



***DRAFTING A WHISTLEBLOWING
POLICY***

GUIDELINES FOR TRADE UNION NEGOTIATORS

on

The Protected Disclosures Act 2014

Irish Congress of Trade Unions, August 2014

Foreword

The Protected Disclosures Act (2014) is the first dedicated whistleblowing legislation in Ireland and has been welcomed by trade unions as a major step forward.

Prior to this, protection for those who blew the whistle on suspected wrongdoing in the workplace was patchy and often ineffective, as it varied from sector to sector.

The new legislation applies to workers in *all* sectors (public and private), who make a '*protected disclosure*' in respect of certain unlawful activities - '*relevant wrongdoings*' - they believe are occurring, in Ireland or elsewhere.

When workers make a disclosure they benefit from a presumption of confidentiality and protection. Where an employee is threatened with dismissal on foot of having made a '*protected disclosure*' a new form of protection in the form of '*interim relief*' is available to prevent an unfair dismissal from going ahead. Protection against other forms of penalisation is available through the Rights Commissioners Service.

However '*workers*' who are not employees – self-employed, for example – and who are subsequently penalised for making a protected disclosure must seek redress through more costly court action and this may make them reluctant to come forward.

The aim of this guide is to provide trade union negotiators with pointers to key provisions in the Act and assist them in negotiations with employers who are interested in having a whistleblowing policy in place. Good practice means that workers will know how to make a protected disclosure in their workplace and that they are assured about protection from reprisal when they do so.

While private companies are not under a statutory obligation to have a specific whistleblowing policy in place, employers will be obliged to review existing policies (such as the health and safety policy) or create new policies to ensure they comply with the legislation. For example, some employment policies and contracts include '*gagging clauses*' and these are not permitted under the legislation.

The Congress Legal Strategy Group will keep the legislation and guidelines under review and we will endeavour to update the guide as appropriate, in light of developments in this area, particularly the Code of Practice Currently being developed by the Labour Relations Commission.

We are always interested in feedback from unions about their experience when operating legislation aimed at improving the lives of workers. It goes without saying that this guide is not legal advice and that anyone considering making a protected disclosure should seek the assistance of their trade union.

Shay Cody, Chairman

Congress Legal Strategy Group,

August 2014

Definitions & Key Concepts

'Mandatory Reporting'

The Protected Disclosures Act 2014 does not make whistleblowing mandatory. The legislation aims to protect those who come forward and voluntarily make a disclosure. However the legislation does not remove existing reporting obligations, so where the law already makes reporting mandatory - in respect of child abuse, for example - the obligation to report remains in place.

'Worker'

The legislation applies to all workers. The definition of 'worker' is very broad and includes employees, contractors, agency staff and trainees, temporary employees and former employees (*section 3*). There are different redress provisions for employees who suffer penalisation and unfair dismissal (*section 11 & 12 and schedules 1 & 2*) than for other categories of 'workers' (*section 13*).

'Relevant Wrongdoing'

For the worker to be protected the subject matter of their disclosure must refer to one or more *relevant wrongdoings*. These are specifically defined in the legislation (*section 5*) as:

- a) offences that are or are likely to be committed;
- b) failing to comply with legal obligations;
- c) miscarriage of justice;
- d) health and safety risks, including risks to the public as well as other workers;
- e) damage to the environment;
- f) the unauthorised use of public funds or resources
- g) oppressive discriminatory or grossly negligent action or inaction by a public body;
- h) information showing any matter falling into categories above may be destroyed.

Exclusion

There are a number of exclusions from the definition of relevant wrongdoing, such as when it relates to a matter “which it is the function of the worker to detect investigate or prosecute.” In this case, the disclosure will not be protected by the Act unless it involves an act or omission on the part of the employer (*section 5.5*). In addition, if the relevant wrongdoing relates to an obligation arising under the worker’s own contract of employment or service, then this is excluded from being a protected disclosure. For example if worker has not been paid the correct overtime rate as stipulated in their contract, this is a breach of their contract but on its own is unlikely to constitute a protected disclosure. However, if the employer requires the entire workforce to work off-the-clock without pay or for cash-in-hand this is likely to constitute a protected disclosure (*section 5.3(b)*).

When & where?

The information on the relevant wrongdoing must have come to the attention of the worker in connection with their employment (*section 5.2*) and may relate to a relevant wrongdoing that happened in the past, may be actively happening, or may occur in the future. It is possible that disclosures made prior to the commencement of the Act may be protected. The relevant wrongdoing may relate to Ireland or another country or territory and therefore has particular implications for organisations operating across multiple jurisdictions (*section 5.4*).

Making a Protected Disclosure

Workers are protected when they make a disclosure about a relevant wrongdoing in accordance with the legislation. The Act anticipates that as a first step, a disclosure would normally be raised with the employer. However the legislation recognises that this depends on the seriousness and sensitivity of the issues involved and who is suspected of the wrongdoing.

Disclosure to Employer

In our Model Policy we recommend that enterprises designate a Protected Disclosure Oversight Manger. The Protected Disclosure Oversight Manger

must have sufficient authority to act on the disclosures received. This can be an employee of the enterprise, or it can be a third party authorised by the employer. There is no requirement in the Act for the employer to agree the third party with their employees. However it is essential that the person operating the procedure enjoys the confidence of the employees and, in particular, there must be no suspicion that the persons receiving the reports might cover up the wrongdoing.

'Prescribed Persons'

Disclosures relating to relevant wrongdoings can be made to certain 'Prescribed Persons' (*section 7.2*), usually the chief executive or relevant regulator such as the National Employment Rights Authority. The most up-to-date list of Prescribed Persons is available in **S.I. No. 339 of 2014**.

'Other Persons'

There is no definitive list of who can be or who cannot be a person for purpose of a disclosure under section 10 of the Act. Instead the legislation requires that the disclosure to that particular person be 'reasonable', bearing in mind all the circumstances and that key criteria are met.

Key Criteria

In order for a disclosure to be protected it must comply with certain criteria. The least amount of criteria apply when disclosures are made to the employer. The criteria increase when the disclosure is made externally, to a Prescribed Person and a further range of criteria apply when the disclosure is made to some 'Other' person. In summary the criteria are as follows:

1. **To be protected when making a disclosure to an employer** or responsible person such as a nominated third party the worker must have a 'reasonable belief' about the 'relevant wrongdoing' (*section 6*);

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2. **To be protected for external disclosures made to a Prescribed Person** i.e. a body/person prescribed by the Minister the worker must reasonably believe (i) that the relevant wrongdoing falls within the responsibilities of the prescribed person and (ii) that the information disclosed, and any allegation contained in it, are substantially true (*section 7*);

 3. **When a worker is employed by a public body he or she may make a protected disclosure to the Minister** with responsibility for that body, rather than to the employer; the standard in this case is the same as a disclosure made to an employer, i.e. a reasonable belief about the relevant wrongdoing (*section 8*):

 4. **To be protected when making an external disclosure to some other person** the worker must reasonably believe that the information disclosed and any allegation is substantially true, the relevant wrong-doing must be sufficiently serious, the disclosure cannot be made for personal gain and in all circumstances of the case it is reasonable for the worker to make the disclosure to that particular person. Other criteria must also be met according to the circumstances such as (i) that at the time of the disclosure the worker reasonably believed they would be subjected to penalisation by the employer if they made the disclosure under the internal process or to a 'Prescribed Person' ; or (ii) where there is no 'Prescribed Person' in relation to the relevant wrong-doing the worker reasonably believed that it is likely that the evidence would be concealed or destroyed if the worker made a disclosure under the internal procedures or (iii) that the worker previously made a disclosure of substantially the same information under the internal process (*section 10*)

 5. **When a worker seeks advice from a trade union**, solicitor or barrister about the operation of the legislation this discussion is also a 'protected disclosure' (*section 9*). It is sufficient in this case that the worker is seeking advice from their trade union about the operation of the Protected Disclosures Act 2014.

Format for Making a Disclosure

There is no required format for making a disclosure. The disclosure can be made verbally or in writing. There is no requirement to refer to the legislation when making the disclosure and there is no requirement for the worker to sign their disclosure. But it may assist the worker and avoid any subsequent confusion if they clearly state that they intend the communication to be disclosure under the Protected Disclosures Act.

Format for making a Disclosure in the Model Policy

Our Model Policy aims to provide assistance by setting out a format for making the disclosure as a means to assist the worker to understand and apply the different criteria as they navigate the different channels as appropriate. There is no requirement to use this format.

'Reasonable Belief'

When making a protected disclosure to an employer the worker is required to have a "reasonable belief" that the action s/he is reporting is a "relevant wrongdoing" as listed in the legislation. While the legislation does not provide a definition of *reasonable belief* it is taken to mean that there is a reasonable basis to believe the matters reported in the disclosure. It is a relative concept and applies to what is appropriate given all of the factors involved in the situation.

'Substantially True'

The requirement for a worker to "reasonably believe that the information disclosed and any allegation are substantially true" applies when making an external disclosure i.e. a disclosure made to Prescribed Persons and to Other Persons. This requirement does not mean that the disclosure has to be one hundred percent accurate. In fact the Minister noted during the recent Dail debate: *"The whistleblower must have reasonable belief in the substantial truth of the information. The information may or may not be true. If he or she can show that he or she had reasonable belief that they were substantially true, he or she has met the criterion."*

“By any objective measure I believe that is a reasonable threshold for enabling the disclosure into the public domain of what might be very damaging allegations”.

In other words, the disclosure will be protected so long as the worker reasonably believes that the information and any allegations were/are substantially true.

Motivation of the Whistleblower

The motivation for making a disclosure is irrelevant (*section 5.7*). However, deliberately false reporting is unlikely to meet the reasonable belief standard and the worker will not be entitled to protection under the Act.

Situation of Persons Accused

The Protected Disclosures Act 2014 does not in any way change the existing rights of workers who are subject of an allegation. In particular, workers who are the subject of a protected disclosure must have their right to natural justice and fair procedures upheld. In this respect the LRC Code of Practice: Grievance and Disciplinary Procedures S.I. NO. 146 OF 2000 is central. Fair procedure principles require that the allegations or complaints be set out in writing, that the source of the allegations or complaint be given or that the employee concerned be allowed to confront or question witnesses. The worker must be given the opportunity to be represented.

Protections for Workers making a Protected Disclosure

Once it has been established that a disclosure meets the requirements under the Act there are several protections available to a whistleblower.

Confidentiality

One of the main ways the legislation seeks to protect workers is by protecting the identity of the worker who made the disclosure. Section 16.2(b) of the Protected Disclosures Act 2014 provides that the presumption is that the identity of the worker making the disclosure will be kept confidential. Steps must be taken by the employer and other persons to ensure that the identity of the worker making the disclosure is kept confidential. A failure to do so may result in a claim by the worker for breach of statutory duty / negligence under the Act (*section 16.3*).

Only where it is necessary can confidentiality be broken, the Act (section 16.2) lists out reasons as for the effective investigation of the relevant wrongdoing concerned, the prevention of serious risk to the security of the State, public health, public safety or the environment, or the prevention of crime or prosecution of a criminal offence, the disclosure is otherwise necessary in the public interest or is required by law.

The Act provides a strong presumption of confidentiality. However the legislation does provide that where the person to whom the protected disclosure was made reasonably believes that the person by whom the protected disclosure was made does not object to the disclosure of any such information they do not have to keep it confidential. To avoid any confusion, accidental or intentional, workers may wish to clearly state as part of their disclosure that they do, or do not, wish their identity to be kept confidential.

Gagging Clauses Prohibited

The legislation prohibits gagging clauses in employment contracts and makes any such provisions void insofar as the clause purports to prohibit or restrict the

operation of the legislation (*section 23*). Existing contracts should be reviewed in light of this provision.

Protection for seeking help from a trade union

Workers are protected when they discuss with their trade union the operation of the Protected Disclosures Act 2014 including at early stages when they are contemplating making a protected disclosure and subsequently where the worker has questions relating to the operation of the legislation. Protection for workers to discuss the operation of legislation applies regardless of the employer's view of the trade union.

Defamation

Immunity from civil liability in the event of damages or other claims in relation to the disclosure is provided. In addition the Defamation Act is amended to include a protected disclosure as a statement having 'qualified privilege' under that Act (*section 14*).

Criminal Prosecution

In a case where a worker is being prosecuted for a criminal offence relating to the disclosure of the information forming their disclosure. It is a defence to show that the disclosure was, or was reasonably believed to be, a protected disclosure (*section 15*).

Actions in Tort

If a third party causes a detriment to a worker who makes a protected disclosure, the worker will have a right of action in tort. 'Detriment' in this context includes coercion, intimidation, harassment or discrimination to the worker, or his/her family (*section 13*).

Specific Protection for employees

All workers are protected from day one, which means that there is no minimum service requirement before a worker can make, or be protected for making, a

protected disclosure. Some avenues for redress are specific to employees and are not available to workers who are not employees.

'Employee'

The definition of 'employee' for the purpose of seeking redress for penalisation and unfair dismissal has the meaning given by section 1 of the Unfair Dismissals Act 1977 and includes Gardai and civil servants. It also means that the hirer may be the 'employer' when the worker making the protected disclosure is an agency worker.

'Penalisation'

'Penalisation' of employees is given a wide definition and includes any acts or omissions, suspensions, demotions, transfers, discipline, unfair treatment, intimidation, harassment or threats (*section 3*). Redress for breaches is available (*section 12*) through the Rights Commissioner Service (*schedule 2*) bearing in mind the changes to the Rights Commissioner Service planned in the Workplace Relations Bill 2014.

'Unfair Dismissal'

If an employee is unfairly dismissed because they made a disclosure the dismissal will be considered unfair for the purpose of the Unfair Dismissal Acts. Protection from unfair dismissal applies from day one, i.e. there is no minimum service required before the worker is protected.

Preventing Unfair Dismissal from Occurring - 'Interim Relief'

Employees facing an unfair dismissal for making a protected disclosure are protected by a new remedy - 'interim relief' whereby application can be made to the Circuit Court, within 21 days, to prevent the unfair dismissal from occurring. The Circuit Court, can where it appears to the Court that there are "substantial grounds for contending that dismissal results wholly or mainly from the employee having made a protected disclosure" make an order preventing the dismissal or requiring the immediate reinstatement of the employee pending the determination of the unfair dismissal case. Reinstatement can be to another position but on terms and

conditions no less favourable and without loss of service etc. (*section 11 and Schedule 1*). Employees do not have to apply for interim relief.

'Compensation'

Compensation for unfair dismissals is usually capped at 104 weeks' pay. However compensation for an unfair dismissal based upon a protected disclosure is double that value, capped at 260 weeks' pay. But if it is found that the investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure the amount of compensation may be up to 25 percent less than it would otherwise be.

'Burden of Proof'

In proceedings involving an issue as to whether a disclosure is a protected disclosure it shall be presumed, until the contrary is proved, that the disclosure is a protected disclosure (*section 5.8*). It is for the employer to prove that a disclosure is not covered by the Act.

Specific Sectors

The legislation contains specific provisions relating to disclosures of information relating to security, defence, international relations, and intelligence and policing.

Protected Disclosure Policy – Key Provisions

Best practice policies are drawn up and agreed with workers and their trade union(s). The whistleblowing policy should include the following elements:

- The policy should support voluntary whistleblowing (other than mandatory reporting required by legislation);
- The procedures for making a 'protected disclosure' should be easy to understand and communicated to all workers;
- The policy should identify the type of concerns that can form the basis of a 'protected disclosure' (where an employer proposes to include matters that

are not included in the list of 'relevant wrongdoings' protected by the legislation the policy should separate these);

- The policy should provide guidance on how to make a protected disclosure and to whom i.e. to the employer, (to a Minister, where relevant) to a 'prescribed person' and to 'others';
- The policy should include information on the different criteria that apply when making a disclosure to an employer, to a prescribed person and to others;
- The policy should identify who will oversee the whistleblowing/protected disclosures policy and procedure, in a large enterprise this may be a senior executive who may also be tasked with the preparation of a regular report to the enterprise on the number and types of concerns raised, the outcome of investigations and any complaints of penalisation or breaches of confidentiality;
- Where an employer decides to authorise a third party to receive disclosures the policy must treat this as a disclosure made to the employer, the workforce will need to have trust and confidence in the authorised third party;
- The policy should provide an assurance of confidentiality – it is important that confidentiality is presumed i.e. it should not require an employee to request confidentiality in their disclosure;
- The policy should outline circumstances where confidentiality may be breached (i.e. only in accordance with the Protected Disclosures Act);
- The policy should set out the feedback and follow up communication that the worker making the disclosure can expect to receive;
- The policy should assure the worker that they are protected from penalisation from management and from fellow workers and should provide some illustrative examples of what constitutes penalisation;
- The policy should explain how a worker who believes they are suffering a detriment for having made a disclosure can raise this along with how to complain about a breach of confidentiality;

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- The policy must inform workers that they are entitled to discuss the operation of the legislation with their trade union;
 - The employer should comply with the policy and its procedures and should provide for sanction of others, including clients and suppliers who subject the worker to penalisation or who breach confidentiality.
 - The policy should provide for monitoring and regular review in conjunction with other policies.

‘MODEL WHISTLEBLOWING POLICY’

What a model policy might look like and the key areas it should cover

1. INTRODUCTION

- 1.1 *Name of Enterprise* is committed to the highest possible standards of compliance with our legal requirements.
- 1.2 Our whistleblowing policy is intended to encourage and enable workers to raise concerns rather than overlooking them. Under this policy a worker can make a disclosure without fear of penalisation or threat of less favourable treatment, subsequent discrimination or disadvantage.
- 1.3 This policy aims to give effect to the obligations and provisions of the Protected Disclosure Act 2014 and does not replace any legal reporting or disclosure requirements arising under other legislation. Where statutory reporting requirements or procedures exist these must be fully complied with.
- 1.4 This policy does not replace the organisation’s grievance procedures, in particular where the issue relates to an individual worker’s contract of employment this matter should be referred under the Companies Grievance Procedure.
- 1.5 Workers are encouraged to seek the assistance of their union in making disclosures and can be represented by their union at any stage.
- 1.6 Our policy has been discussed and agreed with our employees and their union(s) and has their full support.

2. AIMS & SCOPE OF THIS POLICY

- 2.1 This policy aims to:
 - encourage workers to feel confident about raising concerns about relevant wrongdoings;
 - provide avenues for workers to make disclosures about relevant wrongdoings and receive feedback on any action taken;
 - ensure that suppliers and clients are aware of their responsibilities;
 - reassure workers that they will be protected from reprisals for making a disclosure in accordance with this policy.

2.2 This policy is intended to cover all aspects of *The Enterprise's* activity including our operations outside of Ireland.

3. PROTECTED DISCLOSURE

3.1 This policy deals with disclosures that relate to 'relevant wrongdoings'. These correspond to the relevant wrongdoings in the Protected Disclosures Act 2014(section 5 subsections 3(a) to (h)) and in summary these are:

- a) offences that are or are likely to be committed;
- b) failing to comply with legal obligations;
- c) miscarriage of justice;
- d) health and safety risks, including risks to the public as well as other workers;
- e) damage to the environment;
- f) the unauthorised use of public funds or resources ;
- g) oppressive, discriminatory or grossly negligent action or inaction by a public body ;
- h) information showing any matter falling into category above may be destroyed.

3.2 A 'protected disclosure' under this policy may be about a relevant wrongdoing

- that is happening now;
- took place in the past;
- that is about to happen.

4. REASONABLE BELIEF

4.1 A worker does not need to be certain about the facts in their disclosure, it is sufficient that in the reasonable belief of the worker the information tends to show one or more relevant wrongdoings and the information came to the attention of the worker in connection with their employment.

5. WHO IS COVERED BY THIS POLICY?

- 5.1 This policy applies to all 'workers' i.e. our employees at all levels, agency workers, trainees, apprentices and interns, self-employed persons acting on our behalf, and in certain circumstances the workers of companies that supply us with goods and services.
- 5.2 This policy applies to current and past employees and at the recruitment stage.

6. REPRESENTATION BY A TRADE UNION

- 6.1 Workers are encouraged to seek advice from their trade union about the operation of this Act and are protected when they do so as a 'protected disclosure'. Every worker can contact, discuss and be represented by their trade union during any meetings or interviews under this policy.

7. CHANNELS FOR MAKING A DISCLOSURE

- 7.1 This policy provides guidance to workers on making
- An internal disclosure within the employment or to an agreed third party authorised by the employer;
 - An external disclosures to a 'Prescribed Person'; and
 - An external disclosure to 'Others'.

8. RAISING A CONCERN UNDER THE INTERNAL DISCLOSURE PROCEDURE

- 8.1 As a first step, a disclosure about a 'relevant wrongdoing' should normally be raised using the internal disclosure procedures however this depends on the seriousness and sensitivity of the issues involved and who is suspected of the wrongdoing.
- 8.2 Disclosures made under the internal procedures may be made verbally or in writing to the 'Protected Disclosure Manager' nominated by the enterprise.
- 8.3 Workers who wish to make a written disclosure are invited to use the following format and to keep a copy of the disclosure and any information provided. It is not necessary to follow this format.

FORMAT FOR MAKING AN INTERNAL DISCLOSURE

- 1. give a description of the 'relevant wrongdoing';*
- 2. provide any information that tends to show the relevant wrongdoing so as to assist the investigation of the matters raised in the disclosure;*
- 3. date the disclosure;*
- 4. give your preferred contact details;*
- 5. state that the disclosure is made under the Protected Disclosures Act and state if you do / do not expect confidentiality.*

8.4 Although workers are not expected to prove the truth of the facts in the disclosure they must have a 'reasonable belief' that there are grounds for their concern when making a disclosure using the internal procedure.

9. CONFIDENTIALITY

- 9.1 All concerns will be treated in confidence. Unless the worker clearly states that they do not object to having their name associated with the disclosure.
- 9.2 Disclosures will be kept secure and in a form that that does not endanger confidentiality of the person making the disclosure. The focus will at all times be on the information in the disclosure rather than the identity of the worker making the disclosure.
- 9.3 At the appropriate time, however, the identity of the person making the disclosure may need to be revealed if it is necessary for the investigation and in accordance with the principles of natural justice and fair procedures.

10. ANONYMOUS ALLEGATIONS

- 10.1 Workers are encouraged to put their name to the disclosure. Concerns expressed anonymously will be treated seriously and considered in accordance with this policy.

11. THE ROLE OF THE 'PROTECTED DISCLOSURE MANAGER'

- 11.1 *The Enterprise* is ultimately responsible for the management of this policy.
- 11.2 The Enterprise has appointed an identified senior executive as the '**Protected Disclosure Manager**' for the maintenance and day-to-day operation of this policy.
- 11.3 The '**Protected Disclosure Manager**' is _____ who is a senior executive of sufficient standing within *the Enterprise* and is empowered to act within the enterprise in response to a disclosure;
(or it may be)
- 11.4 The **Protected Disclosure Manager** is _____ who is a third party person/organisation agreed with the union and authorised by the enterprise to operate as the internal disclosure channel in accordance with section 6.2 of the Protected Disclosure Act 2014.
- 11.5 The contact details for the **Protected Disclosure Manager** are phone_____; email_____; and post_____.

12. HOW THE ENTERPRISE WILL RESPOND

- 12.1 **The Protected Disclosure Manager** will respond to all concerns raised under the internal disclosure procedure¹.
- 12.2 Disclosures may, in light of the seriousness of the allegations be referred immediately to the appropriate authorities. Likewise if urgent action is required (for example to remove a health and safety hazard) this will be taken before any other investigation is conducted.
- 12.3 In order to protect any individuals accused of a 'relevant wrongdoing' initial inquiry will be made to decide whether an informal or formal investigation is appropriate and, if so, what form it should take. Where appropriate, the matters raised in the disclosure may:
- be investigated by management, internal audit, be referred to the external auditor;

¹ The enterprise is not required by the legislation to take any action on foot of a receipt of a disclosure however in -action, or the belief of in-action is part of the justification when escalating the disclosure to external persons.

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- be referred to An Garda Siochana;
 - be referred to external enforcement agency or regulator;
 - form the subject of an independent (third party) inquiry;
 - be dealt with under in accordance with the enterprise's grievance and disciplinary procedures.

12.4 Generally within ten working days (and no later than 21 working days) of a concern being raised, the **Protected Disclosure Manager** will write to the worker who made the report (where this is known):

- acknowledging that the concern has been received;
- indicating in summary form how the organisation proposes to deal with the matter;
- giving an estimate of how long it will take to provide the next response; or
- providing an approximate date by which the person making the disclosure will receive the final communication;
- or setting out why no investigation will take place².

12.5 The communication will include information on staff support mechanisms including the right to be represented by the trade union.

12.6 The amount of contact between the **Protected Disclosure Manager** (or the person working on their behalf) and the worker making the disclosure during the investigations will depend on the nature of the matters raised, the potential matters involved and the clarity of the information provided in the report.

12.7 The **Protected Disclosure Manager** will ensure that the person who made the disclosure is aware that the matter is under active consideration and will provide them with a final statement summarising how the concerns raised in the disclosure were dealt with and what action was taken to rectify the wrong doing.

12.8 In circumstances where an investigation does not conclude that any relevant wrongdoing has taken place or where the person making the disclosure is mistaken

² The legislation does not require the enterprise to communicate with the worker who made the protected disclosure. The recommendation is aimed at assisting enterprises to communicate that action is being undertaken by the enterprise so that the worker can determine if it is appropriate for them to make an external disclosure.

or unaware of all the facts surrounding the issues raised the **Protected Disclosure Manager** will in the final statement take the opportunity to explain that the concerns are unfounded.

- 12.9 The **Protected Disclosure Manager** will maintain a record of all concerns raised and reports received along with notes of the investigation and the outcome, in a secure manner which does not endanger workers' confidentiality or damage reputations or worker's employment records in the case of inaccurate disclosures.
- 12.10 The **Protected Disclosure Manager** will report as necessary to *The Enterprise* providing a record of the number and type of disclosures received, the actions taken, any breaches of confidentiality or of penalisation and the actions taken to remedy these and a statement on awareness and training on the policy.

13. RAISING A CONCERN EXTERNALLY

- 13.1 Workers are encouraged to raise their concerns under the enterprise's internal disclosure procedure in the first instance. However it is recognised that this may not always be appropriate therefore this policy, in line with the Protected Disclosure Act 2014 provides for external reporting to 'Prescribed Persons' and to 'Others'.

14. MAKING A DISCLOSURE TO A PRESCRIBED PERSON

- 14.1 The Protected Disclosure Act 2014 provides for external reporting of wrong-doing to appropriate authorities in circumstances where:
- (i) the worker reasonably believes that the information disclosed and any **allegations contained are substantially true** and
 - (ii) the wrongdoing falls within matters in respect of which there is a 'Prescribed Person'.
- 14.2 A '**Prescribed Person**' is the external authority as prescribed by Ministerial Order (under section 7 of the Protected Disclosures Act 2014). Prescribed Persons are normally the Regulating or Supervising Authority or Inspectorate with responsibility for dealing with any 'relevant wrongdoing' falling within the scope of the Protected Disclosure Act 2014 such as the Health and Safety Authority and the labour inspectorate in the Work Place Relations Service.

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- 14.3 *The Enterprise* aims to maintain and make generally available to workers and members an up-to-date list and contact details of the various ‘Prescribed Person’s and the matters that may be reported to them. A copy of the relevant Statutory Instrument is attached.
- 14.4 The ‘**Prescribed Person**’ may have their own procedures for making a disclosure and workers are encouraged to contact their trade union in advance of making a disclosure to a ‘**Prescribed Person**’.
- 14.5 Where the ‘**Prescribed Person**’ does not have a format for making a disclosure, workers are invited to use the following and to keep a copy of the disclosure and any information provided:

FORMAT FOR MAKING A DISCLOSURE TO A PRESCRIBED PERSON

- *State that you are making the disclosure under Section 9 of the Protected Disclosures Act 2014³;*
- *Give a description of the ‘relevant wrongdoing’ and why it falls within the Prescribed Person’s area of responsibility;*
- *Provide any copies of information that tend to show the wrongdoing so as to assist the investigation of the matters raised in the disclosure;*
- *Include any information relating to your raising (or not raising) the concern under the internal procedure;*
- *Date the disclosure;*
- *Give your preferred contact details;*
- *Make it clear (i) that you expect confidentiality or (ii) that you want your name associated with the disclosure⁴.*

- 14.6 Although workers are not expected to prove the truth of the facts in the disclosure they must have a ‘reasonable belief’ that the information and any allegation are substantially true, this a somewhat higher standard than when making the internal disclosure.

³ It is not a legal requirement to state this but it may assist the person to whom you are making the disclosure to know that is your intention.

⁴ The legislation requires that the Prescribed Person treat the disclosure as confidential, including this in the disclosure is for the avoidance of confusion.

15. RAISING CONCERNS EXTERNALLY OTHER THAN TO A PRESCRIBED PERSON

15.1 The Protected Disclosure Act 2014 provides for external reporting to other persons. There is no definitive list of who can be or who cannot be an 'Other Person' instead the legislation requires the disclosure to the 'Other Person' to be 'reasonable' bearing in mind,

- (i) the identity of the person to whom the disclosure is made,
- (ii) the seriousness of the relevant wrongdoing,
- (iii) whether the relevant wrongdoing is continuing or is likely to occur in the future,
- (iv) any action which the employer of the worker or the person to whom the previous disclosure was made has taken or might reasonably be expected to have taken as a result of the previous disclosure,

15.2 There are other criteria that must also be met such as the relevant wrongdoing must be sufficiently serious and the worker reasonably believes

- (i) that the information disclosed and any allegation is substantially true,
- (ii) the disclosure is not made for personal gain (excluding any rewards payable under any enactment),
- (iii) in all circumstances of the case it is reasonable for the worker to make the disclosure,
- (iv) and **any one** of the following applies

- that at the time of the disclosure the worker reasonably believed they would be subjected to penalisation by the employer if they made the disclosure under the internal process or to a 'Prescribed Person' ;
- that in the case where there is no 'Prescribed Person' in relation to the relevant wrong-doing the worker reasonably believed that it is likely that the evidence would be concealed or destroyed if the worker made a disclosure under the internal procedures;
- that the worker previously made a disclosure of substantially the same information under the internal process or to a Prescribed Person;

-that the relevant wrongdoing is of an exceptionally serious nature.

- 15.3 It is difficult to recommend a format for making a protected disclosure to an 'OTHER PERSON' as the nature of the criteria depends on the specifics of the situation and the nature of the relevant wrongdoing. Workers considering making a protected disclosure to an 'OTHER PERSON' in accordance with section 10 of the Protected Disclosures Act 2014 are therefore encouraged to discuss and get assistance from their trade union.

16. WORKERS OUTSIDE THE ENTERPRISE REPORTING CONCERNS USING THE INTERNAL PROCEDURE

- 16.1 Workers from outside the enterprise working for our clients or suppliers who become aware of a relevant wrongdoing as part of their work with or for us may make a report to the ' **Protected Disclosure Manager** in respect of a relevant wrongdoing.
- 16.2 Workers from outside the enterprise making such disclosures are encouraged to use the same format as our workers and give an indication of whether they are willing to participate in any investigation that may take place in response to the disclosure.

17. UNTRUE ALLEGATIONS

- 17.1 If a worker makes a report in accordance with this policy, but the information or allegation is subsequently not confirmed by the investigation, no action will be taken against the person making the disclosure. They will be fully protected from any less favourable treatment, penalisation or victimisation.
- 17.2 The motive of the person making the disclosure is not relevant but if an allegation, known to be false is made maliciously, then disciplinary action may be taken.

18. A WORKER WHO IS THE SUBJECT OF A DISCLOSURE

- 18.1 A worker who is the subject of a disclosure is entitled to fair treatment. While an investigation is on-going, all reasonable steps will be taken to protect the confidentiality of those who are the subject of allegations in a protected disclosure

pending the outcome of the investigation. In some circumstances, where the fact of the investigation is widely known, the conclusion of the investigation may involve a statement of exoneration.

19. PROTECTION FROM PENALISATION

- 19.1 *The Enterprise* is committed to good practice and high standards and we want to support and protect workers who make disclosures under this policy. Direct or indirect pressure on workers not to make a disclosure or to make a disclosure contrary to this policy will not be tolerated.
- 19.2 *The Enterprise* recognises that penalisation can take many forms; it can be direct and indirect and may be perpetrated by fellow workers, management or those who supply us with goods and services and our customers and clients.
- 19.3 Examples of penalisation include any unfair or adverse treatment (whether acts of commission or omission) that result in the employee suffering any unfavourable change in his/her conditions of employment including (but not limited to)
- (i) suspension, lay-off or dismissal (including a dismissal within the meaning of the Unfair Dismissals Acts) , or the threat of suspension, lay-off or dismissal
 - (ii) demotion or loss of opportunity for promotion,
 - (iii) transfer of duties, change of location of place of work, reduction in wages or change in working hours,
 - (iv) imposition of any discipline, reprimand or other penalty (including a financial penalty),
 - (v) unequal treatment under sick leave or disciplinary policies, unfair selection for tasks or attendance at events,
 - (vi) coercion, intimidation,
 - (vii) discrimination, disadvantage or unfair treatment,
 - (viii) injury damage or loss,
 - (ix) treats of reprisal,
 - (x) Verbal harassment - jokes, comments, ridicule or songs;
 - (xi) Written harassment - including faxes, text messages, emails, comments or postings on social media;
 - (xii) Physical harassment - jostling, shoving or any form of assault;

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- (xiii) Intimidatory harassment - gestures, posturing or threatening poses;
 - (xiv) Isolation or exclusion from social activities;
 - (xv) Bullying.

19.4 *The Enterprise* will not penalise or threaten to penalise the worker for making a protected disclosure. The enterprise will not allow any other person to penalise or threaten penalisation (including informal pressure) for having made a disclosure in accordance with this policy.

19.5 *The Enterprise* will take appropriate action to prevent and remedy any penalisation or breach of confidentiality of workers when they report a relevant wrongdoing or

- (i) are suspected of making a report about a relevant wrongdoing, or
- (ii) provide information or act as a witness as part of an investigation under this policy;
- (iii) seek redress under the provisions of the Protected Disclosures Act 2014;
- (iv) or are otherwise involved in actions under this policy.

19.6 These protections extend beyond the workplace, for example to conferences and training that occurs outside the workplace and to work-related social events.

19.7 Penalisation or threats of penalisation by members of staff will not be tolerated. Such behaviour may constitute misconduct and may lead to disciplinary action up to and including dismissal.

19.8 Penalisation or threats of penalisation of our workers by suppliers, clients and others we do business with will not be tolerated and may lead to termination of contracts or suspension of services, or the exclusion from *The Enterprise's* premises or the imposition of other sanctions.

20. COMPLAINTS PROCEDURE

20.1 A complaint of penalisation or for a breach of confidentiality under this policy can be made under *The Enterprises' Grievance Policy*.

20.2 A copy of the complaint of penalisation should be brought to the attention of the **Protected Disclosure Manager**.

20.3 Employees can make a complaint of Penalisation, under the Protected Disclosure Act 2014 to the Rights Commissioner (Adjudication Officer under the Workplace Relations Reform) in accordance with Schedule 2 of the Act.

21. COMMUNICATION, MONITORING AND REVIEW

- 21.1 This policy will be communicated to all workers and members and others we do business with.
- 21.2 This policy will be monitored for its effectiveness and will in any event be referred to joint union/management review every three years.

22. CONTACT AND ADVICE POINTS

The Trade Union(s) contact details

The Protected Disclosures Act 2014

<http://www.oireachtas.ie/documents/bills28/acts/2014/a1414.pdf>

List of Prescribed Persons (**S.I. No. 339 of 2014**)

<http://www.per.gov.ie/protected-disclosures-i-e-whistleblowing/>

Copy of the Code of Practice: Grievance and Disciplinary Procedures S.I. NO. 146 OF 2000 <http://www.lrc.ie/viewdoc.asp?DocID=88>

Workplace Relations Service

<http://www.workplacerelations.ie/en/>

Irish Congress Trade Unions

<http://www.ictu.ie/>

Transparency International

<http://transparency.ie/>