

General Scheme of the Protected Disclosures in the Public Interest Bill, 2012

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Part I

GENERAL PROVISIONS

Long Title

Head 1 – Short title

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Long Title

Provide a Long Title for the Bill.

AN ACT TO PROVIDE FOR THE PROTECTION OF WORKERS WHO MAKE DISCLOSURES OF CERTAIN INFORMATION IN THE PUBLIC INTEREST AND TO PROVIDE FOR RELATED MATTERS.

Explanatory Note

The Long Title of the Bill will be considered further in consultation with the Office of the Parliamentary Counsel.

Head 1 – Short Title

Provide for a short title

1. *This Act may be cited as the Protected Disclosures in the Public Interest Act, 2011; and*
2. *This Act will have immediate effect following enactment.*

Explanatory Note

It is proposed that the Bill will have immediate effect once enacted.

Head 2 – Definitions

Provide for definitions used in the Bill

In this Act,

“Civil Service” means the Civil Service of the Government and the Civil Service of the State;

“contravene” includes failure to comply, and also includes

- (a) *attempting to contravene,*
- (b) *aiding and abetting and counselling and procuring a person to commit a contravention,*
- (c) *inducing, or attempting to induce, a person (whether by threats or promises or otherwise) to commit a contravention,*
- (d) *being (directly or indirectly) knowingly concerned in, or a party to, a contravention, and*
- (e) *conspiring with others to commit a contravention;*

“worker”

- (a) means an individual who has entered into or works under (or, where the employment has ceased, worked under)
 - (i) a contract of employment, or
 - (ii) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual
- (b) works or worked for a person in circumstances in which -
 - (i) he or she is or was introduced or supplied to do that work by a third person, and
 - (ii) the terms on which he or she is or was engaged to do the work are or were in practice substantially determined not by him or her but by the person for whom he or she works or worked, by the third person or by both of them,
- (c) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person,
- (d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than-
 - (i) under a contract of employment, or
 - (ii) by an educational establishment on a course run by that establishment,

and any reference to a worker's contract, to employment or to a worker being "employed" shall be construed accordingly.

"eligible disclosure" has the meaning assigned to it by Head 4

"employer" in relation to a worker, means the person with whom the worker has entered into or for whom the worker works under (or, where the employment has ceased, entered into or worked under) a contract of employment, and includes—

- (a) a person (other than a worker employed by that person) under whose control and direction a worker works, and
- (b) where appropriate, the successor of the employer or an associated employer of the employer;

"environment" has the meaning given to it by the elements contained within Article 2 of EU Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC;

"impropriety" means any conduct which falls within the categories referred to in subsections (a) to (i) of Head 4;

"Minister" means Minister for Public Expenditure and Reform

"Minister of the Government" is a Minister appointed under Article 13 of the Constitution by the President;

"penalisation" mean any act or omission by an employer, or by a person acting on behalf of an employer, that affects a worker to his or her detriment with respect to any term or condition of his or her employment and, without prejudice to the generality of the foregoing, includes –

- a) suspension, lay-off, or dismissal,
- b) demotion or loss of opportunity for promotion,
- c) transfer of duties, change of location of place of work, reduction in wages or change in working hours,
- d) the imposition or the administering of any discipline, reprimand or other penalty (including a financial penalty),
- e) unfair treatment including selection for redundancy
- .f) coercion, intimidation or harassment,
- g) discrimination, disadvantage or adverse treatment,
- h) injury, damage or loss, and
- i) reprisal;

"dismissal" includes a dismissal within the meaning of the Unfair Dismissals Acts 1977 to 2007, and a dismissal wholly or partly for or connected with the purpose of the

avoidance of a fixed-term contract being deemed to be a contract of indefinite duration under section 9(3) of the Protection of Employees (Fixed-Term Work) Act 2003;

“enactment” has the same meaning as in the Interpretation Act 2005;

“office holder” means—

- (a) the President,
- (b) the holder of a qualifying office,
- (c) a member of either House of the Oireachtas,
- (d) a member of the judiciary,
- (e) a military judge appointed under Chapter IVC of Part V of the Defence Act 1954 (as amended by the Defence (Amendment) Act 2007),
- (f) a member of a local authority within the meaning of the Local Government Act 2001, or
- (g) a member of the European Parliament for a constituency in the State, being a member who is in receipt of the salary specified in section 2(2) of the European Parliament (Irish Constituency Members) Act 2009;

“personal gain” excludes any reward payable by or under any enactment;

“qualifying office” has the same meaning as it has in section 13 (inserted by the Oireachtas (Allowances to Members) and Ministerial, Parliamentary and Judicial Offices (Amendment) Act 1977) of the Ministerial and Parliamentary Offices Act 1938, that is to say

- (a) a ministerial office within the meaning of that section as amended by the Oireachtas (Allowances to Members) and Ministerial and Parliamentary Offices (Amendment) Act 1973), or
- (b) a secretarial office within the meaning of that section as amended by the Oireachtas (Allowances to Members) and Ministerial, Parliamentary and Judicial Offices (Amendment) Act 1983 and the Ministerial, Parliamentary and Judicial Offices and Oireachtas Members (Miscellaneous Provisions) Act 2001);

“relevant body” means -

- (a) the Central Bank of Ireland
- (b) the Competition Authority
- (c) the Comptroller and Auditor General,
- (d) the Data Protection Commissioner,
- (e) the Environmental Protection Agency,
- (f) the Garda Síochána
- (g) the Health Information and Quality Authority ,
- (h) the Health and Safety Authority,
- (i) the Information Commissioner,

- (j) the National Consumer Agency
- (k) the Office of the Director of Corporate Enforcement
- (l) the Ombudsman,
- (m) the Standards in Public Office Commission,
- (n) the Revenue Commissioners
- (o) the National Employment Rights Authority
- (p) such other body or person that the Minister may prescribe by order under Head 6;

“public servant” means a person who is employed by, or who holds any office or other position in, a public service body but does not include an office holder;

“public service body” means

- (a) the Civil Service,
- (b) the Garda Síochána,
- (c) the Permanent Defence Force,
- (d) a local authority for the purposes of the Local Government Act 2001,
- (e) the Health Service Executive,
- (f) the Central Bank of Ireland,
- (g) a vocational education committee established under section 7 of the Vocational Education Act 1930,
- (h) a body established -
 - (i) by or under an enactment (other than the Companies Acts), or
 - (ii) under the Companies Acts in pursuance of powers conferred by or under another enactment, and financed wholly or partly by means of money provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or on behalf of a Minister of the Government, in respect of which a public service pension scheme exists or applies or may be made,
- (i) a body (other than a body specified or referred to in the Schedule) that is wholly or partly funded directly or indirectly out of money provided by the Oireachtas or from the Central Fund or the growing produce of that Fund and in respect of which a public service pension scheme exists or applies or may be made,
- (j) any subsidiary of, or company controlled (within the meaning given by section 10 of the Taxes Consolidation Act 1997) by, a body to which paragraph (d), (e), (f), (g), (h) or (i) relates and in respect of which a public service pension scheme exists or applies or may be made.

Explanatory Note

The definitions are either standard definitions drawn from Irish legislation or are based on definitions used in the UK and / or South African protected disclosure legislation.

Head 3 – Purpose of Act

Provide for the purpose of the Act.

The objects of the Act are to

- (a) promote in the public interest the disclosure of information in appropriate circumstances relating to unlawful conduct or other misconduct by an employer;
- (b) provide procedures in terms of which a worker can in a responsible manner disclose such information;
- (c) protect a worker whether in the private or public sector from being subjected to an occupational detriment on account of disclosing in a prescribed manner information relating to unlawful or other misconduct by an employer;
- (d) make available certain remedies providing redress for workers who suffer detriment as a consequence of having made a protected disclosure.

Explanatory Note

It is considered essential that the Bill contains a statement of purposes in order to provide a clear overall context to the detailed provisions contained in the legislation.

The Head sets out these as being:-

- *the promotion in the public interest of the disclosure of information relating to unlawful or other misconduct by an employer*
- *the provision of specific procedures for such disclosures (i.e. disclosure channels)*
- *the protection of workers who make such disclosures from reprisals by their employer and*
- *provide redress for workers in such circumstances*

This Head is based on the corresponding provision in the South African Protected Disclosure Act 2000 (Section 2).

Part II

PROTECTED DISCLOSURES

- Head 4- Protected Disclosures
- Head 5 - Disclosure to employer
- Head 6 - Disclosure to Relevant Body
- Head 7 - Disclosure to a Minister
- Head 8 - Disclosure in other cases
- Head 9 - Disclosure of exceptionally serious impropriety
- Head 10 – Disclosure to a legal adviser
- Head 11 – Anonymous disclosures not protected disclosures

Head 4 – Protected disclosures

Provide that –

- (1) *A protected disclosure means any disclosure of information regarding any conduct of an employer made by a worker which in the reasonable belief of the worker making the disclosure the information concerned shows or tends to show one or more of the following :*
 - (a) *that a criminal 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 to which he or she is subject;*
 - (c) *that a miscarriage of justice has occurred, is occurring or is likely to occur;*
 - (d) *that the health and 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, corrupt, or irregular use of funds or resources of a public sector body has occurred, is occurring or is likely to occur;*
 - (g) *that an unlawful, corrupt or irregular use of public monies has occurred, is occurring or is likely to occur;*
 - (h) *that an act, omission, or course of conduct by a public official is oppressive, improperly discriminatory, or grossly negligent, or constitutes gross mismanagement;*
 - (i) *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.*
- (2) *An impropriety referred to in subhead (1) may have occurred, occurs or would occur in the State or elsewhere and the law applying to it may be that of the State or of any other country or territory.*
- (3) *A disclosure is a protected disclosure under this Act whether the impropriety occurred before the commencement of this Act or occurs thereafter*
- (4) *A disclosure is not a protected disclosure where the person making the disclosures does so knowing that the disclosure is false or misleading or where he/she made the disclosure recklessly without regard to whether it was false or misleading, frivolous or vexatious.*

Explanatory Note

This Head is closely modeled on the definition of “qualifying disclosure” contained in Section 43B of the UK Public Interest Disclosures Act 1998. This definition is also used in the South African legislation and is the definition used in the 1999 Whistleblowers Protection Bill. It sets out what is intended to be an exhaustive list of the matters in relation to which a whistleblowing complaint would be expected to arise as follows: the commission of a criminal offence; failure to comply with a legal obligation; a miscarriage

of justice; threat to health and safety; damage to the environment; misuse of public funds; public mismanagement / maladministration; concealment of any of the foregoing. The wrongdoing is not necessarily limited to the jurisdiction or needs to have occurred subsequent to the legislation coming into effect.

Head 5 – Disclosure to an Employer

Provide that -

- (1) *A disclosure made in good faith by a worker in relation to any of the matters set out in Head 4*
- (a) *to his or her employer,*
- or*
- (b) *where the worker reasonably believes that the impropriety relates solely or mainly to-*
- (i) *the conduct of a person other than his or her employer, or*
- (ii) *any other matter for which a person other than his or her employer has legal responsibility,*
- to that other person*
- is a protected disclosure for the purposes of this Act.*
- (2) *A worker who, in accordance with a procedure whose use by him or her is authorised by his employer, makes a protected disclosure to a person other than his or her employer, is to be treated for the purposes of this Act as making the protected disclosure to his employer.*

Explanatory Note

An eligible disclosure qualifying as a protected disclosure made to an employer must in the first instance relate to an impropriety identified in Head 4. In addition the worker must have a reasonable belief that allegation is true and make the disclosure in good faith. The Head also relates to a disclosure made by an agency worker or contractor made to the responsible person. In addition, 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

Provide that -

- (1) A disclosure made in good faith by a worker, which the worker reasonably believes is substantially true, to a relevant body where the impropriety falls within any description of matters prescribed by the Minister in respect of that body is a protected disclosure for the purposes of this Act.*
- (2) A relevant body which is of the opinion that the protected disclosure relates to a matter would be more appropriately dealt with by another such body must render such assistance to the worker concerned as is necessary to enable him or her to make the protected disclosure to that other body.*
- (3) The Minister may, by order, prescribe such body or person to be a relevant body for the purposes of this head.*

Explanatory Note

Where a “regulator” is classified as a Relevant Body under this legislation (or is prescribed) it is important to note that there is no requirement that (a) the particular disclosure was reasonable; (b) the malpractice was serious; nor (c) the worker should have first raised the matter internally. However, the worker must meet a higher evidential burden than in the case of internal whistleblowing. For an eligible disclosure made to a relevant body or to a person prescribed by the Minister to be a protected disclosure, the worker must reasonably believe the disclosure to be substantially true.

Head 7–Disclosure to a Minister

Provide that -

A disclosure made by a worker in a public body, in good faith, in relation to any of the matters set out in Head 4 to a Minister of the Government on whom statutory functions stand conferred for that public body is a protected disclosure for the purposes of this Act.

Explanatory Note

Workers in State bodies are protected if they report their concerns in good faith to the sponsoring Department rather than to their employer. Legally a disclosure to a Department is what this section refers to as a disclosure to a Minister.

Head 8 – Disclosure in other cases

Provide that –

- (1) Subject to Heads 21 and 22, a disclosure made by a worker in good faith in relation to any of the matters set out in Head 4 where he or she
 - (a) reasonably believes that the information disclosed, and any allegation contained in it, are substantially true and wishes to disclose the information so that the serious wrongdoing can be investigated*
 - (b) the disclosure is not made for personal gain and*
 - (c) any of the conditions in subsection (2) is met, and*
 - (d) making the disclosure is in all the circumstances of the case reasonable is a protected disclosure for the purpose of this Act.**

- (2) The conditions referred to in subsection (1) (c) are
 - (a) that, at the time he or she makes the disclosure, the worker reasonably believes that he will be subjected to penalisation and detriment by his or her employer if he or she makes a disclosure to his or her employer under Head 5,*
 - (b) that, in a case where no relevant body is prescribed for the purposes of Head 6 in relation to the impropriety, the worker reasonably believes that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes a disclosure to his or her employer, or*
 - (c) that the worker has previously made a disclosure of substantially the same information -
 - (i) to his or her employer, or*
 - (ii) in accordance with Head 5, 6 or 7 in respect of which he or she reasonable believes that no action was taken in relation to the protected disclosure within a reasonable period after the disclosure was made.***

- (3) In determining for the purposes of subsection (1)(d) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to
 - (a) the identity of the person to whom the disclosure is made,*
 - (b) the seriousness of the impropriety,*
 - (c) whether the impropriety is continuing or is likely to occur in the future,*
 - (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer of that worker to any other person*
 - (e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with Heads 5, 6 or 7 was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and*
 - (f) in a case falling within subsection (2) (c)(i), whether in making the disclosure to the employer of the worker concerned he or she complied with any procedure whose use by him was authorised by the employer**

- (4) For the purposes of this Head a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous*

disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

Explanatory Note

This section sets out the circumstances in which other disclosures, including those to the media, may be protected. 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.

Provide that -

(1) A disclosure relating to any of the matters set out in Head 4 made by a worker in good faith under heads 5,6, 7 or 8 where

- (a) he or she reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,*
- (b) the disclosure is not made for personal gain,*
- (d) the impropriety is of an exceptionally serious nature, and*
- (e) in all the circumstances it is reasonable to make the disclosure.*

will be a protected disclosure for the purposes of this section

(2) In determining for the purposes of subsection (1) (d) whether it is reasonable to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

Explanatory Note

This Head provides that other disclosures of exceptionally serious improprieties may be protected, even though they do not meet the conditions in the previous Heads.

Head 10 - Disclosure to a legal adviser

Provide that -

A disclosure made by a worker

(a) to a legal practitioner or a person whose occupation involves the giving of legal advice

and

(b) with the object of and in the course of obtaining legal advice

is a protected disclosure for the purposes of this Act.

Explanatory Note

This Head enables a worker to seek legal advice about a concern and to be fully protected in doing so. It should be noted that 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 not protected disclosures

Provide that –

A disclosure made anonymously shall not be a protected disclosure for the purposes of this Act.

Explanatory Note

Important safeguards are provided in Heads 15 and 16 to protect the confidentiality of a worker making a protected disclosure. It is not considered appropriate or practical that a worker 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

Head 13 – Immunity from civil liability

Head 14 - Tortious liability of person for victimisation

Head 15 – Immunity from criminal proceedings

Head 12 – Protection of workers from penalisation by employer

Provide that -

- (1) An employer shall not penalise or threaten penalisation against a worker, or cause or permit any other person to penalise or threaten penalisation against a worker
 - (a) for having made a protected disclosure, unless the worker
 - (i) in making the disclosure did so knowing it to be false or misleading, or*
 - (ii) in connection with the disclosure, furnished information that he or she knew to be false or misleading,**
 - (b) for giving evidence in any proceedings under this Act or under any of the enactments set out in Schedule 1, or*
 - (c) for giving notice of his or her intention to do any of the things referred to in paragraph (a) or (b).**
- (2) Paragraphs (a), (b), (c), (d) and (e) of the definition of “penalisation” in Head 2 shall not be construed in a manner which prevents an employer from
 - (a) ensuring that the business concerned is carried on in an efficient manner, or*
 - (b) taking any action required for economic, technical or organisational reasons.**
- (3) Schedule 4 has effect in relation to an alleged contravention of subsection (1) and matters consequential on such a contravention.*
- (4) In proceedings under Schedule 4 before a rights commissioner or the Labour Court in relation to a complaint that subsection (1) has been contravened, it shall be presumed, until the contrary is proved, that the worker concerned acted reasonably and in good faith in making a protected disclosure.*
- (5) Any person who, upon examination on oath or affirmation authorised under paragraph 3(1) of Schedule 5, wilfully makes any statement which is material for that purpose and which the person knows to be false or does not believe to be true commits an offence and is liable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or both.*
- (6) A person to whom a notice under paragraph 3(2) of Schedule 4 has been given and who refuses or wilfully neglects to attend in accordance with the notice or who, having so attended, refuses to give evidence or refuses or wilfully fails to produce any document to which the notice relates commits an offence and is liable on summary conviction to a class A fine.*
- (7) Proceeding in respect of offences under subsections 5 or 6 shall be initiated by the Minister.*
- (8) A document purporting to be signed by the chairperson or a deputy chairperson of the Labour Court stating that-*

- (a) a person named in the document was, by a notice under paragraph 3(2) of Schedule 4, required to attend before the Labour Court on a day and at a time and place specified in the document, to give evidence or produce a document, or both, and*
- (b) a sitting of the Labour Court was held on that day and at that time and place, and the person did not attend before the Labour Court pursuant to the notice or, having so attended, refused to give evidence or refused or wilfully failed to produce the document, shall, in a prosecution of the person under subsection (6) or (7), be evidence of the matters so stated without further proof unless the contrary is shown.*

Explanatory Note

The protections to be provided under this Part covers protection against possible penalisation or detriment to workers especially those in relation to protection from dismissal or disciplinary and other more subtle forms of reprisal, retaliation and discrimination. The full range of issues covered is set out under the definition of ‘penalisation’ under Head 2. The text is based on S.35 (1) of Central Bank (Supervision and Enforcement) Bill, 2011.

Head 13 – Immunity from civil liability

Provide that -

- (1) A worker shall not be liable in damages in respect of the making of a protected disclosure under this Act.*
- (2) Subhead (1) does not apply in respect of a worker who
 - (a) makes a disclosure knowing it to be false or misleading, or*
 - (b) in connection with a disclosure, furnishes information that the person knows to be false or misleading**
- (3) The reference in subhead (1) to liability in damages shall be read as including a reference to liability to any other form of relief*
- (4) This Head is in addition to, and not in substitution for, any privilege or defence available in legal proceedings by virtue of any other enactment or rule of law.*

Explanatory Note

Immunity from civil liability for workers who make or wish to make protected disclosure is a critical underpinning for the effectiveness of the Act. Equivalent provisions are already included in all of the sectoral and horizontal legislation in Ireland in relation to whistleblowing.

Head 14 - Tortious liability of person for victimisation

Provide that -

(1) If a person causes detriment to another person (in this section referred to as the “second-mentioned person”) because the second-mentioned person

(a) made a protected disclosure, unless he or she —

(i) in making the protected disclosure did so knowing it to be false or misleading, or

(ii) in connection with the disclosure, furnished information that he or she knew to be false or misleading,

(b) gave evidence in any proceedings under this Act or under any of the enactments set out in Schedule 1, or

(c) gave notice of his or her intention to do any of the things referred to in paragraph (a) or (b), the second-mentioned person has a right of action in tort against the person who causes the detriment.

(2) In this section, “detriment” includes—

(a) intimidation or harassment,

(b) discrimination, disadvantage or adverse treatment in relation to a person’s employment,

(c) injury, damage or loss, or

(d) a threat of reprisal.

(3) A worker may not pursue a right of action under this Head and under any provision of any other enactment in respect of the same matter.

Explanatory Note

Section 36 of the Central Bank (Supervision and Enforcement) Bill 2011, is considered to provide an additional and strong protection for a person making a protected disclosure.

In addition to the protections from civil liability and the retributive action of an employer already provided for this provision provides a legal protection against the actions of a third party who, 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

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 an 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.

The full detail of the particular provision is to be worked out in consultation with other relevant Departments and subject to the legal advice of the Attorney General in the context of the drafting of the Bill.

Explanatory Note

Further consideration can be given in the detailed drafting of the Bill to whatever amendments to the Official Secrets Act and other legislation may be required to ensure that highly sensitive and secret official information is safeguarded in a manner which facilitates the effective operation of the protected disclosure regime.

Part IV

MISCELLANEOUS PROVISIONS

Head 15 - Confidentiality

Head 16 - Other protections preserved

Head 17 - Legal professional privilege

Head 18 - No contracting out of Act

Head 19 – Technical failure to comply with or refer to Act

Head 16 - Confidentiality

Provide that -

(1) Every person to whom a protected disclosure is made or referred must use his or her best endeavours not to disclose information that might identify the worker who made the protected disclosure unless—

(a) that worker consents in writing to the disclosure of that information; or

(b) the person who has acquired knowledge of the protected disclosure reasonably believes that disclosure of identifying information—

(i) is essential to the effective investigation of the allegations in the protected disclosure; or

(ii) is essential to prevent serious risk to public health or public safety or the environment; or

(iii) is essential having regard to the principles of natural justice.

Explanatory Note

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

Provide that -

This Act does not limit any protection, privilege, immunity, or defence, whether statutory or otherwise, relating to the disclosure of information.

Explanatory Note

This Bill does not seek to limit or transcend existing privileges, rights obligations or requirements set out in Irish law.

Head 18 – Legal professional privilege

Provide that -

A disclosure of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is not a protected disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

Explanatory Note

This provision means that if a legal adviser cannot be compelled in court to give evidence about a matter, neither he or she 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 or her 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 Act

Provide that -

(1) Any provision in an agreement to which this Head applies is void in so far as it purports to preclude the worker from making a protected disclosure.

(2) This Head applies to any agreement whatsoever between a worker and his or her employer, whether a worker's contract or not, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.

Explanatory Note

A provision of this nature is necessary to obviate a situation where an employer might seek to 'buy off' a complainant or introduce contractual clauses that might limit the operation of the Act.

Head 20 – Technical failure to comply with Act

Provide that -

- (1) A disclosure of information is not prevented from being a protected disclosure for the purposes of this Act merely because —*
- (a) of a technical failure to comply with Part II if the worker has substantially complied with the requirements to disclose the information in accordance with that part, or*
 - (b) the worker does not expressly refer to the title of this Act or the relevant provisions thereof when the disclosure is made.*
- (2) This section applies despite anything to the contrary expressed or implied in the relevant internal procedures*

Explanatory Note

If a worker reports an impropriety 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. It is based on the Protected Disclosures Act, 2000 New Zealand

Part V

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

Head 21 – Definitions for this Part

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

Head 23 – Disclosures relating to Law Enforcement

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

Head 25 – Redress for members of the Garda Síochána

Head 26 Public service organisations to establish and publish as appropriate their internal procedures for enabling the making of a protected disclosure under the Bill

Head 21- Definitions for this part

Provide as follows;

Add the following definition;

Intelligence, security, defence and international relations shall be construed as provided in Head 21 Subsection (1).¹

Law enforcement and public safety shall be construed as provided in Head 22, Subsection (1).²³

Insert a new paragraph (e) in the definition of worker as follows

(e) includes employee as defined in the Terms of Employment Act 1994.

Explanatory Note

The addition of the new paragraph (e) is to confirm the comprehensive nature of the scope of coverage of all workers including the members of a Garda Síochána and the members of the Defence Force.

¹ Modelled on Section 24 of the Freedom of Information Act, 1997

² Modelled on Section 23 of the Freedom of Information Act, 1997

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

Provide for special restricted procedures for a disclosure of information concerning security, intelligence, defence or international relations. The class of employees covered by this Section will mainly come from An Garda Síochána, The Defence Forces, some Civil Servants and possibly wider groups of public servants.

The suggested head would include the following elements;

(1) A disclosure of information will not constitute a protected disclosure for the purposes of Head 6 (i.e. disclosure to a relevant body) Head 8 or Head 9 (i.e. which both relate to wider external / public disclosure) if the disclosure of this information (and, in particular, but without prejudice to the generality otherwise of this subsection, to information to which subsection (2) applies) could reasonably be expected to affect adversely

- (a) the security of the State,*
- (b) the defence of the State,*
- (c) the international relations of the State, or*
- (d) matters relating to Northern Ireland.*

(2) This subsection applies to information that was obtained or prepared for the purpose of intelligence in respect of the security or defence of the State, or

(a) that relates to

- (i) the tactics, strategy or operations of the Defence Forces in or outside the State, or*
- (ii) the detection, prevention, or suppression of activities calculated or tending to undermine the public order or the authority of the State (which expression has the same meaning as in section 2 of the Offences against the State Act, 1939),*

(b) contains a communication between a Minister of the Government and a diplomatic mission or consular post in the State or a communication between the Government or a person acting on behalf of the Government and another government or a person acting on behalf of another government,

(c) contains a communication between a Minister of the Government and a diplomatic mission or consular post of the State,

(d) contains information communicated in confidence to any person in or outside the State from any person in or outside the State and relating to a matter referred to in

subsection (1) or to the protection of human rights and expressed by the latter person to be confidential or to be communicated in confidence,

(e) contains information communicated in confidence from, to or within an international organisation of states or a subsidiary organ of such an organisation or an institution or body of the European Union or relates to negotiations between the State and such an organisation, organ, institution or body or within or in relation to such an organisation, organ, institution or body, or

(f) is a record of an organisation, organ, institution or body referred to in paragraph (e) containing information the disclosure of which is prohibited by the organisation, organ, institution or body.

(3)(1) A disclosure of information that relates to the matters which are the subject of subsection (1) above (i.e. security, defence, intelligence or international relations) shall not be a protected disclosure unless:-

(i) an internal disclosure under Head 5 is made to the Head of the public body concerned; or

(ii) the disclosure complies with the requirements of Head 7; or

(iii) the disclosure is made to the complaints referee reporting to [the Taoiseach] appointed in accordance with this section

(4) This section will also provide for the appointment, terms and conditions, tenure of Office and roles and responsibilities of the proposed complaints referee in investigating protected disclosures made to him/her;⁴

Explanatory Note

Special rules and procedures are necessary for all public bodies and agencies including the Garda Síochána and the Defence Forces who have access to secret and highly sensitive information relevant to the maintenance of the security of the State. This Head introduces certain necessary limitations on the internal channels through which such disclosures can be made and also excludes any wider external public disclosures of such information while maintaining the key principle embodied in the proposed legislation of potential access to an independent third party by providing for a new disclosure channel to a “complaints referee” [reporting to the Taoiseach] for protected disclosures made in relation to these issues. The proposed complaints referee is based on the system in place under the Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993

⁴ Modelled on Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993

The provisions of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 (No. 10/1993; Section 193 of the UK Employment Rights Act (as amended by the Employment Relations Act 1999 and the Protected Disclosures Act, 2000 New Zealand are relevant to this Head as well as Section 24 of the Freedom of Information Act, 1997.

Head 23– Disclosures relating to Law Enforcement etc.

Provide for specific restricted procedures for any wider public disclosure of information relating to law enforcement and disclosures relating to certain other matters (e.g. security of particular communication systems or of a penal institution).

The suggested head would include the following elements;

(1) Disclosure of information will not constitute a protected disclosure for the purposes of Head 8 if the disclosure of this information could reasonably be expected to

(a) prejudice or impair

(i) the prevention, detection or investigation of offences, the apprehension or prosecution of offenders or the effectiveness of lawful methods, systems, plans or procedures employed for the purposes of the matters aforesaid,

(ii) the enforcement of, compliance with or administration of any law,

(iii) lawful methods, systems, plans or procedures for ensuring the safety of the public and the safety or security of persons and property,

(iv) the fairness of criminal proceedings in a court or of civil proceedings in a court or other tribunal,

(v) the security of a penal institution,

(vi) the security of any system of communications, whether internal or external, of the Garda Síochána, the Defence Forces, or a penal institution,

(b) reveal or lead to the revelation of the identity of a person who has given information to a public body in confidence in relation to the enforcement or administration of the law or any other source of such information given in confidence, or

(c) facilitate the commission of an offence.

(2) Subsection (1) does not apply to a disclosure of information that an investigation for the purpose of the enforcement of any law, or anything done in the course of such an investigation or for the purposes of the prevention or detection of offences or the apprehension or prosecution of offenders, is not authorised by law or contravenes any law, or

(3)(1) A disclosure of information that relates to the matters which are the subject of subsection (2) above shall not be a protected disclosure under Head 8 and Head 9 unless in addition to the requirements set out in that Head:-

(i) the disclosure is made to a Member of Dail Eireann and

(ii) a disclosure of substantially the same information has already been made in accordance with Head 6 to the relevant external investigatory authority, for example in the case of a member of the Garda Síochána, the Garda Síochána Ombudsman Commission in respect of which the person making the protected disclosure reasonable believes that no action was taken in relation to the protected disclosure within a reasonable period after the disclosure was made

Explanatory Note

In order to safeguard the integrity of criminal investigations it is proposed that any scope for outside disclosure would be limited strictly to a Member of Dáil Éireann with no potential for a general outside disclosure (e.g. to the media).

Disclosure to a Member of Dail Eireann under the strict conditions set out in this Head provides an essential outside disclosure channel for a potential whistleblower which it is expected would enable further, final independent pursuit of very serious allegations of wrongdoing by individual members of the Garda Síochána contained in a protected disclosure.

Special provisions will apply in respect of the procedures to be followed in relation to a disclosure under subsection (2) to ensure that such disclosure does not conflict or prejudice the provisions of subsection (1). For example, a disclosure could only be made to a Member of Dáil Éireann where it did not prejudice a criminal investigation on the basis that the criminal investigation is not authorised by law or being carried out in contravention of any law.

In addition, it is proposed that prior to making a disclosure to a Member of Dáil Éireann the disclosure must have been made to the relevant external investigatory body (e.g. in the case of the Garda Síochána, the Garda Síochána Ombudsman Commission). The internal procedures to be put in place for all public bodies could provide for guidance on what might constitute a “reasonable period” under subsection 3(1)(ii).

A disclosure of information made in relation to law enforcement other than to these disclosure channels cannot be a protected disclosure.

The restricted basis on which an outside disclosure can be made in relation to law enforcement matters is considered fully appropriate on the basis of the very strong statutory framework provided by the Garda Síochána Ombudsman Commission in relation to the investigation of misconduct by individual members of the Garda Síochána.

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

Provide for the:-

establishment of a “complaints referee” to act as a “Relevant Body” under Head 6 for the investigation of protected disclosures made by Members of the Defence Forces and .

consequential amendments to the Garda Síochána legislation required to allow the Garda Síochána Ombudsman Commission to directly receive and investigate protected disclosures made to it by members of the Garda Síochána under Head 6

Explanatory Note

There is currently no party to which it would be appropriate for a protected disclosure to be made under Head 6 by a Member of the Defence Forces. This Head will, therefore, provide for the establishment of a “complaints referee” for this purpose or the role will be introduced in legislation brought forward separately by the Department of Defence.

An amendment to the Garda Síochána Act may also be required in order to allow the Garda Síochána Ombudsman Commission receive protected disclosures in accordance with Head 6 directly from Members of the Garda Síochána in circumstances that the protected disclosure is not made in accordance with ‘confidential recipient’ regime provided for under Regulations made under Section 124 of the Garda Síochána Act, 2005.

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

Provide for a redress system equivalent to that contained in Schedule 4 for employees in general for Garda Síochána personnel in relation to any protected disclosure made under the provisions of this Bill. Such a system could be provided for in this Bill or in appropriate sectoral legislation. The redress of wrongs system in the Defence Forces and particularly, the Ombudsman for the Defence Forces would be expected to meet this requirement for any members of the Defence Forces that experience reprisals on account of having made a protected disclosure.

Head 26 – Public sector bodies to establish and publish internal procedures

Provide that all public sector organisations (including the Garda Síochána and the Defence Forces) must establish and publish internal procedures for protected disclosures.

The suggested text is as follows;

(1) Every public sector organisation shall have in operation appropriate internal procedures for receiving and dealing with information about a serious impropriety in or by that organisation.

Explanatory Note

The requirement for the development and publication of internal procedures would be expected, in particular, to help inform and guide members for the Garda Síochána and the Defence Forces of the circumstances and conditions under which it may be appropriate for them to seek to make a protected disclosure in relation, for example, to security, intelligence, and defence matters or the conduct of a criminal investigation and to ensure that the proposed stepped disclosure channel mechanism is used to best effect. The extent to which internal procedures have been followed is under Head 8 of the draft Heads an important consideration in determining whether a protected disclosure can be made within the wider external disclosure channel.

SCHEDULE 1

SECTORAL WHISTLEBLOWER LEGISLATION ALREADY IN PLACE

| Item (1) | Number and year (2) | Short Title (3) |
|----------|---------------------|---|
| 1. | No. 49 of 1998 | Protections For Persons Reporting Child Abuse Act 1998 |
| 2. | No. 31 of 2001 | Standards in Public Office Act 2001 |
| 3. | No. 14 of 2002 | Competition Act 2002 |
| 4. | No. 16 of 2006 | Employment Permits Act 2006 |
| 5. | No. 19 of 2007 | Consumer Protection Act 2007 |
| 6. | No. 22 of 2007 | Communications Regulations Amendment Act 2007 ⁵ |
| 7. | No. 23 of 2007 | Health Act 2007 ⁶ |
| 8. | No. 13 of 2008 | Chemicals Act 2008 |
| 9. | No. 6 of 2009 | Charities Act 2009 |
| 10. | No. 34 of 2009 | National Asset Management Agency Act 2009 |
| 11. | No. 38 of 2009 | Labour Services (Amendment) Act 2009 ⁷ |
| 12. | No. 10 of 2010 | Inland Fisheries Act 2010 |
| 13. | No. 33 of 2010 | Prevention of Corruption (Amendment) Act 2010 ⁸ |
| 14. | No. 22 of 2011 | Criminal Justice Act 2011 |
| 15. | No. 40 of 2011 | Property Services(Regulation) Act 2011 |
| 16. | S.I. 168 of 2007 | Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007 |

⁶ The whistleblowing provisions in this Act are an insertion into the health Act 2002

⁷ The whistleblowing provisions in this Act are an insertion into the Labour Services Act 1987

⁸ The whistleblowing provisions in this Act are an insertion into the Prevention of Corruption (Amendment) Act 2001

SCHEDULE 2

REPEALS

| Item (1) | Number and year (2) | Short Title (3) | Extent of repeal (4) |
|----------|---------------------|--|--|
| 1. | No. 15 of 1987 | Labour Services Act 1987 | Sections 13B(2) and 13B(3) as inserted by Section 7 of the Labour Services (Amendment) Act 2007. |
| 2. | No. 49 of 1998 | Protections For Persons Reporting Child Abuse Act 1998 | Sections 4(2), 4(3), 4(4), 4(5), 4(6) and 4(7). |
| 3. | No. 27 of 2001 | Prevention of Corruption (Amendment) Act 2001 | Sections 8A(6), 8A(7), 8A(8), 8A(9), 8A(10), 8A(11), 8A(12), 8A(13), 8A(14), 8A(15) and Schedule 1 as inserted by Section 4 of the Prevention of Corruption (Amendment) Act 2010. |
| 4. | No. 31 of 2001 | Standards in Public Office Act 2001 | Sections 5(3), 5(4) and 5(5) |
| 5. | No. 14 of 2002 | Competition Act 2002 | Section 50(4) and Schedule 3 |
| 6. | No. 42 of 2004 | Health Act 2004 | Sections - 55M(2), 55M(3), 55M(4), 55M(5), 55M(6), 55M(7), 55M(8), 55M(9), 55M(10), 55M(11), 55M(12), 55M(13), 55M(14), 55M(15), 55M(16), 55M(17), 55N, 55O, 55P, 55Q as inserted by Section 103 of the Health Act 2007. |
| 7. | No. 16 of 2006 | Employment Permits Act 2006 | Sections 26(1), 26(2), 26(4), 26(5), and Schedule 2. * |
| 8. | No. 19 of 2007 | Consumer Protection Act 2007 | Section 87(4) and Schedule 6 |
| 9. | No. 13 of 2008 | Chemicals Act 2008 | Sections 26(2), 26(3), 26(4), 26(5), 26(6) and 26(7) |
| 10. | No. 6 of 2009 | Charities Act 2009 | Sections 62(2), 62(3), 62(4), 62(5), 62(6), 62(7) and 62(8). |
| 11. | No. 34 of 2009 | National Asset Management Agency Act 2009 | Section 223(4) , 223(5) and Schedule 2. |
| 12. | No. 10 of 2010 | Inland Fisheries Act 2010 | Sections 38(2), 38(3), 38(4) and Schedule 4. |
| 13. | No. 22 of 2011 | Criminal Justice Act 2011 | Sections 20(2), 20(3), 20(4) , 20(5), 20(6) and Schedule 2. |
| 14. | No. 40 of 2011 | Property Services (Regulation) Act 2011 | Sections 67(5), 67(6), 67(7), 67(8), 67(9), 67(10), 67(11), 67(12), 67(13), 67(14) and Schedule 4 |

* Repeal of Schedule 2 in its entirety needs to be confirmed with E,T&E.

SCHEDULE 3

AMENDMENTS TO CERTAIN OTHER ACTS

PART 1

AMENDMENT OF LABOUR SERVICES ACT 1987

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|---|
| 1. | Section 13 | Insert the following subsection into Section 13B as inserted by Section 7 of the Labour Services (Amendment) Act 2007 – “(2) Where an employee makes a communication in accordance with the provisions of section 13A of this Act such communication shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.” |

PART 2

AMENDMENT OF PROTECTIONS FOR PERSONS REPORTING CHILD ABUSE ACT 1998

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|--|
| 1. | Section 4 | Insert the following subsection - “(2) Where an employee makes a communication in accordance with the provisions of this section such disclosure in shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.” |

PART 3

AMENDMENT OF PREVENTION OF CORRUPTION (AMENDMENT) ACT 2001

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---|---|
| 1. | Section 8A as inserted by Section 4 of the Prevention of Corruption (Amendment) Act 2010. | (a) Insert the following subsection – “8A(6) Where an employee makes a communication in accordance with the provisions of section 8A(5) of this such communication shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.” (b) Renumber Section 8A(16) as Section 8A(7) |

PART 4

AMENDMENT OF STANDARDS IN PUBLIC OFFICE ACT 2001

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|--|
| 1. | Section 5 | Insert the following subsection - “(3) Where an employee makes a complaint in accordance with the provisions of this section such complaint shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.” |

PART 5

AMENDMENT OF COMPETITION ACT 2002

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|--|
| 1. | Section 50 | Insert the following subsection - “(4) A communication made by an employee in accordance with the provisions of this section shall be regarded as a protected disclosure for the purposes of the Protected Disclosures in the Public Interest Act 2012. ” |

PART 6

AMENDMENT OF COMMUNICATIONS REGULATION ACT 2002

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---|---|
| 1. | Section 24B as inserted by Section 7 of the Communications Regulation (Amendment) Act 2007 and amended by Section 45 of the Communications Regulation (Postal Services) Act 2011. | Insert the following subsection into Section 24B – “(3) Where an employee makes a disclosure in accordance with the provisions of section 24A(2) of this Act such disclosure shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.” |

PART 7

AMENDMENT OF HEALTH ACT 2004

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|---|
| 1. | Section 55 | <p>(a) Replace Section 55K(1) as inserted by Section 103 of the Health Act 2007 with the following -</p> <p>“(1) Where an employee makes a disclosure in accordance with the provisions of section 55B, 55C, 55D, 55E, 55F or 55G such disclosure shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.”</p> <p>(b) Redesignate section 55R as inserted by Section 103 of the Health Act 2007 as Section 55N</p> <p>(c) Redesignate section 55S as inserted by Section 103 of the Health Act 2007 as Section 55O</p> <p>(d) Redesignate section 55T as inserted by Section 103 of the Health Act 2007 as Section 55P</p> |

PART 8

AMENDMENT OF EMPLOYMENT PERMITS ACT 2006

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|---|
| 1. | Section 26 | <p>(a) Renumber Section 26(3) as 26(1)</p> <p>(b) Insert the following subsection</p> <p>“(2) Where an employee makes a complaint, gives evidence or gives notice in relation to any of the matters set out in this section such complaint, giving of evidence or giving of notice of shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.”</p> |

PART 9**AMENDMENT OF CONSUMER PROTECTION ACT 2007**

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|--|
| 1. | Section 87 | Insert the following subsection - “(4) Where an employee makes a communication in accordance with the provisions of this section such communication shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.” |

PART 10**AMENDMENT OF CHEMICALS ACT 2008**

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|--|
| 1. | Section 26 | Insert the following subsection “(2) Where an employee makes a communication in accordance with the provisions of Section 25 of this Act such communication shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.” |

PART 11**AMENDMENT OF CHARITIES ACT 2009**

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|--|
| 1. | Section 62 | Insert the following subsection “(2) Where an employee makes a communication in accordance with the provisions of Section 61 of this Act such communication shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.” |

PART 12**AMENDMENT OF NATIONAL ASSET MANAGEMENT AGENCY ACT 2009**

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|--|
| 1. | Section 223 | <p>Insert the following subsection</p> <p>“(4) Where an employee makes a communication in accordance with the provisions of section 222 of this Act such communication shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.”</p> |

PART 13**AMENDMENT OF INLAND FISHERIES ACT 2010**

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|---|
| 1. | Section 38 | <p>Insert the following subsection</p> <p>“(2) Where an employee makes a communication in accordance with the provisions of section 37 of this Act such communication shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.”</p> |

PART 14**AMENDMENT OF CRIMINAL JUSTICE ACT 2011**

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|---|
| 1. | Section 20 | <p>(a) Insert the following subsection -</p> <p>“(2) Where an employee makes a disclosure, gives evidence or gives notification of intent in accordance with the provisions of this section such disclosure, notification or giving notice of intent shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.”</p> <p>(b) Insert the following subsection -</p> <p>“(3) “disclosure”, in relation to an employee, means a disclosure by the employee to a member of the Garda Síochána of information which he or she knows or believes might be of material assistance in—</p> <p>(a) preventing the commission by any other person of a relevant offence, or</p> <p>(b) securing the apprehension, prosecution or conviction of any other person for a relevant offence;”</p> |

PART 15

AMENDMENT OF PROPERTY SERVICES (REGULATION) ACT 2011

| Item (1) | Provision Affected (2) | Amendment (3) |
|-------------|---------------------------|--|
| 1. | Section 67 | Insert the following subsection “(5) Where an employee makes a communication in accordance with the provisions of subsection (1) such communication shall be regarded as a “protected disclosure” for the purposes of the Protected Disclosures in the Public Interest Act 2012.” |

SCHEDULE 4

REDRESS FOR CONTRAVENTION OF HEAD 12

Complaints to rights commissioner.

1. (1) A worker (or, in the case of a worker who has not reached the age of 18 years, the worker's parent or guardian with his or her consent) or, with the consent of the worker, any trade union of which the worker is a member may present a complaint to a rights commissioner that the worker's employer has contravened Head 12 in relation to the worker.
- (2) Where a complaint under *subparagraph (1)* is made, the rights commissioner shall—
 - (a) give the parties an opportunity to be heard by the commissioner and to present to the commissioner any evidence relevant to the complaint,
 - (b) give a decision in writing in relation to it, and
 - (c) communicate the decision to the parties.
- (3) A decision of a rights commissioner under *subparagraph (2)* shall do one or more of the following:
 - (a) declare that the complaint was or was not well founded;
 - (b) require the employer to take a specified course of action, which may include, in a case where the penalisation constitutes a dismissal within the meaning of Head 12 re-instatement or re-engagement;
 - (c) require the employer to pay to the worker compensation of such amount (if any) as is just and equitable having regard to all the circumstances, but not exceeding 2 years' remuneration in respect of the worker's employment calculated in accordance with regulations under section 17 of the Unfair Dismissals Act 1977.
- (4) The references in *clauses (b) and (c) of paragraph (3)* to an employer shall be construed, in a case where ownership of the business of the employer changes after the contravention to which the complaint relates occurred, as references to the person who, by virtue of the change, becomes entitled to such ownership.
- (5) Subject to *subparagraph (7)*, a rights commissioner shall not entertain a complaint under this paragraph if it is presented to him or her after the expiration of the period of 6 months beginning on the date of the contravention to which the complaint relates.
- (6) Notwithstanding *subparagraph (5)*, a rights commissioner may entertain a complaint under this paragraph presented to him or her after the expiration of the period referred to in *subparagraph (5)* (but not later than 6 months after such expiration) if he or she is satisfied that the failure to present the complaint within that period was due to exceptional circumstances.

- (7) Where a delay by a worker in presenting a complaint under this paragraph is due to any misrepresentation by the employer, *subparagraph (5)* shall be construed as if the reference to the date of the contravention were a reference to the date on which the misrepresentation came to the worker's notice.
- (8) A complaint shall be presented by giving notice of it in writing to a rights commissioner and the notice shall contain such particulars and be in such form as may be specified from time to time by the Minister for Jobs, Enterprise and Innovation.
- (9) A copy of a notice under subparagraph (8) shall be given to the other party concerned by the rights commissioner concerned.
- (10) Proceedings under this paragraph before a rights commissioner shall be conducted otherwise than in public.
- (11) A rights commissioner shall furnish the Labour Court with a copy of each decision given by the commissioner under subparagraph (2).

Appeals from decisions of rights commissioner.

2. (1) A party concerned may appeal to the Labour Court from a decision of a rights commissioner under paragraph 1(2) and, if the party does so, the Labour Court shall—
 - (a) give the parties an opportunity to be heard by it and to present to it any evidence relevant to the appeal,
 - (b) make a determination in writing in relation to the appeal affirming, varying or setting aside the decision, and
 - (c) communicate the determination to the parties.
- (2) An appeal under this paragraph shall be initiated by the party concerned giving, within 6 weeks (or such greater period as the Labour Court may determine in the particular circumstances) from the date on which the decision to which it relates was communicated to the party, a notice in writing to the Labour Court containing such particulars as are determined by the Labour Court under *clauses (e) and (f)* (in so far as it relates to the said *clause (e)*) of *subparagraph (4)* and stating the intention of the party concerned to appeal against the decision.
- (3) A copy of a notice under *subparagraph (2)* shall be given by the Labour Court to any other party concerned as soon as practicable after the receipt of the notice by the Labour Court.
- (4) The Labour Court shall determine the following matters and the procedures to be followed in relation to them:
 - (a) the procedure in relation to all matters concerning the initiation and the hearing by the Labour Court of appeals under this paragraph;

- (b) the times and places of hearings of such appeals;
 - (c) the representation of the parties to such appeals;
 - (d) the publication and notification of determinations of the Labour Court;
 - (e) the particulars to be contained in a notice under *subparagraph (2)*;
 - (f) any matters consequential on, or incidental to, the foregoing matters.
- (5) The Labour Court may refer a question of law arising in proceedings before it under this paragraph to the High Court for its determination and the determination of the High Court shall be final and conclusive.
- (6) A party to proceedings before the Labour Court under this paragraph may appeal to the High Court from a determination of the Labour Court on a point of law and the determination of the High Court shall be final and conclusive.

Paragraphs 1 and 2: supplemental provisions.

3. (1) The Labour Court shall, on the hearing of any appeal referred to it under *paragraph 2*, have power to take evidence on oath or on affirmation and for that purpose may cause persons attending as witnesses at that hearing to swear an oath or make an affirmation.
- (2) The Labour Court may, by giving notice in that behalf in writing to any person, require such person to attend at such time and place as is specified in the notice and—
- (a) to give evidence in relation to any matter appealed to the Labour Court under *paragraph 2*, or
 - (b) to produce any document specified in the notice relating to the matter in the person's possession or power, or both.
- (3) A witness at a hearing of an appeal before the Labour Court has the same privileges and immunities as a witness before the High Court.
- (4) Where—
- (a) a decision of a rights commissioner in relation to a complaint under this Schedule has not been carried out by the employer concerned in accordance with its terms, and
 - (b) the time for bringing an appeal against the decision has expired and no such appeal has been brought or, if such an appeal has been brought, it has been abandoned, the worker concerned may bring the complaint before the Labour Court and the Labour Court shall, without hearing the employer concerned or any evidence (other than in relation to the matters aforesaid), make a determination to the like effect as the decision.
- (5) The bringing of a complaint before the Labour Court under *subparagraph (4)* shall be effected by giving to the Labour Court a written notice containing such particulars (if any) as may be determined by the Labour Court.

- (6) The Labour Court shall publish, in a manner it considers appropriate, particulars of any determination made by it under any of *clauses (a), (b), (c), (d), (e) and (f) of subparagraph (4) of paragraph 2* (not being a determination as respects a particular appeal under that paragraph) and *subparagraph (5)*.
- (7) (a) If penalisation of a worker, in contravention of Head 12, constitutes a dismissal of the worker, as referred to in *paragraph (a) of the definition of “penalisation” in Head 12*, the worker (or, in the case of a worker who has not reached the age of 18 years, the worker’s parent or guardian with his or her consent) may institute proceedings in respect of that dismissal under the Unfair Dismissals Acts 1977 to 2007 or to recover damages at common law for wrongful dismissal and, if the worker or his or her parent or guardian, as the case may be, does so, such dismissal may not be presented to a rights commissioner under *paragraph 1(1)*.
- (b) If a worker (or, in the case of a worker who has not reached the age of 18 years, the worker’s parent or guardian with his or her consent) presents a complaint to a rights commissioner under *paragraph 1(1)* in respect of a dismissal referred to in *clause (a)*, the worker or his or her parent or guardian, as the case may be, may not institute proceedings in respect of that dismissal under the Unfair Dismissals Acts 1977 to 2007 or to recover damages at common law for wrongful dismissal.

Enforcement of determinations of Labour Court.

4. (1) If an employer fails to carry out in accordance with its terms a determination of the Labour Court in relation to a complaint under paragraph 1 within 28 days from the date on which the determination is communicated to the parties, the Circuit Court shall, on application made to it in that behalf by—
- (a) the worker concerned (or, in the case of a worker who has not reached the age of 18 years, the worker’s parent or guardian with his or her consent), or
- (b) with the consent of the worker, any trade union of which the worker is a member, without hearing the employer or any evidence (other than in relation to the matters aforesaid), make an order directing the employer to carry out the determination in accordance with its terms.
- (2) The reference in *subparagraph (1)* to a determination of the Labour Court is a reference to a determination in relation to which, at the expiration of the time for bringing an appeal against it, no such appeal has been brought or, if such an appeal has been brought, it has been abandoned, and the reference in that subparagraph to the date on which the determination is communicated to the parties shall, in a case where such an appeal is abandoned, be read as a reference to the date of such abandonment.

- (3) In an order under this paragraph providing for the payment of compensation, the Circuit Court may, if in all the circumstances it considers it appropriate to do so, direct the employer concerned to pay to the worker concerned interest on the compensation (at the rate per annum standing specified for the time being in section 26 of the Debtors (Ireland) Act 1840) for each day or part of a day beginning 28 days after the day on which the determination of the Labour Court is communicated to the parties and ending on the day the order is made.
- (4) An application under this paragraph to the Circuit Court shall be made to the judge of the Circuit Court for the circuit in which the employer concerned ordinarily resides or carries on any profession, trade, business or occupation.

Provisions relating to winding-up and bankruptcy.

5. (1) There shall be included among the debts which, under section 285 of the Companies Act 1963 are, in the distribution of the assets of a company being wound-up, to be paid in priority to all other debts, all compensation payable by virtue of a decision under *paragraph 1(2)(b)* or a determination under *paragraph 2(1)* by the company to an worker, and that Act shall have effect accordingly. Formal proof of the debts to which priority is given under this subparagraph shall not be required except in cases where it may otherwise be provided by rules made under that Act.
- (2) There shall be included among the debts which, under section 81 of the Bankruptcy Act 1988 are, in the distribution of the property of a bankrupt or arranging debtor, to be paid in priority to all other debts, all compensation payable by virtue of a decision under *paragraph 1(2)(b)* or a determination under *paragraph 2(1)* by the bankrupt or arranging debtor, to a worker, and that Act shall have effect accordingly. Formal proof of the debts to which priority is given under this subparagraph shall not be required except in cases where it may otherwise be provided under that Act.

Amendment of Protection of Employees (Employers' Insolvency) Act 1984

1. Section 6 of the Protection of Employees (Employers' Insolvency) Act 1984 (as amended by Schedule 5 to the Property Services (Regulation) Act 2011) is amended
 - (a) in subsection (2)(a) -
 - (i) in subparagraph (xxviii), by substituting "that Schedule, and" for "that Schedule."
 - and
 - (ii) by inserting after subparagraph (xxviii) the following:

“(xxix) any amount which an employer is required to pay by virtue of a decision of a rights commissioner under paragraph (1)(2)(b) of Schedule 4 to the Protected Disclosures in the Public Interest Act 2012, or a determination by the Labour Court under paragraph 2(1)(b) of that Schedule.”,

(b) in subsection 2(b), by substituting “, (xxviii) or (xxix)” for “or (xxviii)”,

(c) in subsection 2(c), by substituting “, (xxviii) or (xxix)” for “or (xxviii)”, and

(d) in subsection (9), in the definition of “relevant date”, by substituting “, (xxviii) or (xxix)” for “or (xxviii)”.

Explanatory Note

(Reproduced from the Central Bank (Supervision and Enforcement) Bill 2011 as initiated)

It is essential to ensure that an appropriate level of redress is available to workers in both the public and private sectors workers and that accessible mechanisms are available to workers to allow them to access such redress. Already a substantial body of work has been done in relation to the level of redress and access routes for private Sector Workers who may have suffered detriment because of making a protected disclosure. The Central Bank (Supervision and Enforcement) Bill, 2011 and the Criminal Justice Act 2011 are the most recent examples in this regard. With regard to civil servants, earliest indications are that part 6 of the Civil Service Regulation (Amendment) Act 2005 applies the Unfair Dismissals legislation to civil servants. However, paragraph (a) (which inserts a new paragraph (h) into subsection 2(1) of the Unfair Dismissals Act 1977) excludes persons employed by the State and dismissed by Government. This means that Secretaries General, Heads of Office and anyone else dismissed by Government cannot take an unfair dismissals claim. Prima facie, this suggests that civil servants, subject to the limited exceptions above, can be given the same avenues and levels of redress as private sector workers under the proposed Protected Disclosures in the Public Interest Bill.