benchmarks very favourably with those recommendations and has been praised internationally as a leader in its field.

What are public sector bodies required to do under the Act?

The Act requires 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. Written information in relation to those procedures must be provided to workers employed by the public body. The Department of Public Expenditure and Reform has issued Guidance for the purpose of assisting public bodies in the performance of these functions.

Additionally, public bodies are required to publish an annual report, in a form that does not enable the identification of persons involved, containing information relating to the number of protected disclosures made to the public body, the action (if any) taken in response to those protected disclosures, and such other information relating to those protected disclosures and the action taken as may be requested by the Minister from time to time.

What is the private sector required to do to ensure compliance with the Act?

The Act provides for protection of workers in all sectors of the economy, whether public or private. While the reporting provisions of the Act do not apply to the private sector, the Workplace Relations Commission has produced a statutorily-based Code of Practice giving guidance and setting out best practice to assist in the practical implementation of the Act and to give guidance on best principles to organisations and their workers. This includes a “Model Whistleblowing Policy”.

Is there a requirement to investigate?

While the Act does not stipulate it, good corporate governance would dictate that disclosures of potential wrongdoings would be investigated.