

# **Information Note on the General Scheme of the Protected Disclosure in the Public Interest Bill, 2012**

## **1. Introduction**

The Programme for Government contains a commitment to introduce “whistleblower” legislation. The Minister for Public Expenditure and Reform confirmed in a statement to Seanad Eireann on 29 June 2011, the Government’s intention to develop legislative proposals to introduce overarching legislation for enactment by the Oireachtas providing for good faith reporting and protected disclosure on a uniform basis for all sectors of the economy.

## **2. Purpose**

In summary the legislative proposals (i.e. Draft Heads of a Bill) published today:-

- have as their main objective ensuring the protection of workers in all sectors of the economy (i.e. public and private) against reprisals in circumstances that they make a disclosure of information relating to wrongdoing which comes to their attention in the workplace;
- provide for a “stepped” disclosure regime in which a number of distinct disclosure channels are available – internal, “regulatory” and external – and through which the worker can, subject to different evidential thresholds, make a protected disclosure;
- seek to safeguard a worker who has made a protected disclosure from being subject to occupational detriment also providing immunity against civil liability and criminal liability in certain circumstances;
- make available certain significant remedies providing redress for workers who suffer detriment as a consequence of having made a protected disclosure;
- confer “protected disclosure” status on disclosures made under existing sectoral whistleblowing legislation to ensure, as much as possible, a uniform standard of protection.

In addition, the proposed legislation highlights the responsibility of employers, to put effective internal mechanisms in place to investigate whistleblowing complaints and to develop an organisational culture that supports whistleblowing as a key element of corporate risk management overall, in order to identify potential wrongdoing and take appropriate corrective action at the earliest possible stage.

## **3. International precedent and principles**

The legislative proposals are modeled on the UK Public Interest Disclosure Act 1998 which is generally considered to represent an example of good practice and has been successfully implemented over a number of years. Elements of the New Zealand Protected Disclosure Act 2000 have also been included. The draft legislation also draws on key principles included in a number of international conventions and highlighted by authoritative international bodies and research relating to the design of an effective whistleblowing regime.

## **4. Proposed Legislative Framework**

The primary elements of the proposed legislative proposals are as follows:-

- Extensive coverage of persons in the workplace.
- A broad scope of wrongdoing is covered.
- A number of disclosure channels are provided through which – subject to what is intended to be a ‘stepped’ disclosure regime - the alleged wrongdoing can be communicated to an appropriate authority for investigation.
- Protections which a whistleblower can avail of in the case of having made a protected disclosure and the proposed redress mechanism.
- Existing sectoral ‘whistleblower’ protections are aligned with the current proposal with the objective of ensuring that there is no diminution of safeguards already provided for in legislation.
- Specific provisions will be put in place to provide for protected disclosures in relation to security, intelligence, defence and international relations and law enforcement issues which appropriately safeguards highly-sensitive and secret information.

The reform of relevant provisions under the Official Secrets Act and its appropriate alignment with the provisions of the proposed Bill will be addressed in the course of drafting the Protected Disclosures in the Public Interest Bill.

#### **5. Coverage of employees**

The proposed definition of employees will be drawn sufficiently broadly to include people who fall into the employee/employer type relationship such as contractors, trainees, agency staff, and home workers. Consideration will be given to other persons who may potentially have access to information regarding potential wrongdoing in the workplace that may suffer detriment on account of having disclosed that information to an appropriate authority.

#### **6. Scope of potential wrongdoing**

These are proposed to be included in the legislation as follows:-

- a criminal offence has been, is being or is likely to be committed;
- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject;
- that a miscarriage of justice has occurred, is occurring or is likely to occur;
- that the health and safety of any individual has been, is being or is likely to be endangered;
- that the environment has been, is being or is likely to be damaged;
- that an unlawful, corrupt, or irregular use of funds or resources of a public sector body has occurred, is occurring or is likely to occur;
- that an unlawful, corrupt or irregular use of public monies has occurred, is occurring or is likely to occur;
- that an act, omission, or course of conduct by a public official is oppressive, improperly discriminatory, or grossly negligent, or constitutes gross mismanagement;
- that information tending to show that any matter falling within any one of the preceding paragraphs, whether alone or in combination has been, is being or is likely to be deliberately concealed.

## **7. Disclosure Channels**

The proposed Bill provides for a stepped system of channels through which employees can make a protected disclosure as follows:-

- Disclosure to an Employer.
- Disclosure to an external body with the legal powers to investigate the matter which is the subject of a whistleblowing complaint.
- Disclosure to a Minister of the Government (in the case of a public service employee).
- Wider public disclosure (e.g. to a public representative or the media).
- Disclosure of Exceptionally Serious Failure (i.e. this is intended as an 'emergency' disclosure channel where, for example, there is a serious, imminent and urgent risk and no scope to avail of the other disclosure channels).

Different conditions and evidential standards apply to each of these disclosure channels. Internal disclosure is usually a preferred and the most accessible channel and is clearly appropriate where the organisation itself has a strong focus on effective risk management, is highly responsive to whistleblower complaints and supports a culture where whistleblowing is encouraged. Where this is not the case, several other disclosure channels are available and can be accessed in appropriate circumstances. External disclosure into the wider public domain should only arise where there have been significant failures in the response of other disclosure channels.

Compliance with the specific provisions included in the proposed Bill in relation to security, intelligence, defence, international relations and law enforcement will help ensure that any disclosures made in relation to such matters benefits from protection under the proposed legislation.

In considering making a protected disclosure, an employee will have to consider the following:-

- The nature of the information to be disclosed as to qualify for protection a disclosure of information regarding a serious wrongdoing rather than an allegation is required.
- The channel through which the information is reported and
- The extent to which the worker believes the information to be true.

In making there types of assessments support, advice and guidance will need to be available from appropriate and trusted sources.

## **8. Protections**

Where an employee is determined to have met the criteria set out in the legislation for having made a “protected disclosure” it is proposed that several important protections will in broad terms be available to them:-

- Protection from the retributive actions of an employer (e.g. dismissal or disciplinary action or more subtle forms of discrimination or reprisal)
- Immunity from civil liability
- Protection from victimisation by a third party
- Protection against criminal liability in certain circumstances

The protections for employees afforded by the proposed Bill arise when an employee is victimised for having made a disclosure. In such circumstances the employee will have access under the proposed legislation to an appropriate redress mechanism (e.g. Rights Commissioner, Labour Court) which will determine on the basis of the criteria included in the Bill that a protected disclosure was in fact made.

The requirement for an employee to have to rely on such protections where a protected disclosure has been made demonstrates, on face value, a failure in the systems, procedures and mechanisms in place to ensure that whistleblowing complaints made in accordance with the legislative provisions are properly addressed by the organisation to whom they relate.

As is the case in all other jurisdictions where whistleblower legislation has been introduced and consistent with international principles of best practice, a protected disclosure is intended to be in the public interest rather than a mechanism for resolving individual employment disputes which are more appropriately dealt with through existing HR processes and procedures and the industrial relations machinery for dealing with employment-related grievances.

## **9. Existing sectoral whistleblowing protections**

There is a range of whistleblower protection already in place in some sectors of the economy or relating to specific offences. The case for a full repeal of all sectoral whistleblowing provisions was carefully considered. It was concluded that this could give rise to a situation in which particular whistleblowing regimes already in place in specific sectors are weakened. The draft Heads therefore fully acknowledge and retain those provisions in existing sectoral legislation designed to target sector specific contraventions. This will be achieved by bringing the sectoral enactments within the ambit of the Bill.

## **10. Conclusion**

The introduction of whistleblower legislation in Ireland represents a very significant measure, which, in appropriate circumstances, will provide important protection for an employee who discloses information on serious wrongdoing in the workplace.