

# General Scheme of the Protected Disclosures in the Public Interest Bill 2011

## Explanatory Memorandum

### Part I

#### GENERAL PROVISIONS

##### *Head 1 — Short Title*

This Head provides for provides for the short title and the commencement of the Bill following enactment.

##### *Head 2 — Definitions*

This Head provides for the definitions used in the Bill.

##### *Head 3 – Purpose of the Bill*

This Head sets out the purpose of the Bill.

##### *Head 4 — Protected disclosures*

This Head provides a definition for an eligible disclosure.

### Part II

#### PROTECTED DISCLOSURE

##### *Head 5 — Disclosure to an employer*

This Head sets out the criteria to be met in order for a disclosure to an employer to attract the protections of the Bill. The employee must have a reasonable belief that allegation is true and make the disclosure in good faith. Where an organisation has a whistleblowing procedure which authorises raising the concern with someone other than the employer a disclosure to that person will be treated as if it were a disclosure to the employer.

##### *Head 6 — Disclosure to a relevant body*

This Head provides for a disclosure to a “relevant body”. Where a relevant regulator is classified as a relevant body under this legislation (or is prescribed) the employee must meet a higher evidential burden than in the case of internal whistleblowing. The employee must reasonably believe the disclosure to be substantially true.

##### *Head 7 — Disclosure to a Minister*

This Head sets out the criteria to be met in order for a disclosure to a Minister in order for such a disclosure to attract the protections of the Bill. Workers in State bodies are protected if they report their concerns in good faith to the sponsoring Department rather than to their employer. A disclosure to a Department is a disclosure to a Minister.

*Head 8 — Disclosure in other cases*

This Head sets out the circumstances in which a disclosure may be made to other recipients, including the media, in order for such a disclosure to attract the protections of the Bill. There are strong qualifying criteria. Such disclosures must meet three tests to be protected. The first of these deals with the evidence and motive of the whistleblower. The second sets out three preconditions, one of which must be met if the disclosure is to be subject to protection. Finally, to be protected the disclosure must be reasonable in all the circumstances.

*Head 9 — Disclosure of exceptionally serious impropriety*

This Head sets out the criteria to be met in order for a disclosure of an exceptionally serious nature to attract the protections of the Bill. The employee must reasonably believe that the information disclosed, and any allegation contained in it, are substantially true, the disclosure must not be made for personal gain, the impropriety is of an exceptionally serious nature, and in all the circumstances it is reasonable to make the disclosure.

*Head 10 — Disclosure to a legal advisor*

This Head sets out the criteria to be met in order for a disclosure to a legal advisor to attract the protections of the Bill. This provision enables an employee to seek legal advice about a concern and to be fully protected in doing so. This is the only disclosure within the Act which does not have to be made in good faith to be protected.

*Head 11 — Anonymous disclosures are not protected disclosures*

This Head provides that an anonymous disclosure cannot be a protected disclosure. Important safeguards are provided in the legislation to seek to maintain the confidentiality of an employee making a protected disclosure. It is not considered appropriate or practical that an employee could seek to avail of the protections provided under the legislation on the basis of having made an anonymous disclosure.

### **Part III**

#### **PROTECTIONS**

*Head 12 — Protection of workers from penalisation by employer*

This Head provides that an employer shall not penalise or threaten to penalise workers who make a protected disclosure. Workers will have available to them the full range of rights and protections under the relevant Irish employment and other laws. The protections provided will cover protection against possible penalisation or detriment to workers especially in relation to protection from dismissal or disciplinary and other more subtle forms of reprisal, retaliation and discrimination. The redress provisions for an employee who suffers detriment as a consequence of the retributive actions of an employer are set out in the Fourth Schedule.

*Head 13 — Immunity from civil liability*

This Head provides for immunity for an employee from any civil liability as a consequence of having made a legitimate protected disclosure. Equivalent provisions are

already included in all of the sectoral and horizontal legislation in Ireland in relation to whistleblowing.

*Head 14 — Tortious liability of persons for victimisation*

This Head provides that where a third party causes a detriment to an employee who has made a protected disclosure under this or any of the Acts listed in Schedule 1 the employee who made the protected disclosure has a right of action in tort against the person who causes such detriment. In addition to the protections from civil liability and retributive actions of an employer this provision provides a legal protection against the actions of a third party who, either of their own volition or at the instigation of the person who is the subject of the whistleblowing, engages in actions to the detriment of the discloser. It allows the whistleblower to institute civil proceedings against that third party.

*Head 15 - Immunity from criminal proceedings*

The Head will provide for immunity from criminal proceedings for a worker who communicates official information while recognising that a multiplicity of complex legal provisions exist for Members of the Garda Síochána, members of the Defence Forces, and other persons. The provision will have to ensure that a whistleblower report can be made while at the same time not facilitating reports which would be harmful to the public interest.

**Part IV**

**MISCELLANEOUS PROVISIONS**

*Head 16 — Confidentiality*

This Head provides for the confidential treatment of the disclosure, the employee making the disclosure and related matters. Such confidentiality provisions are a standard part of whistleblower legislation domestically and internationally and confidentiality clauses are an integral part of the Sectoral approach adopted up to now in Ireland.

*Head 17 — Other protections preserved*

This Head provides that this Act does not limit any protection, privilege, immunity, or defence, whether statutory or otherwise, relating to the disclosure of information. This Bill does not seek to limit or transcend existing privileges, rights obligations or requirements set out in Irish law other than as provided for within the Bill itself.

*Head 18 — Legal professional privilege*

This Head provides that the provisions of this Act do not limit legal professional privilege. If a legal adviser cannot be compelled in court to give evidence about a matter, neither he nor the staff in his office can make a protected disclosure about it. Of course, he can make such disclosure as the client instructs him to make on his behalf. As such, the disclosure will be judged as made by the client and it will only be protected if it is made in accordance with the other provisions of this Act

*Head 19— No contracting out of the Act*

This Head provides that this Act will not allow for any contracting out of a protected disclosure once made.

*Head 20 — Technical failure to comply with the Act*

This Head provides that a disclosure cannot be prevented from being protected or invalidated merely because of technical errors made in the presentation of the communication of the wrongdoing. If an employee reports a wrongdoing and the internal procedures require the information to be submitted using a particular format then under this section, the disclosure is still a protected disclosure for the purposes of this Act notwithstanding the fact that the proper format has not been used.

**Part V**

**SPECIAL PROVISIONS ON PROTECTED DISCLOSURES RELATING TO SECURITY, INTELLIGENCE, DEFENCE, INTERNATIONAL RELATIONS AND LAW ENFORCEMENT**

This Part is designed to encompass protected disclosures relating to:-

- sensitive security, intelligence, defence and international relations matters made by members of the Garda Síochána or the Defence Forces in particular but also covering civilian staff in these organisations as well as civil servants who may have roles in these areas through which they have access to sensitive information
- law enforcement matters by members of the Garda Síochána.

*Head 21 – Definitions for this Part*

Additional definitions may be necessary in the context of the drafting process of the Bill to provide legal certainty on the circumstances in which, owing to the sensitive content of a potential protected disclosure, it is subject to the special provisions in this supplementary part of the General Scheme of the Bill.

*Head 22 – Disclosures relating to security, intelligence defence and international relations*

This Head provides for the special rules and procedures that are necessary - in particular for members of organisations such as the Garda Síochána and the Defence Forces - who in the course of performing their duties have access to sensitive and highly secret information that relates to preservation of the security of the State. It introduces certain necessary limitations on the channels through which protected disclosures relating to such information are made.

*Head 23 – Disclosures relating to Law Enforcement etc.*

This Head provides for special procedures for a protected disclosure of information concerning law enforcement by a member of the Garda Síochána and others in order to maintain the integrity of law enforcement activities carried out by the force. The Head also deals with disclosures relating to the security of certain systems of communication and the security of prisons.

*Head 24 – Protected disclosures by members of the Garda Síochána and the Defence Forces to relevant bodies under Head 6*

This Head is required to make Head 6 operable for members of the Garda Síochána and the Defence Forces.

*Head 25 – Redress for members of the Garda Síochána and the Defence Forces*

This Head is intended to ensure that a Member of the Garda Síochána or of its civilian staff and the Defence Forces are provided with means for redress in the event of detriment as a result of making a protected disclosure which is equivalent to that provided to employees in general. All other workers are covered under Head 12.

*Head 26 – Internal Procedures for public service organisations*

This Head requires public service organisations to establish and publish as appropriate their internal procedures for enabling the making of a protected disclosure under the Bill

*First Schedule*

This Schedule lists sectoral whistleblower legislation already in place.

*Second Schedule*

This Schedule deals with repeals of certain provisions in the sectoral legislation which will be redundant after the passage of this Act. These repeals are necessary in order to achieve the overarching effects of this Bill.

*Third Schedule*

This Schedule sets out the amendments to sectoral legislation already in place which contains protected disclosure provisions and protections. These amendments are necessary to ensure that protected disclosures made by employees under the sectoral legislation listed in the First Schedule become protected disclosures under this Bill and attract all of the protections set out under this Bill.

*Fourth Schedule*

This Schedule sets out the redress provisions for workers who suffer detriment as a result of making a protected disclosure.