McCann FitzGerald

Briefing
Whistleblowing and the Protected Disclosures Act 2014

INSTITUTE OF DIRECTORS IN IRELAND

The Protected Disclosures Act 2014 (the "**Act**") was commenced on 15 July 2014.

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The Act: Introduction

Transparency policies have eroded employers' ability to enforce workers' duties of confidentiality where disclosure of certain kinds of suspected wrongdoing is concerned. Relevant legal provisions fall into two categories: mandatory reporting for suspicions of certain crimes and protected voluntary disclosures.

The Act aims to provide comprehensive whistleblower protection across all sectors, within which workers can raise concerns about suspected wrongdoing coming to their attention in the workplace with the benefit of significant legal protections if they are penalised by their employer or suffer other detriment for reporting their suspicions.

The Interests at Stake

Corporates are entitled to expect that those working in the organisation will keep sensitive information obtained in the workplace confidential, and disclose it neither outside the organisation, nor within the organisation outside authorised channels, without proper authority. In the instant information age, immediate serious damages can happen if information is leaked internally or externally. Where workers have genuine concerns about suspected wrongdoing, they can raise it with the board (in the case of executives reporting to board) or appropriate manager, but employees should trust senior management to investigate and deal appropriately with concerns. In governance terms, it is in every corporate's interest to ensure that wrongdoing is discovered and corrected.

Workers are entitled to expect a safe workplace, with competent and honest colleagues, and that they are not put at risk of criticism or legal liability if their organisation breaches duties to customers or members of the public. Workers may

feel a moral duty to act if they see what they believe is illegal or unethical behaviour in the workplace (whether the wrongdoers are colleagues or others, such as suppliers) and will become frustrated if genuine concerns are not effectively investigated

Grievance procedures usually address wrongs affecting workers themselves (eg bullying or discrimination). Whistleblowers are often focussed on wrongs affecting others (customers, clients, the public), so the whistleblower rarely has a personali nterest in the outcome of any investigation.

Mandatory Reporting

Powerful policy considerations, domestically and internationally, of tackling terrorism, preventing child abuse and white collar crime, have led to legal obligations to report suspicions of crime, which may often arise in the workplace, on risk of oneself becoming a criminal by failing to do so. The general structure of withholding information offences is that it is an offence where a person who "knows or believes" that a relevant crime has been committed and has information which might be of "material assistance" in securing the arrest or conviction of the guilty party to "fail without reasonable excuse" to disclose that information to the Gardaí.

Obligations to report financial or white collar crime arise under the Criminal Justice (Theft and Fraud Offences) Act 2001 and the Companies Act 2014. Section 19 of the Criminal Justice Act 2011 created a very broad new offence of withholding information in respect of over thirty varieties of white collar crime.

Suspicions about crimes of violence must also be reported under section 9 of the Offences Against the State (Amendment) Act 1998 and the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

The Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 created an obligation to report suspected offences (including sexual offences, offences of violence and offences of neglect) against children and vulnerable adults, though the obligation to report is subject to qualifications and exceptions.

Protected disclosures

Protected voluntary disclosure has been another transparency tool in legislation to support the investigation of issues of concern. Common elements of most statutory protected disclosure schemes are that legal protection is provided so that the whistleblower does not face legal liability (eg in defamation or by disciplinary action) for making the disclosure, but the disclosure must be made in good faith because a false or unreasonable allegation is not protected.

Sectoral protected disclosure legislation began in Ireland from the 1990s in areas where the balance between the duty of confidentiality and the public interest in exposing wrongdoing seemed wrong. These areas included child protection, healthcare and workplace safety. The number of such provisions has snowballed, to the extent that such

a provision is now almost standard. The obvious endpoint was to move from sector-specific to general protection. This is what is done in the Act.

The Act provides a general suite of employment protections and legal immunities to whistleblowers (regardless of the nature or characteristics of their workplace), who, by raising concerns about possible wrongdoing discovered in their workplace, are at risk of penalisation by their employer or adverse action by third parties. A key concept is "protected disclosure" in section 5. To be a "protected disclosure" the disclosure must be of "relevant information" made by a "worker" according to the stepped disclosure regime in sections 6 to 10.

What is "Relevant Information"?

Under section 5, information is "relevant information" if (a) in the worker's reasonable belief, it tends to show one or more "relevant wrongdoings", and (b) it came to the worker's attention in connection with the worker's employment.

As a general rule, the motivation for making the disclosure is irrelevant where there is a reasonable belief that the information shows a "relevant wrongdoing" has occurred. However, where it is alleged that the disclosure concerned the unlawful acquisition, use or disclosure of a trade secret then the worker must have acted for the purposes of protecting the general public interest.

What "Workers" may make Protected Disclosures?

The safeguards in the Act are extended in line with international best practice to a wide range of "workers". Those covered include all those at risk of retribution, including public and private employees and those outside the traditional employer-employee relationship (eg consultants, contractors, trainees, volunteers, temporary workers, former employees and jobseekers).

About what Relevant Wrongdoings may Disclosures be made?

The legal protections are engaged where a disclosure relates to a "relevant wrongdoing". The kinds of relevant wrongdoings are where:

a) a criminal offence has been, is being or is likely to be committed,

b) a person has failed, is failing or is likely to fail to comply with any legal obligation (other than a duty under the person's contract),

c) a miscarriage of justice has occurred, is occurring or is likely to occur,

d) human health or safety has been, is being or is likely to be endangered,

e) unlawful or improper use of public money, has occurred, is occurring or is likely to occur,

f) an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or

g) information tending to show any of the above matters has been, is being or is likely to be concealed or destroyed.

The Stepped Disclosure Regime

The Act incentivises internal reporting. It encourages the vast majority of disclosures to be made to the employer in the first instance; however a "stepped" approach is provided where disclosure to the employer

Disclosure to an Employer or other Responsible Person: Section 6

The first obvious recipient of a protected disclosure is the worker's employer. A disclosure is protected if the worker makes it (a) to the worker's employer, or (b) where the worker reasonably believes that the relevant wrongdoing the disclosure tends to show relates solely or mainly:

i) to the conduct of a person other than the worker's employer, or

ii) to something for which a person other than the worker's employer has legal responsibility, to that other person.

Internal Whistleblowing Policies

Given the enhanced protection of external whistleblowing, it is prudent for private organisations (and is obligatory for public bodies under section 21 of the Act) to have credible internal whistleblowing policies. Having such policies will improve the prospects that the right people inside the organisation will be alerted to wrongdoing quickly and will take effective steps to deal with it before it becomes an external issue, thus protecting the organisation's control of the issue where an investigation may be needed.

It is also prudent for large organisations to have structures to manage mandatory reporting obligations, including Garda liaison points; management of mandatory reporting can be integrated with a whistleblowing policy and with existing procedures, such as grievance procedures.

An internal whistleblowing policy should only have to be used where there is a suspicion of wrongdoing which cannot by effectively addressed through ordinary reporting mechanisms and procedures (such as a grievance procedure). Often this will be for one of two reasons – either the suspected wrongdoing involves or affects third parties such as suppliers or customers, or the reporting line manager of the worker reporting is implicated in wrongdoing.

An internal whistleblowing policy should:

1. provide an alternative reporting line where the concerned worker feels the ordinary reporting line does not provide an effective mechanism for dealing with concerns;
2. ensure that a worker reporting concerns is provided reasonable support and protected by an "anti-retaliation" element in the policy;
3. provide commitment that where a reported concern is genuine, material and supported by evidence, it will be appropriately investigated;
4. protect the identity of the worker reporting at the preliminary stage (though anonymous complaints should not be entertained), but the whistleblower should know that if the matter goes to a formal investigation, his identity will probably have to be disclosed, to ensure that the subject of the complaint has fair procedures;
5. provide that any retaliatory action, or any abusive or false allegations, could involve exposure to disciplinary proceedings.

The ultimate channel for reports may be the chief executive or an identified non-executive director. The person receiving the report should assess whether there appears to be substance to the report and, if there is, refer the matter onward for appropriate internal action or investigation and/or refer the matter to an appropriate external agency. The reporting worker should be kept apprised of the progress and outcome. Where a whistleblowing policy is introduced or updated, staff training or information sessions may be desirable.

Disclosure to a Prescribed Person: Section 7

The Minister for Public Expenditure and Reform may prescribe persons under section 7 as appropriate recipients of disclosures of relevant wrongdoings falling within particular descriptions, ie "confidential recipients". Disclosure to a prescribed person is protected where the worker reasonably believes that the relevant wrongdoing falls within that person's remit and that the information disclosed, and any allegation contained in it, are substantially true.

Pursuant to this provision, the Protected Disclosures Act 2014 (Section 7(2)) Order 2014 (S.I. 339 of 2014) was made on 23 July 2014. For each of the state bodies included in the Order, the prescribed person is typically the Chief Executive Officer or equivalent. Persons dealing with whistleblowing issues within public bodies should consult this Order for further details of appropriate recipients.

Disclosure to a Minister: Section 8

Section 8 protects disclosures made by a worker in a public body to a Minister on whom any function relating to the public body is conferred or imposed by law rather than to the actual employer.

Disclosure to a Legal Advisor: Section 9

Section 9 provides that a worker may make a protected disclosure in the context of seeking legal advice from a barrister, solicitor or trade union official.

Disclosure in other Cases: Section 10

Disclosure may be made to other recipients in certain circumstances under section 10. Section 10 involves a reasonableness test, so the availability of legal protections is less certain if it is used.

A disclosure under section 10 (which is not covered by sections 6 to 9) is protected if the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; the disclosure is not made for personal gain; one or more of the conditions in section 10(2) is met, and it was reasonable in the circumstances for the worker to make the disclosure.

The conditions in section 10(2) are that:

- the worker reasonably believes that the he will be subjected to penalisation if he makes a disclosure in accordance with section 6, 7 or 8;
- where no person is prescribed under section 7 in relation to the relevant wrongdoing, the worker reasonably believes it is likely that evidence will be concealed or destroyed if he discloses under section 6;
- the worker has previously disclosed substantially the same information under section 6, 7 or 8, or
- the relevant wrongdoing is exceptionally serious.

In deciding whether a disclosure was reasonable, regard will be had to matters including the identity of the person to whom the disclosure is made; the seriousness of the relevant wrongdoing; whether the relevant wrongdoing is continuing or likely to recur; whether the disclosure was in breach of a duty of confidentiality owed by the employer to any other person; any action the employer or another person to whom a previous disclosure was made took or might reasonably have taken, and whether the worker complied with any applicable whistleblowing policy.

Worker Protections

Under section 11 of the Act, an employee dismissed for making a protected disclosure is unfairly dismissed and can be awarded compensation of up to five years' remuneration. An employee who claims to have been dismissed or threatened with dismissal for having made a protected disclosure may apply to the Circuit Court to restrain the dismissal. Any employer contemplating dismissal, particularly, on grounds of unauthorised disclosure of information where there may be a contention that the disclosure is protected will therefore proceed at considerable risk. However, case law tends to require an employee seeking an injunction to show a connection between the disclosure and the dismissal and where the employee should have reported the matter as part of his or her ordinary duties, why it was not reported.

Under section 12 of the Act, an employer must not penalise or threaten penalisation against an employee (or cause or permit another person to do so) for making a protected disclosure. Redress is available from an adjudication officer who, if the complaint is well-founded, may require the employer to take a specified course of action, or require the employer to pay compensation of up to five years' remuneration. There is a right of appeal to the Labour Court from a rights commissioner's decision. Decisions of the Labour Court may be enforced through the District Court.

Where a whistleblower or family member experiences coercion, intimidation, harassment, discrimination or threats by a third-party, section 13 of the Act provides a statutory right of action in tort for victimisation.

Whistleblowers benefit from civil immunity from damages claims and have qualified privilege in defamation law under section 14. Under section 15, it is a defence to any criminal charge concerning unauthorised disclosure to show that the disclosure was, or was reasonably believed to be, a protected disclosure.

Any provision in a contract of employment which purports to prohibit or restrict the making of protected disclosures or to remove the legal protections available to a worker who makes a protected disclosure is void.

Protection of Identity of Whistleblowers

Section 16 of the Act pays particular attention to using best endeavours to protect the identity of a whistleblower. It first provides that the recipient of a protected disclosure, and any person to whom a protected disclosure is referred in the performance of that person's duties, must not disclose any information that might identify the whistleblower. Failure to comply with this requirement is actionable by the whistleblower if he suffers any loss because of the failure to comply.

However, the general rule on protecting the identity of the whistleblower does not apply if disclosure of the whistleblower's identity is necessary in the public interest or is required by law; or if the recipient of the protected disclosure took all reasonable steps to avoid disclosing the whistleblower's identity, or reasonably believed the whistleblower did not object to the disclosure of his identity, or reasonably

believed that disclosing the whistleblower's identity was necessary for (i) effective investigation of the relevant wrongdoing; or (ii) prevention of serious risk to State security, public health, public safety or the environment, or (iii) prevention of crime or prosecution of a criminal offence.

Sections 17 and 18 modify the ordinary rules where a protected disclosure may have implications for law enforcement or security issues. Where such considerations arise, the disclosure is only protected if it meets certain additional requirements.

Conclusion

In light of the Act, if they have not already done so, organisations need to adapt to an environment where whistleblowing has strong statutory support. Consideration should be given to establishing or reviewing policies around whistleblowing (and this is an obligation for public bodies, for whom Departmental guidelines have been issued). A Code of Practice on the Act was also produced by the Workplace Relations Commission and is incorporated into the Code of Practice on Protected Disclosures Act 2014 (Declaration) Order 2015 (S.I. No. 464 of 2015).

The incremental movement towards increased transparency may also cause organisations to consider their information management practices and arrangements.

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