



An Roinn Caiteachais
Phoiblí agus Athchóirithe
Department of Public
Expenditure and Reform

Protected Disclosures Act

Interim guidance for public bodies and
prescribed persons

November 2022

Contents

| | |
|---|-----------|
| Disclaimer | 4 |
| Foreword..... | 5 |
| 1. Introduction..... | 6 |
| 2. Definitions used in the Guidance..... | 7 |
| 3. Legal basis for the Guidance | 9 |
| 4. Key Principles Informing the Guidance..... | 10 |
| 5. Requirement for and benefits of Procedures..... | 11 |
| 6. Protected Disclosures Procedures – Overview | 13 |
| 6.1 Responsibility | 13 |
| 6.2 Policy Statement | 13 |
| 6.3 Application | 14 |
| 6.4 Awareness | 14 |
| 7. What is a Protected Disclosure? | 15 |
| 7.1 A Worker | 15 |
| 7.2 Relevant Wrongdoings | 16 |
| 7.3 Disclosure of information | 17 |
| 7.4 Reasonable belief | 18 |
| 7.5 In a work-related context | 19 |
| 7.6 Reports that may not be protected disclosures | 19 |
| 8. Making a Protected Disclosure | 22 |
| 8.1 Overview | 23 |
| 8.2 Disclosure to the employer | 23 |
| 8.3 Disclosure to another responsible person | 24 |
| 8.4 Disclosure to prescribed persons | 25 |
| 8.5 Disclosure to a Minister | 28 |
| 8.6 Disclosure to the Protected Disclosures Commissioner | 28 |
| 8.7 A legal adviser | 31 |
| 8.8 Disclosure to other third parties | 31 |
| 8.9 Disclosure in the area of law enforcement, security, defence, international relations and intelligence | 31 |
| 9. Establishing Reporting Channels..... | 32 |
| 9.1 Legal requirements | 32 |
| 9.2 Minimum requirements for channels | 32 |
| 9.3 Design of reporting channels | 33 |
| 9.4 Appointment of designated persons | 34 |

| | | |
|------------|--|-----------|
| 9.5 | Oversight and co-ordination of information | 36 |
| 9.6 | Record keeping, data protection and FOI | 37 |
| 10. | Acknowledgement, Assessment and Investigation | 40 |
| 10.1 | Acknowledgement | 40 |
| 10.2 | Assessment | 41 |
| 10.3 | Investigation | 43 |
| 10.4 | Review | 47 |
| 11. | Feedback | 49 |
| 11.1 | Timing of Feedback | 49 |
| 11.2 | Content of Feedback | 50 |
| 11.3 | Communication of final outcome | 51 |
| 12. | Protections under the Act | 52 |
| 12.1 | Protection against Penalisation | 52 |
| 12.2 | Preventing penalisation | 54 |
| 12.3 | Confidentiality & Protection of Identity | 55 |
| 12.4 | Motivation and disciplinary record of reporting persons | 57 |
| 12.5 | Criminal Offences | 58 |
| 13. | Implementation and Review of Procedures | 59 |
| 13.1 | Consultation & Provision of Information & Training | 59 |
| 13.2 | Support and Advice | 60 |
| 13.3 | Adaptation of Procedures – Evaluation & Review | 61 |
| 13.4 | Non-restriction of Rights | 61 |
| 14. | Annual Reports | 62 |
| 15. | Review of this Guidance..... | 64 |
| | Appendix A: Information that should be included in a disclosure | 65 |
| | Appendix B: Checklist for protected disclosures procedures | 66 |
| B.1 | Internal Channels | 66 |
| B.2 | External Channels | 69 |
| | Appendix C: Ministerial Reporting Channel | 71 |
| C.1 | Overview | 71 |
| C.2 | Conditions for reporting to a Minister | 71 |
| C.3 | Design of the Ministerial reporting channel | 72 |
| C.4 | Operation of the Ministerial reporting channel | 73 |
| C.5 | Information to be published | 74 |

Disclaimer

This Guidance does not constitute legal advice, or a legal interpretation of the Protected Disclosures Act 2014 (as amended). Where bodies are uncertain regarding the interpretation of the Act or its application, legal advice should be sought where necessary.

Foreword

The Protected Disclosures (Amendment) Act 2022 will commence operation on **1 January 2023**.

This new legislation makes significant changes to the operation of the legal framework for the protection of whistleblowers in Ireland, the Protected Disclosures Act 2014. These changes have important implications for employers in the public and private sectors and for persons prescribed under section 7 of the Act.

In advance of commencement, this interim Guidance has been prepared to assist public sector employers and prescribed persons in implementing the new requirements of the amended legislation as regards the establishment and operation of internal and external reporting channels. It is essential that these channels are put in place in advance of the commencement date.

Following commencement, this interim Guidance will be issued as formal Statutory Guidance by the Minister for Public Expenditure and Reform in accordance with section 21 of the revised Act. The Department is open to receiving comments and suggestions on this Guidance from public sector employers and prescribed persons with a view to further revision before it is formally issued by the Minister. Submissions can be made in this regard to: PDconsultation@per.gov.ie.

While this Guidance is intended primarily to assist the public sector in the implementation of the Act, private sector employers subject to the requirements of the Act to establish reporting channels may find this Guidance of use, insofar as it applies to the design and operation of internal reporting channels.

Government Reform Unit
Department of Public Expenditure and Reform
November 2022

1. Introduction

The Protected Disclosures Act 2014 (the “**Act**”) protects workers from retaliation if they speak up about wrongdoing in the workplace. Persons who make protected disclosures (sometimes referred to as “**whistleblowers**”) are protected by this law. They should not be treated unfairly or lose their job because they have made a protected disclosure.

This Guidance revises and updates the previous Statutory Guidance, which was issued in 2015 following the enactment of the Act. In the intervening years, much experience has been gained regarding the operation of the Act, in both the public and private sectors.

In 2019, the European Union adopted Directive 2019/1937 on the protection of persons who report breaches of Union Law (the “**Directive**”). The Directive introduces a common EU regime for the protection of persons who report breaches of EU law, and sets out, among other things, procedures for reporting channels, follow up of reports of breaches, prohibition of penalisation and provisions in relation to confidentiality. While many of the protections set out in the Directive were already provided for under the Act, an amendment to the legislation was required to implement all of the Directive’s provisions. The Protected Disclosures (Amendment) Act 2022 was signed into law on 21 July 2022 and will commence operation on 1 January 2023.

As well as transposing the provisions of the Directive, the amended Act takes into account lessons learned since 2014. In particular, it seeks to address a number of issues raised in the 2018 Statutory Review of the Act and by certain rulings concerning the Act in the Workplace Relations Commission and the courts.

The Act also introduces the Office of the Protected Disclosures Commissioner and appoints the Ombudsman as the Protected Disclosures Commissioner (the “**Commissioner**”). The Commissioner will have a role in the handling of external reports made under section 7 of the Act (as amended) and reports made to Ministers under section 8 of the Act.

2. Definitions used in the Guidance

Making a “**protected disclosure**” refers to a situation where a person who is in a work-based relationship with an organisation discloses information in relation to wrongdoing that the person has acquired in the context of current or past work-related activity. This is sometimes referred to as “**whistleblowing**”. For the purposes of this Guidance such a person is referred to as a “**worker**” or “**reporting person**” and disclosing information in relation to alleged wrongdoing in accordance with the Act is referred to as “**making a report**” or “**making a disclosure**”.

The Act provides specific remedies for reporting persons who are penalised for making a protected disclosure. For the purpose of this Guidance the term “**penalisation**” includes dismissal and any act or omission causing detriment to a reporting person. Penalisation can be caused not only by the reporting person’s employer but also the reporting person’s co-workers or otherwise in a work-related context. The Act provides significant forms of redress for penalisation and other loss.

A disclosure made under this Act may name persons alleged to be involved in or otherwise connected with the wrongdoing reported. Such persons – referred to as “**persons concerned**” – also have certain protections under the Act.

Persons who assist the reporting person in making a disclosure are also entitled to certain protections under the Act. These persons are referred to as “**facilitators**”.

Section 6 of the Act provides that a reporting person may make a disclosure to their employer. This is referred to as “**internal reporting**”. Where the employer has set up a formal channel and procedures for their employees to make disclosures, this is referred to as an “**internal reporting channel**”.

Section 7 of the Act provides that a reporting person may make a disclosure to a person designated by the Minister for Public Expenditure and Reform (“**the Minister**”). Such persons – most of whom are the heads of statutory regulatory or supervisory authorities – are referred to as “**prescribed persons**”.

The Act also provides that a reporting person who is uncertain as to whom the most appropriate prescribed person they can report to may make a disclosure under Section 7 to the “**Protected Disclosures Commissioner**” (“**the Commissioner**”). The Commissioner also has a role under the Act in assessing and referring all disclosures made to Ministers of the Government and Ministers of State.

Where a reporting person makes a disclosure under Section 7 of the Act to a prescribed person or the Commissioner, this is referred to as “**external reporting**”. Prescribed persons

and the Commissioner are required to establish formal “**external reporting channels**” and procedures for reporting persons to make disclosures to them.

Where a public body or a prescribed person is required to establish an internal reporting channel or an external reporting channel or both, a “**designated person**” must be assigned with responsibility for the operation of the channel(s).

Under the Act, the Commissioner may transmit disclosures to third parties, other than prescribed persons, who the Commissioner considers to be the most appropriate persons to follow-up on the information reported. Such persons are referred to as “**suitable persons**”.

3. Legal basis for the Guidance

Section 21(1) of the Act provides that the Minister for Public Expenditure and Reform may issue guidance to assist public bodies, prescribed persons, the Commissioner and suitable persons in the performance of their functions under the Act. The Minister may also issue guidance in respect of the information that must be published setting out how disclosures may be made to Ministers of the Government or Ministers of State.

This Guidance is issued with the aim of assisting the persons referred to above when establishing and maintaining reporting channels and procedures for the making of protected disclosures and for dealing with such reports of disclosures (referred to in this Guidance as “**Procedures**”).

Subsection (2) provides that the persons referred to above “*shall have regard to*” this Guidance when establishing and maintaining such Procedures. This means that while the channels and procedures should be tailored according to the specific business needs of the organisations concerned, they should be in general conformity with the principles set out in this Guidance.

4. Key Principles Informing the Guidance

The following key principles inform this Guidance:

- All reports of wrongdoing in the workplace should, as a matter of routine, be the subject of an initial assessment and any appropriate follow-up action;
- The focus of the process should primarily be on the wrongdoing reported, and whether it is a relevant wrongdoing, and not on the reporting person;
- The identity of the reporting person and any person concerned should be adequately protected; and
- Provided that the reporting person discloses information relating to a relevant wrongdoing, in an appropriate manner, and based on a reasonable belief, no question of penalisation should arise.

If those principles are respected, there should be no need for reporting persons to access the protections and redress contained in the Act.

5. Requirement for and benefits of Procedures

The Act requires all public bodies¹ to establish, maintain and operate internal reporting channels and Procedures to allow for the making of disclosures and for follow-up.

Similarly, prescribed persons and the Commissioner are required to establish, maintain and operate independent external reporting channels and Procedures for the making of disclosures and for follow-up.

For public bodies, having in place appropriate Procedures is central to encouraging workers to make disclosures internally to their employer in the first instance.

Internal disclosures facilitate public bodies in, for example:-

- deterring wrongdoing in the public service;
- ensuring early detection and remediation of potential wrongdoing;
- reducing the risk of external disclosure of confidential information;
- demonstrating to interested stakeholders, regulators, the courts and the public that the public body is accountable and managed effectively;
- improving trust, confidence and morale of workers in the public body;
- building a responsible and ethical organisational culture; and
- limiting the risk of reputational and financial damage.

Having appropriate Procedures in place is also a factor that a Court or an Adjudication Officer in the Workplace Relations Commission may consider when hearing a claim alleging penalisation for having made a protected disclosure and when determining if it was reasonable for a reporting person to make an alternative external report of a disclosure.

¹ A “public body” is defined in the Act as:

- (a) A Department of State;
- (b) A Local Authority;
- (c) Any other entity established by or under any enactment (other than the Companies Acts), statutory instrument or charter or any scheme administered by a Minister of the Government;
- (d) A company (within the meaning of the Companies Acts), a majority of shares are held by or on behalf of a Minister of the Government;
- (e) A subsidiary (within the meaning of the Companies Act) of such a company;
- (f) An entity established or appointed by the Government or a Minister of the Government;
- (g) Any entity (other than one within paragraph (e)) that is directly or indirectly controlled by an entity within any of the paragraphs (b) to (f);
- (h) An entity on which any functions are conferred by or under any enactment (other than the Companies Acts), statutory instrument or charter; or
- (i) An institution of higher education (within the meaning of the Higher Education Authority Act 197) in receipt of public funding.

Having appropriate Procedures in place provides a safe platform for reporting persons who wish to make a protected disclosure to do so in the confidence that they have the protections of the Act.

6. Protected Disclosures Procedures – Overview

6.1 Responsibility

Overall responsibility for Procedures for internal reporting should rest with the head of the public body. In the case of a Government Department, this should be the Secretary General. In other public bodies, it should be the chief executive (or the person who holds an equivalent role to that of a chief executive).

Overall responsibility for Procedures for external reporting should rest with the person designated as the prescribed person under the Protected Disclosures Act. Similarly overall responsibility for Procedures for handling reports received or referred to the Office of the Protected Disclosures Commissioner lie with the Protected Disclosures Commissioner.

Oversight of Procedures should rest with the Board of the public body, the Management Board of the Government Department, and the equivalent body in the prescribed person.

Day-to-day responsibility for Procedures should be delegated to an appropriate function of the public body or prescribed person with the requisite authority, independence, knowledge and expertise to operate the Procedures correctly. This is a matter for individual public bodies and prescribed persons to consider in the context of their own particular structures and resources.

Public bodies should also consider appointing a senior individual in the organisation to “champion” the protected disclosures process, and to promote and drive cultural change and a change in attitudes to protected disclosures among all employees of the body.

6.2 Policy Statement

Each public body should incorporate as part of its Procedures a succinct policy statement confirming the Board / Management commitment to creating a workplace culture that supports the making of protected disclosures and provides protection for reporting persons. The policy statement should also cover the workplace disclosure options available and the protections available for reporting persons.

Prescribed persons and the Commissioner should include a similar policy statement in their Procedures, confirming that protections are provided for reporting persons, what these are and how they can be accessed, and the alternative options for making a report that are available.

6.3 Application

The Procedures should set out clearly to whom they apply.

For public bodies, the Procedures should apply to all workers as defined in section 3 of the Act, which includes current and former employees, independent contractors, trainees, agency staff, volunteers, board members, shareholders and job candidates.

For prescribed persons, the Procedures should apply to all workers who wish to report a relevant wrongdoing that relates to the matters for which they have been designated a prescribed person by the Minister under statutory instrument. These matters should be clearly set out in the Procedures.

Legal advisors, where information comes to their attention while providing legal advice, are excluded from the protections of the Act.² Where a claim to legal professional privilege could be maintained in respect of such information, it will not be a protected disclosure if it is disclosed by the legal advisor. This is the position whether the legal advisor is employed or not employed by the public body.

6.4 Awareness

Public bodies should ensure that information on how to access and use the internal reporting channel and copies of the Procedures applying to the internal channel are easily accessible to their workers. Public bodies should actively promote the existence of the internal reporting channel to their workers.

Prescribed persons and the Commissioner should ensure that information on how to access and use their external reporting channels is easily available to the public, by publishing this information on their website. Prescribed persons should actively promote the existence of the external reporting channel among workers in the sectors they regulate or supervise.

Public bodies, prescribed persons and the Commissioner should also provide information as to where workers can seek independent advice and support if they are considering making a protected disclosure or have made a protected disclosure. Exchequer funding is provided to Transparency International Ireland for the provision of a free Speak-Up Helpline and Legal Advice Centre in the regard. Advice and support may also be available from workers' trade unions as well as Citizens' Advice.

² Section 5(6) of the Protected Disclosures Act 2014

7. What is a Protected Disclosure?

A protected disclosure, in the Act, is a **disclosure of information** which, in the **reasonable belief** of a **worker**, tends to show one or more **relevant wrongdoings**; came to the attention of the worker in a **work-related context**; and is disclosed in the manner prescribed in the Act.

The Procedures should contain guidance on what is meant by the following terms.

7.1 A Worker

For the purposes of the Act a worker means an individual who has acquired information on a relevant wrongdoing in a work-related context.

A worker includes:

- a) an individual who is or was an employee,
- b) an individual who entered into or works or worked under any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertook to do or perform (whether personally or otherwise) any work or services for another party to the contract for the purposes of that party's business,
- c) an individual who works or worked for a person in circumstances in which
 - (i) the individual is introduced or supplied to do the work by a third person, and
 - (ii) the terms on which the individual is engaged to do the work are or were in practice substantially determined not by the individual but by the person for whom the individual works or worked, by the third person or by both of them,
- d) an individual who is or was provided with work experience pursuant to a training course or programme or with training for employment (or with both) otherwise than under a contract of employment,
- e) an individual who is or was a shareholder of an undertaking,
- f) an individual who is or was a member of the administrative, management or supervisory body of an undertaking, including non-executive members,
- g) an individual who is or was a volunteer,
- h) an individual who acquires information on a relevant wrongdoing during a recruitment process, and
- i) an individual who acquires information on a relevant wrongdoing during pre-contractual negotiations (other than a recruitment process referred to in (h) above).

Civil Servants, members of An Garda Síochána, members of the Permanent Defence Forces and members of the Reserve Defence Forces are also deemed to be workers under the Act.

Additional categories of worker are now covered under the Act, following its amendment in 2022, and these are set out at (e) to (i) above. Public bodies should note in particular the following:

- Individuals who are or were members of the administrative, management or supervisory body of an undertaking, including non-executive members are now included within the scope of the Act. This will include the members of any Board (or similar) appointed to a public body. Furthermore, in the context of local government, it is considered that members of a local authority (i.e. county/city councillors) are included in the scope of the Act by virtue of this provision. The Procedures of relevant public bodies should reflect this and provide for making of reports by this category of workers accordingly.
- Volunteers are also now within the scope of the Act. Public bodies that work with and interact with volunteers, both formally and informally, should particularly take note of this, and it should be clear that Procedures allow for reports to be made by such persons.

For the purposes of the Act, in relation to the categories of worker at (a) to (i) above, the employer of a worker is considered to be:

- a) the person with whom the worker entered into, or for whom the worker works or worked under, the contract of employment,
- b) the person with whom the worker entered into, or works or worked under, the contract,
- c) the person (i) for whom the worker works or worked, or (ii) by whom the individual is or was introduced or supplied to do the work,
- d) the person who provides or provided the work experience or training;
- e) the undertaking of which the worker is or was a shareholder,
- f) the undertaking, the administrative, management or supervisory body of which the worker is or was a member,
- g) the person for whom the individual is or was a volunteer,
- h) the person by whom or on whose behalf the recruitment process concerned is or was carried out, or
- i) the person by whom or on whose behalf the pre-contractual negotiations are or were carried out.

7.2 Relevant Wrongdoings

For the purposes of the Act, the following are relevant wrongdoings:

- a) that an 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, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services,

- c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- d) that the health or 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 or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,
- g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement,
- h) that a breach of specified EU law set out in the Directive has occurred, is occurring or is likely to occur, or
- i) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed or an attempt has been, is being or is likely to be made to conceal or destroy such information.

It is immaterial whether a relevant wrongdoing occurred, occurs or would occur in Ireland or elsewhere and whether the law applying to it is that of Ireland or that of any other country or territory.

Reports may also be made by workers of wrongdoing in respect of other relevant employment-specific or profession-specific obligations, which may not be covered by the definition of wrongdoing in section 5 of the Act and may be covered by other statutory protection for reports. The public body should consider the extent to which it is necessary to include reference to reports that tend to show relevant employment-specific or profession-specific wrongdoing and, if this is necessary, any other statutory protections and requirements that apply to such reports; any appropriate internal protections to be provided for reports that are not provided for by statute; and how reporting persons in such circumstances may be made aware of any risks that may arise for them. For example, a person may make a complaint under the Medical Practitioners Act 2007.

The term “**wrongdoing**” or “**wrongdoings**” referenced in these Guidelines is to be taken to refer to one or more of the relevant wrongdoings referenced in section 5 of the Act and Section 7.2 of this Guidance.

7.3 Disclosure of information

A protected disclosure should contain “information” which tends to show wrongdoing. The ordinary meaning of disclosing “information” is conveying facts, such as stating that particular events have occurred.

The Supreme Court has held that to qualify as a protected disclosure a statement must contain “*such information – however basic, pithy or concise – which, to use the language of ... the 2014 Act, “tends to show one or more relevant wrongdoings” on the part of the employer ...*”

and ...” *the disclosure must have “sufficient factual content and specificity” for this purpose ... even if it does merely by necessary implication* ”³. This is different to simply making an allegation on the basis of a suspicion that is not founded on anything tangible, however the general context of any statement would need to be assessed to determine if it qualified as a protected disclosure.

For example, if a worker was communicating information about the state of a hospital then a statement that "you are not complying with Health and Safety requirements" would appear to be a mere allegation that does not contain specific factual information that tends to show a relevant wrongdoing, although the context in which the statement was made would need to be considered. That statement also does not provide sufficient factual information to allow an assessment and/or investigation and further information would be useful for that purpose.

By contrast, a statement that "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around" would be more likely to include information tending to show a relevant wrongdoing. It would also be more useful to the hospital in terms of assessment, investigation and taking of appropriate action. Workers should be encouraged to provide specific factual information in any disclosure to allow the appropriate assessment and investigation of the disclosure.

Workers should be informed in the Procedures that they are not required or entitled to investigate matters themselves to find proof of their suspicion and should not endeavour to do so. All workers need to do, and should do, is disclose the information that they have, based on a reasonable belief that it discloses a wrongdoing and, where the information relates to individuals, that it is necessary to disclose that information. The responsibility for investigating and addressing any wrongdoings lies with the public body or prescribed person, not the reporting person.

7.4 Reasonable belief

A reporting person must have a reasonable belief that the information disclosed shows, or tends to show, wrongdoing. The term “reasonable belief” does not mean that the belief has to be correct. Reporting persons are entitled to be mistaken in their belief, so long as their belief was based on reasonable grounds. The High Court has determined that “*Some form of objective basis for such a belief must exist in order for it to constitute a “reasonable belief”, as required by the 2014 Act.*”⁴

It may be quite reasonable for a reporting person to believe that a wrongdoing is occurring on the basis of what he or she observes. A reporting person may not know all the facts of the

³ *Baranya v Rosderra Irish Meats Group Limited* [2022] IESC 77

⁴ *Barrett v Commissioner for An Garda Síochána & Minister for Justice & Equality* [2022] IEHC 86.

case and as noted above, the reporting person is not obliged to find proof of their suspicion. In such a case the reporting person may have reasonable grounds for believing that some form of wrongdoing is occurring, but it may subsequently turn out that the reporting person was mistaken.

The Procedures should confirm that no reporting person will be penalised simply for getting it wrong, so long as the reporting person had a reasonable belief that the information disclosed showed, or tended to show, wrongdoing.

7.5 In a work-related context

The information must come to the attention of the reporting person in a work-related context. A work-related context means current or past work activities in the public or private sector through which, irrespective of the nature of these activities, the reporting person acquires information concerning a relevant wrongdoing, and within which the reporting person could suffer penalisation for reporting the information.

This definition has been introduced by the Directive and will be subject to interpretation by the Workplace Relations Commission and the courts. However, a work-related context will include the work activities of employees and contractors, but may also include the work activities of service providers, trainees, volunteers and job candidates. It may also include activities related to work such as training, travel and employer arranged social events. The information does not need to become known as part of the reporting person's own duties, or even relate to the reporting person's own employer/contractor, as long as the information comes to the attention of the reporting person in a work-related context. The possibility of penalisation of the reporting person for reporting information will be a factor in determining if the context is a work-related context.

7.6 Reports that may not be protected disclosures

7.6.1 INTERPERSONAL GRIEVANCES

The Act is intended to deal with reports of relevant wrongdoing as defined in the Act.

A matter concerning interpersonal grievances exclusively affecting a reporting person, such as grievances about interpersonal conflicts involving the reporting person and another worker, or a complaint to the employer or about the employer which concerns the worker exclusively, is not a relevant wrongdoing for the purposes of the Act.

Care should be taken when assessing whether a potential protected disclosure concerns the worker exclusively. If the potential protected disclosure refers to information that could also apply to other workers, or other workers could also be affected, then it may be a relevant wrongdoing for the purposes of the Act.

The Procedures should confirm the distinction between an interpersonal grievance or a complaint concerning the worker exclusively, and a protected disclosure. The Procedures should also confirm that the Procedures are not intended to act as a substitute for normal day to day operational reporting or other internal employment procedures.

Interpersonal grievances should generally be dealt with under the internal grievance, or dignity at work, procedures. If a matter is raised as a protected disclosure, but following the initial assessment referred to in Section 10.2, is determined in fact to be a grievance or dignity at work issue, it should be addressed under these procedures. For example, a worker may complain that there is a dispute between the worker and a manager concerning their duties or work practices,. That type of complaint should generally be dealt with under the grievance (or equivalent) procedure. As another example,, a worker may claim that they are being bullied or harassed by a colleague. That type of complaint should generally be dealt with under the dignity at work (or equivalent) procedure. Again, care should be taken to confirm that the complaint concerns an interpersonal grievance exclusively affecting a reporting person.

Public bodies should review their grievance and dignity at work procedures and seek to align these with the Procedures relating to protected disclosures insofar as is appropriate and feasible.

If public bodies are unclear as to whether a report is an interpersonal grievance exclusively affecting a reporting person / a complaint concerning the worker exclusively, or a protected disclosure, they should consider seeking legal advice.

7.6.2 FUNCTION OF WORKER OR EMPLOYER TO DETECT WRONGDOING

Section 5(5) of the Act provides that a matter is not a relevant wrongdoing (and does not come within the terms, or attract the protections and redress of the Act) if it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer.

Even if the wrongdoing is a function of the reporting person to detect, investigate or prosecute, it will still be a protected disclosure if the wrongdoing involves an act or omission on the part of the employer. The High Court has stated that "*there are two requirements (an investigative function and misconduct other than by the employer), which must both be present to exclude something from the definition of relevant wrongdoing*"⁵.

The High Court has offered the following examples of where the exclusions may and may not apply: "*An obvious example may be where a member of An Garda Síochána reports wrongdoing by a person outside of An Garda Síochána. Such wrongdoing will not be covered by the 2014 Act where it relates to wrongdoing which it is the function of the Gardaí to detect,*

⁵ Clarke v GGI Foods [2020] IEHC 368

*investigate or prosecute and as the wrongdoing will not have been committed by the employer. Another example might be a Revenue inspector who identifies wrongdoing during the course of an audit. A disclosure of relevant information in relation to such wrongdoing would not be a protected disclosure because it is the function of the Revenue to detect, investigate and prosecute revenue wrongdoings. Where the wrongdoing relates to practices within the Gardaí or the Revenue, however, s.5(5) will not serve to exclude from the scope of s. 5(2) relevant information in relation to those practices even though the disclosure is made by a member of An Garda Síochána or a Revenue official”.*⁶

The High Court held that, as a limitation on the scope of the protection available under the 2014 Act, this exclusion falls to be narrowly construed and in general the language of “function to detect, to investigate or to prosecute” connotes either a public law role or at least an official role pursuant to a particular contractual obligation in detecting, investigating or prosecuting rather than a role which might be implied as arising from the general duties on an employer.

The High Court also held that this exclusion did not apply to the general obligation of an employer to investigate wrongdoing in the workplace, for example the obligation of an employer to investigate a health and safety complaint from an employee.

7.6.3 MANDATORY REPORTING

The Act does not oblige a worker to make a protected disclosure and it also does not absolve any worker from mandatory obligations to report contained in other legislation. There are several other pieces of legislation which contain mandatory reporting provisions and any relevant mandatory reporting requirements should be dealt with where necessary and appropriate in separate and distinct policies and procedures.

⁶ Nolan v Fingal CC [2022] IHEC 335

8. Making a Protected Disclosure

| Disclosure to | Employer (Internal report) | Prescribed person (External report) | Commissioner (External report) | Minister (Other) |
|--|--|--|---|--|
| Specific section(s) of the Act | 5, 6, 6A | 5, 7, 7A | 5, 7, 10B, 10C | 5, 8, 10D |
| Who does this apply to? | A worker of the employer. A worker of another employer where the wrongdoing relates solely/mainly to the conduct of that employer or for which the employer has legal responsibility. | A worker. | A worker. | A worker who is or was employed by a public body. |
| Conditions for protection under the Act | Came to attention in work-related context. Reasonable belief that information tends to show relevant wrongdoing. | Came to attention in work-related context. Reasonable belief that: <ul style="list-style-type: none"> Information tends to show relevant wrongdoing; Information and any allegations are substantially true; and Relevant wrongdoing relates to matter for which person is prescribed. | Came to attention in work-related context. Reasonable belief that: <ul style="list-style-type: none"> Information tends to show relevant wrongdoing; and Information and any allegations are substantially true. | Came to attention in work-related context. Reasonable belief that information tends to show relevant wrongdoing. Meets one of the following conditions: <ul style="list-style-type: none"> Has reported internally and/or externally but reasonably believes no action or insufficient follow-up action taken; Reasonably believes the Head of the public body concerned is complicit in the wrongdoing; Reasonably believes wrongdoing may constitute imminent or manifest danger to public interest. |
| Anonymous reports | Public bodies are required to accept. | Must accept unless prohibited by other legislation. | Must accept. | Must accept. |
| Method of reporting | In writing or orally or both (at choice of employer). | In writing and orally. | In writing and orally. | At choice of Minister. |
| Obligations on recipient | Acknowledge within 7 days. Diligently follow-up on information reported. Provide feedback within 3 months. Provide ongoing feedback at 3 month intervals (on request). | Acknowledge within 7 days, unless requested not to or to do so would jeopardise protection of reporting person's identity. Diligently follow-up on information reported. Provide feedback within 3 months (or 6 months in exceptional cases) Provide ongoing feedback at 3 month intervals (on request) Provide information on final outcome of any investigation triggered by report. | Acknowledge within 7 days, unless requested not to or to do so would jeopardise protection of reporting person's identity. Transmit the report within 14 days (or longer in exceptional circumstances) to: <ul style="list-style-type: none"> Such prescribed person(s) as the Commissioner considers appropriate; or Another suitable person (other than a prescribed person) as the Commissioner considers appropriate. If no prescribed person or suitable person can be identified, the Commissioner shall follow-up directly on the report in the same manner as a prescribed person. | Transmit the report to the Commissioner within 10 days of receipt. On receipt the Commissioner shall: <ul style="list-style-type: none"> Acknowledge within 7 days, unless requested not to or to do so would jeopardise protection of reporting person's identity. Transmit the report within 14 days (or longer in exceptional circumstances) to: <ul style="list-style-type: none"> Such prescribed person(s) as the Commissioner considers appropriate; or Another suitable person (other than a prescribed person) as the Commissioner considers appropriate. If no prescribed person or suitable person can be identified, the Commissioner shall follow-up directly on the report in the same manner as a prescribed person. |

Figure 1. Comparison of disclosure channels

8.1 Overview

The Procedures for both internal and external reporting should include guidance on how a worker should make a protected disclosure and what it means to make a protected disclosure in a manner prescribed by the Act. The Procedures should make it clear that the worker must make a report in the manner set out in the Act to gain the protections of the Act and that higher standards apply when the protected disclosure is made externally.

The Act provides that protected disclosures can be made internally to the worker's employer and also externally to persons other than their employer where certain conditions set out in the Act are met. Different requirements need to be met in different cases, as set out below.

Information in relation to the options available and the requirements of each option should be set out in the Procedures.

8.2 Disclosure to the employer

It should be possible in most, if not all cases, for reporting persons to make protected disclosures internally to their employer. While public bodies cannot oblige reporting persons to make a protected disclosure internally before making it externally, as noted above it is preferable and more beneficial for public bodies that reports are made internally, and the Procedures should encourage reporting persons to do so. It should be confirmed that internal reports will be taken seriously and that the reporting person will receive appropriate protection.

Public bodies should state in the Procedures to whom protected disclosures should be made within the public body.

An impartial designated person or persons must also be appointed by the public body. This designated person will be responsible for receiving and following up on reports, maintaining communication with the reporting person and where necessary, requesting further information from and providing feedback to the reporting person. See Section 9.4 for further information on designated persons.

The Procedures should state whether workers can make their reporting in writing or orally or both. If the Procedures allow for oral reporting, the public body must, on request, facilitate a physical meeting between the reporting person and the designated person for the purpose of making the report.

Public bodies should recognise that workers may raise concerns informally at first (with a line manager, for example) rather than immediately using the formal internal channels. This is particularly the case where the concern is a minor one, albeit that it may technically be a relevant wrongdoing under the Act (e.g. a minor health and safety concern). Where the line

manager is comfortable doing so, these concerns can be addressed by the line manager in the first instance.

Should a worker raise such concerns with a line manager, there is no obligation to follow the requirements in the Act regarding formal acknowledgement, follow-up, feedback, etc., since these reports are not being made through the formal channel. The line manager may need to follow up on the concern and provide feedback to the worker, but this can be done in a more informal manner.

However, it should be noted that despite a concern being raised in an informal manner with a line manager, the worker may still be entitled to the protections of the Act. Line managers should have basic awareness of the Act and the protections it provides, and should be able to direct a worker to the formal internal reporting channel if necessary.

ANONYMOUS DISCLOSURES

A public body's Procedures should draw attention to the distinction between an anonymous disclosure (where identity is withheld by the reporting person) and confidential disclosures (where identity is protected by the recipient).

Public bodies should give a commitment that anonymous disclosures will be acted upon to the extent that is possible, while recognising that they may be restricted in their ability to investigate the matter in the absence of the knowledge of the identity of the reporting person.

While affording appropriate consideration to an anonymous disclosure, public bodies should also make it clear that important elements of the public body's Procedures (e.g. keeping the reporting person informed and protecting a reporting person from penalisation) may be difficult or impossible to apply unless the reporting person discloses their identity. The Procedures should also make it clear that a reporting person cannot obtain redress under the Act without identifying themselves as part of the process of seeking redress.

Where the anonymous report contains enough information to allow an initial assessment that there is prima facie evidence that a relevant wrongdoing has occurred, follow-up action should be taken by the public body to the extent that is possible from the information provided. Where it is possible to communicate with the reporting person (e.g. they have made their report via an anonymous email account), it may be possible to seek further information from the reporting person in order to make a better initial assessment or as part of further follow-up action.

8.3 Disclosure to another responsible person

Where the worker reasonably believes that the wrongdoing relates solely or mainly to the conduct of a person other than the worker's employer, or to something for which that other person has legal responsibility, then the worker can disclose to that other person.

For example, if a public body engaged a contractor company and an employee of a contractor became aware of a relevant wrongdoing in relation to the public body in a work-related context, then it may be more appropriate for the disclosure to be made directly to the public body rather than the individual's own employer.

Public bodies should consider whether individuals for whom the public body is not an employer under the Act – such as contractors and their employees, agency workers or persons working for suppliers – should be able to report to the public body directly via its internal reporting channels, in particular where there the potential for wrongdoing presents a high financial and/or reputational and/or other serious risk to the public body.

If a report is received by a public body as a responsible person, but not through the internal channels, the report should nonetheless be dealt with in accordance with the procedures for handling internal reports.

Where a report appears to be directed to a Minister, it should be treated as a disclosure to a Minister (see Section 8.5 below and Appendix C for further guidance).

8.4 Disclosure to prescribed persons

Certain persons are prescribed by the Minister for Public Expenditure and Reform to receive protected disclosures (“**prescribed persons**”). This includes the heads or senior officials of a range of bodies involved in the supervision or regulation of certain sectors of the economy or society.

A reporting person may make a protected disclosure to a prescribed person if the reporting person reasonably believes that the relevant wrongdoing falls within the description of matters in respect of which the prescribed person is prescribed. **However, the Act also provides an additional requirement in this case in that the reporting person must reasonably believe that the information disclosed, and any allegation contained in it, are substantially true.**

Public bodies should specify in their Procedures any prescribed person who is relevant to the particular public body. The Procedures should also refer to the list of prescribed persons at <https://www.gov.ie/prescribed-persons> to enable a worker to identify the prescribed person for any other wrongdoing not relevant to the particular public body, but which has come to the attention of the worker in a work-related context.

An impartial designated person or persons must also be appointed by the prescribed person. This designated person must be responsible for providing information on making an external disclosure, receiving and following up on reports, maintaining communication with the reporting person and where necessary, requesting further information from and providing feedback to the reporting person. See Section 9.4 for further information on designated persons.

Differing requirements that apply to prescribed persons are highlighted throughout the Guidance.

ANONYMOUS DISCLOSURES

It is mandatory for prescribed persons and the Commissioner to accept and follow-up on anonymous disclosures, unless there is a specific prohibition on doing so in the prescribed person's sectoral legislation.⁷

Procedures for prescribed persons should state that they may be restricted in their ability to investigate the matter in the absence of the knowledge of the identity of the reporting person.

While affording appropriate consideration to an anonymous disclosure, prescribed persons should also make it clear that important elements of the prescribed persons Procedures (e.g. keeping the reporting person informed) may be difficult or impossible to apply unless the reporting person discloses their identity. The Procedures should also make it clear that a reporting person cannot obtain redress under the Act without identifying themselves as part of the process of seeking redress.

Where the anonymous report contains enough information to allow an initial assessment that there is prima facie evidence that a relevant wrongdoing has occurred or if communication with the reporting person is possible (e.g. via an anonymous email account), follow-up action should be taken by the prescribed person to the extent that is possible from the information provided.

⁷ For example, section 8 of the Standards in Public Office Act 2001 provides that the Standards in Public Office Commission "shall not investigate a complaint made or referred to it unless the identity of the person making the complaint is disclosed to it".

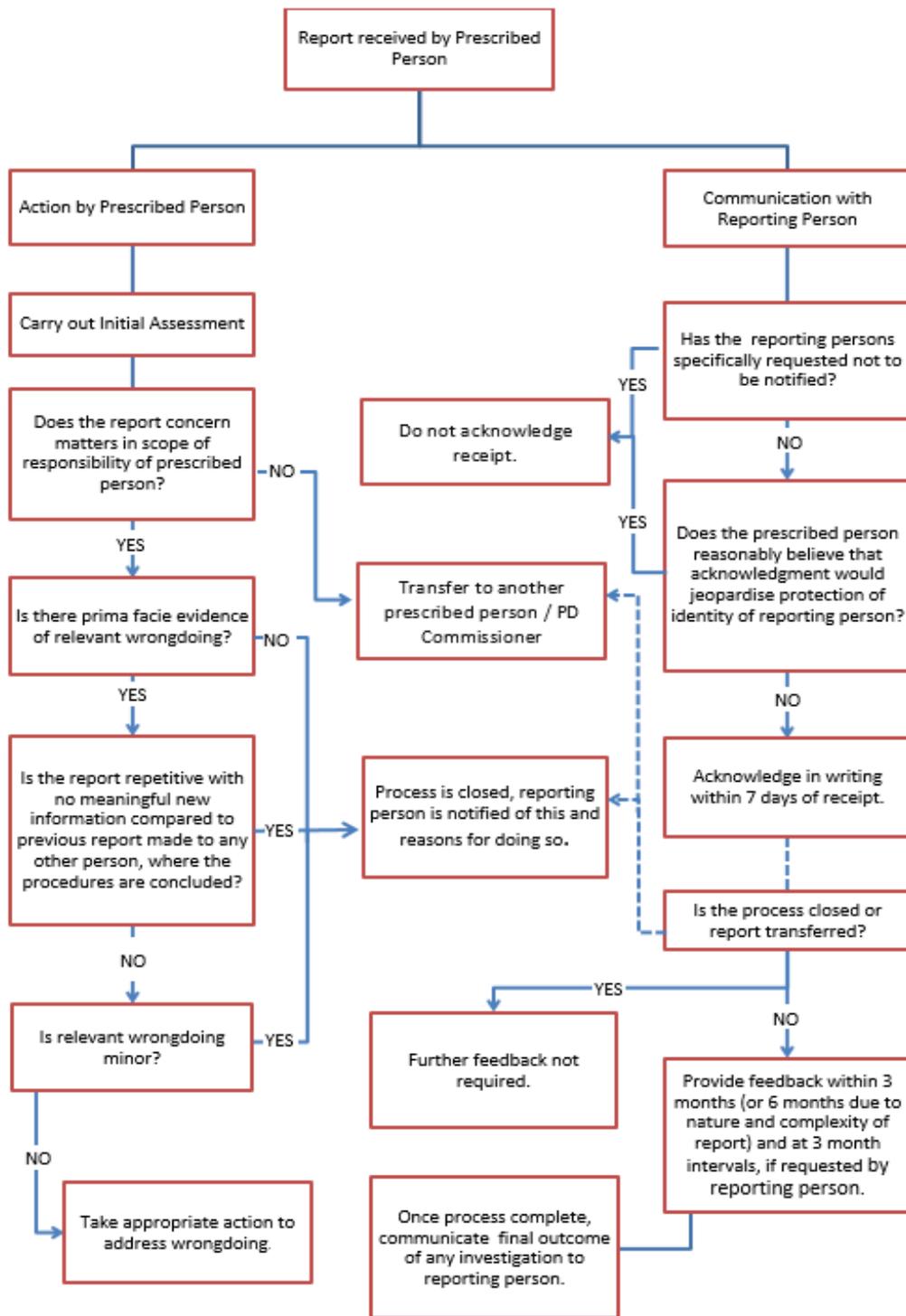


Figure 2: Flowchart for prescribed person process

8.5 Disclosure to a Minister

If a worker is or was employed in a public body, the worker may make a protected disclosure to a relevant Minister. The relevant Minister for the public body should be identified in the Procedures.

A “**relevant Minister**” is defined as a Minister with responsibility for the public body concerned in whom functions, whether statutory or otherwise, as respects the public body, are vested, or a Minister of State to whom any such function is delegated. In general, this will be the Minister for the parent department of the public body.

In order to make a disclosure to a relevant Minister, the worker must reasonably believe that the information disclosed tends to show one or more relevant wrongdoings; and one or more of the following must also apply:

- I. The worker has previously made a disclosure of substantially the same information to their employer, other responsible person, prescribed person, or relevant Minister, as the case may be, but no feedback has been provided to the worker in response to the disclosure within the period allowed, or, where feedback has been provided, the reporting person reasonably believes that there has been no follow-up or that there has been inadequate follow-up;
- II. The worker reasonably believes the head of the public body concerned is complicit in the relevant wrongdoing reported;
- III. The worker reasonably believes that the disclosure contains information about a relevant wrongdoing that may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage.

To ensure that the relevant Minister is aware of the worker’s intention, it is recommended that the worker specify when making a disclosure under this channel that it is a disclosure to the named Minister under section 8 of the Protected Disclosures Act 2014. Disclosures received by Ministers are required to be forwarded by Ministers to the Commissioner.

See Appendix C for more detailed guidance for Ministers.

8.6 Disclosure to the Protected Disclosures Commissioner

The Protected Disclosures (Amendment) Act 2022 created the Office of the Protected Disclosures Commissioner. The Commissioner has certain powers and responsibilities under the Act. The Commissioner’s primary duty is to refer any reports received under the Act to the most appropriate prescribed person (or other suitable person, if a prescribed person cannot be identified). Only as a last resort should the Commissioner directly follow-up on a report.

The Commissioner may receive disclosures by means of external reporting channels, which must meet the same criteria as the external reporting channels for prescribed persons. The Commissioner may also receive disclosures which have been transmitted onwards from Government Ministers, as per section 8.4 above.

An impartial designated person or persons must also be appointed by the Commissioner. This designated person must be responsible for providing information on making an external disclosure, receiving and following up on reports, maintaining communication with the reporting person and where necessary, requesting further information from and providing feedback to the reporting person. See Section 9.4 for further information on designated persons.

Receipt of a report

When the Commissioner receives a report, within 14 calendar days (or a longer period as deemed reasonable due to the nature and complexity of the report) the Commissioner must identify the prescribed person which the Commissioner considers appropriate and transmit the report to them.

In the alternative, the report can be transmitted to another suitable person, where the Commissioner considers there is no appropriate prescribed person; or where having regard to the nature of the wrongdoing concerned the Commissioner is of the opinion that the report should not be transmitted to the prescribed person due to the risk of serious penalisation against the reporting person or that evidence of the wrongdoing would be concealed or destroyed. Suitable persons must be informed of their obligations under the Act when a report is transmitted to them.

The reporting person must be notified, as soon as practicable, of the transmission of the report and the reasons for doing so, as well of any extension to the 14 day period referred to above.

Only where a prescribed person or other suitable person cannot be identified will the Commissioner accept the report and notify the reporting person. Once the report has been accepted, the Commissioner must perform an initial assessment, feedback and follow-up.

A person to whom a report is transmitted by the Commissioner may notify the Commissioner within 7 calendar days of receipt that they are of the opinion the report does not come within their remit, and the reasons for this. The Commissioner may not accept this opinion; or accept this opinion and transmit the disclosure to another prescribed person / suitable person; or where no prescribed person / suitable person can be identified, accept the report and follow-up.

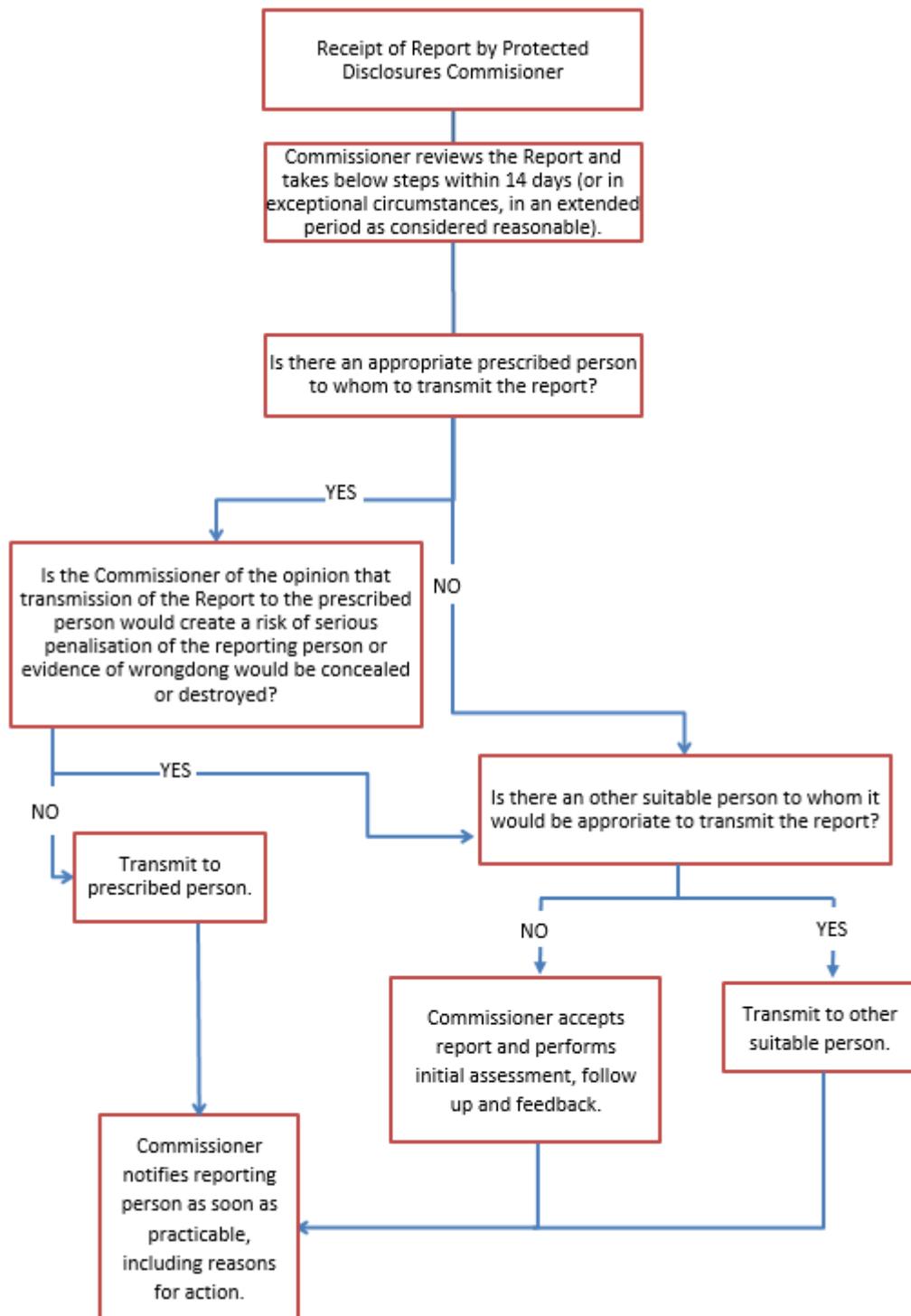


Figure 3: Flowchart for Protected Disclosures Commissioner process

8.7 A legal adviser

The Act allows a protected disclosure to be made by a worker in the course of obtaining legal advice from a barrister, solicitor, trade union official or official of an excepted body (an excepted body is a body which negotiates pay and conditions with an employer but is not a trade union as defined in section 6 of the Trade Union Act 1941).

8.8 Disclosure to other third parties

The Procedures should confirm that it is preferable in most circumstances to disclose to the employer and, if that is not appropriate, to use one of the options at 8.2 to 8.5 above. The Procedures should explain that there are stringent requirements for alternative external reports to qualify as protected disclosures under section 10 of the Act.

8.9 Disclosure in the area of law enforcement, security, defence, international relations and intelligence

The Act makes particular provision for making disclosures in the areas of law enforcement, security, defence, international relations and intelligence. Detailed information pertaining to these particular provisions should be included in the Procedures of public bodies to which they are relevant.

WITHDRAWAL OF A PROTECTED DISCLOSURE

Once a protected disclosure has been made in accordance with the Act, it is not possible for a reporting person to withdraw the disclosure. Reporting persons are required under the Act to co-operate with a prescribed person, the Commissioner or a person to whom a report is transmitted to such extent as may reasonably and lawfully be required for the purposes of the Act.

Where co-operation is withdrawn or the reporting person seeks to withdraw a protected disclosure, public bodies and prescribed persons are still required to comply with the provisions of the Act, to the greatest extent possible. Should the reporting person cease to co-operate with the protected disclosure process, this may make follow-up, including any investigation, more difficult.

9. Establishing Reporting Channels

9.1 Legal requirements

9.1.1 INTERNAL REPORTING CHANNELS

Section 6(3) of the Act provides that employers must establish, maintain and operate internal channels and procedures for the making of reports and for follow-up of said reports. Section 6(4) of the Act provides that this applies to all public bodies regardless of the number of employees they have.

Section 14A(1)(f) of the Act provides that it is an offence not to establish internal reporting channels as required by the Act. Compliance with the Act in this regard will be monitored and enforced by the inspectorate of the Workplace Relations Commission.

Section 6A of the Act sets out specific minimum requirements as to what must be included in the internal reporting procedures. Please refer to section 9.2 for further information.

9.1.2 EXTERNAL REPORTING CHANNELS

Section 7(2A) of the Act provides that prescribed persons and the Protected Disclosures Commissioner must establish, maintain and operate independent and autonomous external reporting channels and procedures for receiving and handling reports made to them by workers in the areas they are responsible for supervising or regulating. **These external reporting channels are separate from and in addition to the internal reporting channels the prescribed person's public body must establish for their own workers in accordance with section 6(3) of the Act.**

Section 7A of the Act sets out specific minimum requirements as to what prescribed persons must include in their external reporting procedures. Similarly, Section 10B(1) of the Act sets out specific minimum requirements for what the Protected Disclosures Commissioner must include in their external reporting procedures. Please refer to section 9.2 for further information.

9.2 Minimum requirements for channels

9.2.1 INTERNAL REPORTING CHANNELS

Internal reporting channels must be designed, established and operated in a secure manner that ensures the identity of the reporting person and any other third party mentioned is protected, and prevents access other than by designated persons;.

Procedures must provide for acknowledgment of reports; follow up by the designated person, to include an initial assessment and the taking of appropriate action; the provision of feedback to the reporting person; and the provision of clear and accessible information to workers on the reporting channels and procedure for making reports.

The procedures must state whether reports can be made in writing or orally or both. It is a matter for each public body to set its own policy in this regard.

Internal channels should be available to all workers of the public body concerned, and, as far as is possible, to other persons who acquire information on a relevant wrongdoing through their work-related activities.

9.2.2 EXTERNAL REPORTING CHANNELS

External reporting channels and procedures operated by prescribed persons must be independent and autonomous. They must be designed, established and operated in a manner that ensures the completeness, integrity and confidentiality of the information concerned and prevents access to the information by persons other than designated persons and any other authorised members of staff; and allow durable storage of information to allow further investigations to be carried out.

Procedures must provide for acknowledgment of reports; follow up by the designated person, to include an initial assessment and the taking of appropriate action; the provision of feedback to the reporting person; and informing the reporting person of the final outcome of any investigation triggered by the report. If there is a breach of applicable EU law, the relevant EU body must be informed, if required by EU or Irish law. Reports of serious relevant wrongdoing may be prioritised, if necessary and appropriate.

Reports via external channels must be able to be made in writing and orally.

9.3 Design of reporting channels

Internal and external reporting channels should be designed and operated in such a manner as to ensure that the confidentiality of the identity of the reporting person, and any other person concerned, as well as the information that has been disclosed, is protected.

Reporting channels are a dedicated means to allow disclosures be made by reporting persons to the public body, prescribed person or the Commissioner. They must be distinct and separate from other lines of communication to or within the public body, prescribed person or Commissioner.

There is a distinction between public bodies as employers and prescribed persons in respect of how disclosures may be made. Public bodies must enable reports to be made in writing or

orally or both. They are not required to enable both. Prescribed persons must enable reports to be made in writing and orally.

On a practical level, at a minimum these channels should consist of a dedicated email address for receiving written reports or a dedicated phone number / voicemail system for receiving oral reports or both, as appropriate.

Access to the email inbox or voicemail system used must be restricted solely to persons designated to receive and handle reports (see section 9.4). Larger organisations may find that other options for reporting may be useful for them, such as the use of secure web forms, for example.

The channels should be designed so that the contents of any disclosure and any material arising from the report (e.g. as part of any follow-up action) are kept secure and confidential and are only available to the designated person or other members of their team or other appropriate persons, as required. This may require separate data storage on IT systems with restricted access and logging of who has accessed what information and when. Any physical materials must also be stored securely (e.g. in a locked room and/or filing cabinet) with access restricted to designated staff, as required. Where a physical meeting is required with the reporting person, the meeting place used should ensure privacy and protection of the identity of the reporting person.

When a report which appears to be a protected disclosure is made orally it should be recorded or documented in the form of minutes by the recipient. Where minutes are taken, the reporting person should be asked to confirm the information provided to avoid dispute at a later date in relation to the information disclosed. Please refer to section 9.6 for further information.

A list of the details that it is recommended should be included in a report of a disclosure is to be found at Appendix A of this Guidance. A similar list should be included in any Procedures.

9.4 Appointment of designated persons

9.4.1 INTERNAL REPORTING CHANNELS

An impartial person (or persons) must be designated by each public body to handle any reports received. This person is known as the “**designated person**”, and must be competent to follow up on reports, carry out an initial assessment of the report, maintain communication with the reporting person, and request further information from, and provide feedback to, the reporting person. This designation should be made in accordance with the standard policies and procedures that apply within the public body as regards the delegation or assignment of duties and responsibilities to staff.

The internal reporting channel should be sufficiently resourced to enable the organisation fulfil all of its obligations under the Act. However – depending on the size of the organisation and the number of reports it will need to handle – the designated person(s) may not be required to be a full-time role, and individuals can carry out the role as an addition to their day-to-day roles within the public body. Resourcing of the internal channel should be kept under regular review.

It is important that the designated person(s) has sufficient seniority, authority and autonomy within the organisation to be able to effectively follow-up on reports independently and impartially. This is a matter for individual public bodies to consider in the context of their own particular structures and resources. It is recommended, however, that the role of designated person be assigned to a person or persons in an area of the organisation responsible for internal corporate governance, compliance etc. Staff members in such functions will usually have the requisite independence and oversight function to allow receipt and follow-up of disclosures without being part of a larger internal reporting structure, which might give rise to conflicts of interest or other issues.

An alternative designated person or point of contact should also be provided should circumstances arise such that it is inappropriate that the primary designated person be involved in the process.

Specific training in the receipt, handling and follow-up of reports of disclosures, as well as the requirements of the Act, should be provided to designated persons.

9.4.2 EXTERNAL REPORTING CHANNELS

Similar to the requirements that apply to internal reporting channels, prescribed persons and the Commissioner must appoint a designated person or persons to handle reports received. This designation should be made in accordance with the standard policies and procedures that apply within the prescribed person (or the Commissioner) as regards the delegation or assignment of duties and responsibilities to staff.

The designated person(s) shall be responsible for: providing information to the public on how a person can make a report to the prescribed person (or the Commissioner); receiving and following up on reports made via the external reporting channels; and maintaining communication with the reporting person for the purposes of providing feedback and, where necessary, requesting further information from the reporting person.

Prescribed persons are mainly senior office holders in public bodies, and the designated person(s), carrying out the role on behalf of a prescribed person, must be a member of the prescribed person's staff. It is a matter for individual prescribed persons to consider if the person(s) they have designated as responsible for handling internal reports should also be designated with responsibility for handling external reports.

The external reporting channel should be sufficiently resourced to enable the prescribed person or the Commissioner to fulfil their obligations under the Act. Where the prescribed person has a single dedicated regulatory and/or enforcement function, it is recommended that the designated person(s) be a suitably competent member of staff of this function. Larger organisations may have multiple regulatory or enforcement functions split over several functional units. In this case, consideration should be given to giving the designated person(s) a co-ordinating role, acting as a single point of contact for workers making reports who liaises and works with staff in the relevant functional areas of the organisation. Where this approach is taken, careful consideration must be given to how the identities of reporting persons should be kept confidential.

Specific training in the receipt, handling and follow-up of reports of disclosures, as well as the requirements of the Act, should be provided to designated persons. In the case of designated persons for prescribed persons and the Commissioner, such training is a legal requirement under the Act.

9.5 Oversight and co-ordination of information

Senior management in a public body will have statutory duties and fiduciary duties relating to oversight and control of the organisation. Senior management are also accountable within and outside the public body such as to the board of the public body, the relevant Minister, the Oireachtas and local government.

In order to fulfil these duties and accountability requirements, senior management require knowledge of any potential or actual issues that may have a material impact on the organisation, its operations, its finances, etc. Therefore senior management should be kept apprised of protected disclosures received by the public body. The level of detail needed to be provided may vary from case to case, however for a disclosure that raises serious issues for the public body, senior management may need to be provided with all details of the disclosure. Only where it is absolutely necessary should this information include the identity of the reporting person.

The Act allows the identity of the reporting person to be disclosed to other persons where necessary for follow-up of reports. Follow-up is defined as meaning any action taken, by the recipient of a report, or a person to whom the report is transmitted, to assess the accuracy of the information and, where relevant, to address the wrongdoing reported. Therefore, follow-up includes the assessment and investigation of the report of a disclosure and actions taken to address the wrongdoing. Involvement of senior management will often be required to address issues raised, particularly where these are serious issues for the organisation.

In each public body there should be a point (or points) of contact for co-ordination of information and case management so that information on protected disclosures can be

managed and collected in order, inter alia, to meet the body's obligations under section 22 of the Act to report annually and to maintain oversight of how protected disclosures are dealt with. The point (or points) of contact should be at an appropriate level.

Public bodies should put an appropriate case management system in place to record and track protected disclosures and for the purpose of fulfilling the annual reporting obligations under the Act. The case management system should ensure that there is effective monitoring of how many protected disclosures are being made; what investigation or other action is being taken; any penalisation of reporting persons and any steps taken to mitigate against penalisation; and whether the Procedures are effective at encouraging reporting persons to come forward.

All reports assessed as protected disclosures, irrespective of whether they are being dealt with formally or informally, should be recorded and notified to the appropriate point of contact.

9.6 Record keeping, data protection and FOI

9.6.1 RECORD KEEPING

Requirements in regards to record keeping are set out in section 16C of the Act. Any person to whom a report is made or transmitted must keep a record of every report made to them, including anonymous reports. Records management policies may need to be reviewed and updated to ensure that records related to protected disclosures are held and managed in a manner compatible with the requirements of the Act.

If a recorded telephone line or voice messaging system is used, a recording or transcript of the report may be kept, with the consent of the reporting person. If the call is not recorded, minutes of the call may be made. If a meeting takes place in person, subject to the consent of the reporting person, a recording of the meeting may be made by the person receiving the report. If the meeting is not to be recorded, accurate minutes should be taken.

The reporting person should be given the opportunity to check, rectify and agree by way of signature the transcript or minutes of the call or meeting.

For anonymous disclosures, the person receiving the report shall record in a manner they deem appropriate, the receipt or transmission of the disclosure, and such information relating to the disclosure that the person receiving the report considers necessary and appropriate for the purposes of the Act, should the person making the report be subsequently identified and penalised. For example, this could include the details of the wrongdoing disclosed and the identity of other persons referred to in the disclosure.

Records should be retained for no longer than is necessary and proportionate to comply with the provisions of the Act or any other legislation.

Public bodies and prescribed persons should ensure that records relating to protected disclosures are ring-fenced within their IT systems and any electronic records management system operated by them. Access to records should be strictly limited to those who require access in accordance with the Procedures. Similarly if paper records are maintained, access to these should also be restricted.

9.6.2 DATA PROTECTION

It can be expected that most, if not all, protected disclosures will involve the processing of personal data. At a minimum, this will likely include the personal details of the reporting person but might also include information regarding persons concerned or other third parties.

Section 16B(7) of the amended Act provides that all personal data shall be processed in accordance with applicable data protection law. This includes, *inter alia*, the General Data Protection Regulation (GDPR). The amended Act provides a general lawful basis for the collection and processing of such personal data. Note, however, that, in accordance with general data protection principles, section 16B(8) provides that any personal data that is manifestly not relevant to the handling of a specific report should not be collected or if collected accidentally should be deleted without undue delay.

Note that Section 16B(1) of the amended Act introduces new provisions where, in certain circumstances, and where necessary and proportionate, the rights of data subjects under data protection law are restricted in respect of their personal data processed for the purposes of the Act, including receiving, dealing with or transmitting a report of a disclosure or follow-up on such a report.

The restrictions apply, among other situations, to the extent necessary, and for as long as is necessary, to prevent and address attempts to hinder reporting or to impede, frustrate or slow down follow-up, in particular investigations, or attempts to find out the identity of reporting persons.

The restrictions also apply where it is necessary and proportionate (a) to prevent the disclosure of information that might identify the reporting person, where such disclosure of identity would be contrary to the protections of the Act; or (b) where exercise of the right would prejudice the effective follow-up, including any investigation, of the relevant wrongdoing.

While the restrictions apply to a number of specific rights under GDPR, the most relevant right for public bodies is likely to be an individual's right to access their personal data on foot of a data subject access request ("DSAR"). The restrictions may allow certain personal data of the individual to be withheld if they fall under the above objectives.

Data protection law is a complex area, and the above is a brief summary of the data protection provisions of the Act. Public bodies and prescribed persons should ensure any exercise of

rights of a data subject under GDPR are dealt with appropriately and in accordance with data protection law. If a public body's Data Protection Officer is considering applying restrictions of data subject rights under the Act, the provisions of the Act should be considered prior to doing so.

Public bodies and prescribed persons should prevent access by unauthorised persons to personal data processed for the purposes of the Act and ensure it is only disclosed to authorised persons.

9.6.3 FREEDOM OF INFORMATION

The Freedom of Information Act 2014 (the "**FOI Act**") has been amended by the Protected Disclosures (Amendment) Act 2022. As a result of this amendment, the FOI Act does not apply to a record relating to a report made under the Act, whether the report was made before or after the date of the passing of the Protected Disclosures (Amendment) Act 2022. Records concerning a public body's general administration of its functions under the Act are subject to FOI, however.

The FOI Act also does not apply to the Office of the Protected Disclosures Commissioner, in the performance of the functions conferred on it by or under the Act, other than insofar as it relates to records concerning the general administration of those functions.

10. Acknowledgement, Assessment and Investigation

10.1 Acknowledgement

10.1.1 INTERNAL REPORTING CHANNELS

The public body must acknowledge, in writing, to the reporting person receipt of every report made through the internal reporting channel within 7 calendar days of its receipt.

10.1.2 EXTERNAL REPORTING CHANNELS

Prescribed persons and the Commissioner must acknowledge, in writing, to the reporting person receipt of the report within 7 calendar days of its receipt. There are two exceptions to this:

1. Where the reporting person has requested otherwise; or
2. The prescribed person or the Commissioner reasonably believes acknowledgement of the receipt would jeopardise the protection of the identity of the reporting person.

10.1.3 INFORMATION TO BE PROVIDED IN ACKNOWLEDGEMENT

The Procedures for internal and external reporting should specify the information that should be included in the initial acknowledgement.

The acknowledgement should provide further information about the protected disclosures process and enclose or link to the Procedures that will apply to the handling of the report.

The acknowledgment should endeavour to set expectations early as to what will happen – and when – after the report is made.

Information should be provided in relation to the protection of the identity of the reporting person and protection from penalisation.

Information in relation to feedback should include the type of feedback that will be provided, as well as the type of feedback that will not be provided, and that the reporting person may request in writing further feedback at three month intervals. It should be made clear that personal information relating to another worker will not be provided, such as whether a disciplinary process has taken place and the outcome of any such process.

10.2 Assessment

10.2.1 INTERNAL REPORTING CHANNELS

When a report of alleged wrongdoing is made, the Act provides that an initial assessment, or screening process, must be undertaken by the public body. This need not be solely carried out by the designated person, but can be delegated to another authorised person, as appropriate. This screening process should be referred to in the Procedures.

The initial assessment should involve an assessment of the report to seek to determine if there is prima facie evidence that a relevant wrongdoing may have occurred and if it should be treated as a protected disclosure, having regard to the provisions of the Act. If it is unclear whether the report qualifies as a protected disclosure, the designated person should treat the report as a protected disclosure (and protect the identity of the reporting person and any persons concerned, in accordance with the Procedures) until satisfied that the report is not a protected disclosure.

It may be necessary, as part of the initial assessment, to differentiate between protected disclosures and complaints exclusively affecting the worker. In some cases the information provided may involve both a complaint exclusively affecting the worker and a protected disclosure. For instance, a worker may allege that there is some mistreatment of the worker and also allege that a colleague is defrauding the public body. The report should be assessed to determine the nature of the information disclosed and the procedure or procedures that is / are most appropriate to be used to investigate the individual elements of the allegation.

If, having assessed the report, it is deemed to relate solely to a complaint exclusively affecting the worker then the reporting person should be encouraged to utilise other processes (for example, the grievance or dignity at work policy) so that the complaint can be dealt with in an appropriate manner, and should be told that the report will not be considered under the protected disclosures procedure. If, having assessed the report, there is a mix of different issues (some involving a protected disclosure, some involving a complaint exclusively affecting the worker) then an appropriate process / processes should be applied to deal with each of the issues. The process to be applied may differ from case to case.

A single disclosure may be broken down into a series of separate allegations or parts, each of which may need to be followed up separately or approached differently, according to the circumstances.

If, after the initial assessment, the designated person (or delegate) determines that there is no prima facie evidence that a relevant wrongdoing may have occurred, then the matter can be closed (or referred to another internal process, as above), and the reporting person notified.

If, after the initial assessment, the designated person (or delegate) determines that there is prima facie evidence that a relevant wrongdoing may have occurred, the designated person (or delegate) should take appropriate action to address the relevant wrongdoing. This will normally involve a consideration of whether the alleged wrongdoing is something that can or should be investigated by the public body or not, and, if so, what steps should be taken as part of such an investigation.

It is important to note that some matters may be of such seriousness that the investigation will more appropriately be carried out externally or by professional experts in a particular area. In some cases the matter may need to be reported to, and investigated by, An Garda Síochána or another body with the statutory power and function of investigation of particular matters.

If an investigation is required, the public body should consider the nature and extent of the investigation. This could consist of an informal approach for less serious wrongdoings, a detailed and extensive investigation of serious wrongdoings, or an external investigation by another body.

10.2.2 EXTERNAL REPORTING CHANNELS

An initial assessment must also be carried out by a prescribed person (or the Commissioner, if the Commissioner cannot identify a prescribed person or other suitable person to transmit the report to), similar to that carried out by a public body dealing with a report made via internal reporting channels. In addition to the options available to a public body following an initial assessment, a number of other options are open to the prescribed person.

As well as seeking to determine whether or not a relevant wrongdoing may have occurred and if it should be treated as a protected disclosure, the initial assessment should also examine whether the report falls within the scope of the matters for which the prescribed person has responsibility.

If the initial assessment shows that the report concerns matters not in the scope of the matters for which the prescribed person has responsibility, the report must be transmitted to the relevant prescribed person, or where there is no such other prescribed person, the Commissioner.

When transmitting a report from one prescribed person to another prescribed person, or to the Commissioner, the report should be transmitted in a secure manner, and in a way that will not compromise the security and confidentiality of the report. The person sending the report should ensure that it is sent to the designated person in the other prescribed person. Prescribed persons should consider creating a dedicated email address, accessible only by the designated person, to allow for such transmission. Alternatively, the report should be sent to the email address provided by that other prescribed person for making a report under the external reporting channels.

If the initial assessment shows that there is a relevant wrongdoing but that it is clearly minor and does not require further follow up, the matter can be closed.

If the initial assessment shows that the report does not contain any meaningful new information about a relevant wrongdoing compared to a past report where the procedures have been concluded, unless new legal or factual circumstances justify a different follow up, the matter can be closed.

The reporting person must be informed, as soon as practicable, if any of these outcomes arise and the reason for the decision.

10.3 Investigation

10.3.1 GENERAL GUIDANCE FOR INTERNAL INVESTIGATIONS BY PUBLIC BODIES

This general guidance refers to internal investigations by public bodies. Investigations by prescribed persons is addressed at 10.3.4 below.

The incorporation of a detailed and prescriptive investigative process in the Procedures may impede the public body's ability to respond flexibly and in a responsive way to reports of wrongdoing. Specific timeframes as part of the investigation process may also create a difficulty as the nature of protected disclosures are such that they will range from being quite simple and relatively easy to assess / investigate to being quite complex and cumbersome, thus requiring a much more substantial period of time to carry out an investigation.

Public bodies should bear in mind that feedback is required to be provided to the reporting person within three months of acknowledgement of receipt of the report of a disclosure, and at three month intervals thereafter, if so requested. Guidance on the provision of feedback is provided in detail in Section 11, however the requirement to provide feedback does not require a full investigation report to be provided after three months. Feedback can consist of action taken or expected to be taken to address the wrongdoing reported.

In order to comply with the obligation to protect the identity of the reporting person under the Act, it is generally unlikely to be permissible for the identity of the reporting person to be disclosed to an individual the subject of an allegation. The provisions of the amended Act reduce the cases in which the duty of confidentiality does not apply.

The designated person will need to consider such matters when determining whether a protected disclosure can be investigated and the nature of any investigation. Persons making a protected disclosure should be encouraged to frame it in terms of information that has come to their attention rather than seeking to draw conclusions about particular individuals or specific offences.

While an investigation under the Procedures is different to a grievance, dignity at work or disciplinary investigation, there are certain key themes and common features, and the nature of any investigation under the Procedures will be informed by the procedures that normally apply in the public body when other allegations are investigated.

An investigation process that goes beyond merely an information gathering exercise, and results in a finding of fact in relation to an individual(s), and may also result in an adverse finding against the individual(s), will require the application of the general principles of natural justice and fair procedures, as appropriate. The public body will need to be mindful that, if the investigation comes to the conclusion that some form of wrongdoing has occurred, the report that issues may need to be used in a subsequent disciplinary process. As a result, it should be able to withstand scrutiny as part of any disciplinary process and there should, where possible, be strong commonality of approach between such procedures.

Each public body should also ensure that any complaint of penalisation or breach of confidentiality is assessed and / or investigated as appropriate.

10.3.2 INFORMAL PROCESS FOR ADDRESSING REPORTS

The public body may wish to provide for an informal process to address a disclosure if the relevant wrongdoing alleged in the disclosure is relatively straightforward, or is not very serious, or does not require consideration of the making of an adverse finding about any individual. The nature of an informal process is a matter to be determined by the public body itself having regard to circumstances including the nature of the alleged relevant wrongdoing. By way of example only, it may involve discussion with relevant persons and/or consideration of documents or information only and/or a broad review of issues without specific enquiry into the facts of a particular scenario.

The public body should consider whether or not the reporting person should be consulted to determine if they are open to addressing the contents of the report using a more informal process.

If the public body provides for an informal process it should recognise in its procedures that there may be occasions where an informal process is commenced but the person(s) appointed to carry out that informal process identifies in the course of that process that the matter is more suitable for a formal investigation, in which case that should be reported to the designated person.

10.3.3 GENERAL PRINCIPLES FOR FORMAL INVESTIGATIONS

Public bodies should consider including in the Procedures a general framework for formal investigation procedures, with a set of guiding principles to ensure some consistency in terms of approach. These principles should include reference to the following:

(a) Terms of Reference

Terms of Reference will not be necessary for all formal investigations, but for more complex or serious investigations, it will usually be necessary to draw up Terms of Reference. Public bodies should take care when drawing up Terms of Reference that the scope and conduct of the investigation is not unduly restricted by the contents of the Terms of Reference and that the investigator is not precluded from taking certain actions or examining further issues that may arise in the course of the investigation. For example, Terms of Reference should allow investigators to investigate additional issues that may come to light during the course of the investigation, not just those set out in the Terms of Reference. Terms of Reference should also give investigators latitude to interview any witnesses and to review any documentation that they deem relevant.

(b) Natural Justice and Fair Procedures:

Where an allegation is made against an individual (the “**Respondent**”), it is important to ensure that the Respondent is afforded appropriate protection. While the procedures for dealing with allegations against an individual will reflect the varying circumstances of public bodies, such procedures must comply with the general principles of natural justice and fair procedures, as appropriate.

Two of the key principles of natural justice and fair procedures are that the Respondent has the right to know the allegations against them and that the Respondent has the right to a fair and impartial hearing.

In many cases, the Respondent’s right to fair procedures may include a right to challenge the evidence against him / her. This right will need to be balanced against rights contained in the Act, such as the reporting person’s right to have their identity protected. It may not always be necessary under fair procedures for the Respondent to question or challenge the reporting person directly, for example where the information has been independently verified by way of documentary evidence or otherwise.

There are very limited cases where the duty of confidentiality does not apply permitting the disclosure of the identity of the reporting person to a Respondent. This may make it difficult to allow Respondents to challenge the evidence and may affect the application of natural justice and fair procedures.

Where the identity of the reporting person cannot be disclosed to the Respondent, it may be possible for the Respondent to pose questions and challenge the evidence by way of an intermediary (for example, the questions are put in writing via a third person / the investigator, who then puts these separately to the reporting person, and informs the Respondent of the reporting person’s response).

Difficulties will also arise where a protected disclosure is made anonymously. In this case, for example, it may not be possible to take further evidence from the reporting person, and for the

Respondent to challenge the person making the report. On the other hand, the only information available from the reporting person will be the contents of the disclosure.

In either case, whether the identity of the reporting person is known or is anonymous, the Respondent should be permitted to address the contents of the disclosure, and also to address any evidence or witness statements gathered as part of the investigation.

(c) Legal Representation

In general, the Respondent's right to representation should be limited to a co-worker or trade union representative. While an individual is entitled to obtain their own legal advice, there is no automatic right to legal representation at the investigation meetings themselves. In addition, the Respondent has no right to have legal costs paid by the public body.

This applies equally to legal representation and payment of legal costs for the reporting person.

A right to legal representation will only arise in exceptional circumstances. The investigator should consider whether failure to allow legal representation is likely to imperil a fair hearing or a fair result, taking into account the general circumstances of the case including:

- I. the seriousness of the charge and of the potential penalty;
- II. whether any points of law are likely to arise;
- III. the capacity of the Respondent to present their own case and whether the Respondent is suffering from any condition that might affect their ability to do so;
- IV. whether there is any procedural difficulty involved in the case;
- V. the formality of the investigation meeting (e.g. if there will be witnesses attending and if it will be necessary to challenge the evidence by putting information to the witnesses, and whether the Respondent would be capable of doing this without legal representation);
- VI. the need for reasonable speed in conducting the investigation; and
- VII. the general need for fairness as between the parties.

(d) Right to review

Where an investigation has made an adverse finding against the Respondent, such that it gives rise to a disciplinary process or further investigations or processes against the Respondent then a right to review the outcome of the investigation should be provided for. Please refer to Section 10.4 for further information.

10.3.4 INVESTIGATIONS BY PRESCRIBED PERSONS

Different considerations apply for prescribed persons in relation to investigations.

Prescribed persons are likely be in a position where the protected disclosure they are investigating involves individuals who are not employees of the prescribed person but rather

individuals and organisations in the sector the prescribed person is responsible for regulating or supervising. In this case, prescribed persons will need to rely on the statutory powers given to them under legislation in order to carry out effective follow-up and investigation of the disclosures.

The prescribed person is permitted to prioritise reports of disclosures of serious relevant wrongdoing, if necessary and appropriate, having regard to the number of reports received by them. It should be noted that timelines for the provision of feedback remain the same for the reports which have not been prioritised.

Where a report of a disclosure concerns a breach of EU law, as provided for in the Act, the prescribed persons must send the information to the relevant EU bodies as soon as practicable, where this is provided for under EU or Irish law. For example, under Article 36 of EU Regulation 1828/2006, public authorities have an obligation to report all major cases of irregularities (defined as cases involving more than €10,000) involving EU funds to OLAF, the EU's anti-fraud office.

10.3.5 INVESTIGATIONS BY THE COMMISSIONER

Section 10F of the Protected Disclosures Act sets out the powers the Commissioner may choose to exercise in the event that direct follow-up of a report made or transmitted to the Commissioner is necessary.

10.4 Review

The Procedures should allow for a system of review of a decision or process taken by a public body, if requested by a party affected by any of the following processes:

- I.** The conduct or outcome of any follow-up actions (including any investigation) taken on foot of the receipt of a report;
- II.** The conduct or outcome of any investigation into a complaint of penalisation; and
- III.** Any decision to disclose the identity of a reporting person (except in exceptional cases).

The system of review should provide for the following:

- Details of how an affected person (“the applicant”) can request a review and to whom they should apply to for a review;
- The time period within which an application for review can be made;
- The applicant should be required to set out the reason(s) they are seeking a review;
- The review should be considered by a person not involved in the original process under review. Consideration may have to be given to appointing a person from outside the organisation to conduct the review in this regard;

- The review should be carried out by a person of at least equivalent – and preferably more senior – level of seniority as the person who carried out the original process;
- The role of the reviewer should not be to re-investigate the matter in question but to address the specific issues the applicant feels have received insufficient consideration. The reviewer should, therefore, consider:
 - Whether the correct procedures were followed;
 - In the case of an investigation, whether the terms of reference were adhered to;
 - Whether the conclusions/findings could or could not reasonably be drawn from the information/evidence on the balance of probability;
- Where a review finds significant shortcomings or failings in the process, the public body should then consider what further action(s) may or may not need to be taken in response to said findings; and
- The outcome of the review should be final and there should be no entitlement to further reviews of the same issue.

11. Feedback

The purpose of the provision of feedback is that the reporting person is kept informed on the process and actions arising from the report made by them. The provision of regular feedback will help to assure the reporting person that their report has been taken seriously and that the issues raised are being addressed. This will also lessen the likelihood that the reporting person will make a disclosure using another channel. The failure of a public body or prescribed person to provide feedback on a report is grounds for a reporting person to make a disclosure to the relevant Minister or to make a disclosure to another third party, including making a public disclosure.

11.1 Timing of Feedback

11.1.1 INTERNAL REPORTING CHANNELS

Feedback is required to be provided to the reporting person within three months of acknowledgement of receipt of the report of a disclosure or if no acknowledgement is sent within three months of receipt of the report. However, there is nothing preventing the provision of feedback earlier than this and it is recommended that public bodies provide feedback sooner than three months if the circumstances allow.

Where the reporting person requests in writing that they wish to receive further feedback after the initial three month period, then the public body must do so at intervals of three months until the procedure relating to the report is closed. Notwithstanding this requirement of the Act, a public body may choose to provide for the provision of further feedback (even if not explicitly requested by the reporting person) at regular intervals as part of its Procedures. Note that the interval for such further feedback should not be greater than the three months provided for under the Act.

Public bodies should also note that if a report was made by an employee of the public body prior to the amendment of the Act, and the report is still being considered in accordance with the public body's previously established procedures, then the reporting person may request in writing that feedback be provided. The public body has three months to provide information on any actions taken or to be taken by that public body in relation to the report.

11.1.2 EXTERNAL REPORTING CHANNELS

For prescribed persons and the Commissioner, the maximum time to provide feedback can be extended from three months up to six months after acknowledgement of the report, where it is justified due to the particular complexity of the report concerned. The reporting person must be informed of the decision to extend the time from three months to six months as soon as practicable.

Where a report is transmitted by the Commissioner to a prescribed person or a report is transmitted by a prescribed person to another prescribed person (or the Commissioner), the three month or six month timeframe starts from the date the report was first made **not** the date of transmission.

Where the reporting person requests in writing that they wish to receive further feedback after the initial three month (or six month) period, then the prescribed person must do so at intervals of three months until the procedure relating to the report is closed. Notwithstanding this requirement of the Act, a prescribed person (or the Commissioner) may choose to provide for the provision of further feedback (even if not explicitly requested by the reporting person) at regular intervals as part of its Procedures. Note that the interval for such further feedback should not be greater than the three months provided for under the Act.

11.2 Content of Feedback

The Act defines feedback as the provision to the reporting person of information on the action envisaged or taken as follow-up and the reasons for such follow-up.

Follow-up is defined as meaning any action taken, by the recipient of a report, or a person to whom the report is transmitted, to assess the accuracy of the information and, where relevant, to address the wrongdoing reported. Therefore, follow-up includes the assessment and investigation of the report of a disclosure and actions taken to address the wrongdoing.

The overriding requirement when providing feedback is that no information is communicated that could prejudice the outcome of the investigation or any action that ensues (e.g. disciplinary, or other legal action, including prosecution) for example, by undermining the right to fair procedures enjoyed by the person against whom a report or allegation is made.

The extent of the feedback will depend on the report itself. If there is no relevant wrongdoing identified, this can be communicated in the feedback. If an alleged relevant wrongdoing is identified, this can be noted in the feedback, as well as identifying actions that have been taken, or are intended to be taken, to address the wrongdoing, and the reasons for these actions.

By way of example, actions may include strengthening processes or procedures where a weakness has been highlighted as a result of the report of a disclosure; providing additional training to personnel; upgrading or replacing equipment; improving cyber security measures, etc.

Procedures should outline the requirement to provide feedback, and what this entails, while making clear the limits to such feedback in order to manage the expectations of reporting persons. Procedures should state that any feedback given is provided in confidence as part of the reporting process and the process of the public body/prescribed person addressing the

report. The feedback should not be disclosed further by the reporting person, other than to their legal advisor or trade union representative, or unless the information forms part of a further protected disclosure being made via another channel. There is no obligation to inform the reporting person of the commencement, or progress, or outcome, of any disciplinary process involving another worker which may arise on foot of an investigation occasioned by a protected disclosure. In general, such information is confidential between the employer and the person who is the subject of a disciplinary process. In such a situation, a reporting person should be informed that appropriate action has been taken but is not generally entitled to know what that action was or that it was disciplinary action.

Care should be taken to ensure that any feedback provided complies with data protection legislation and does not breach the data protection rights of any persons involved. Similarly, the requirement to provide feedback does not override any statutory obligations that might apply to a public body or a prescribed person as regards confidentiality and secrecy.

Apart from the requirement under the Act to provide feedback, in the absence of appropriate feedback there is a risk that a worker will perceive that the report of a disclosure is not being dealt with adequately, with sufficient speed, or at all. Apart from the potential adverse impact on the credibility of the public body's protected disclosures procedure, such a situation increases the possibility that the worker will raise the issue again, this time outside of the public body.

If the public body does not take action that might be reasonably expected to be taken, a Court or Adjudication Officer may consider this when determining if it was reasonable for that worker to make a report in respect of the matter outside of the organisation. This is especially so as the Act requires diligent follow-up to be carried out by the designated person.

11.3 Communication of final outcome

Prescribed persons and the Commissioner are required to communicate in writing to the reporting person the final outcome of any investigations triggered by the report of the disclosure, subject to legal restrictions applying concerning confidentiality, legal privilege, privacy and data protection or any other legal obligation.

This does not require the provision of the full investigation report. The outcome of the investigation should be provided, subject to the above restrictions.

Although this is not a legal requirement applying to public bodies in respect of reports received through internal channels, it is considered good practice to inform the reporting person of the final outcome of the process, in line with the practice outlined above.

12. Protections under the Act

The Act provides for certain protections for reporting persons. These include protection against penalisation and keeping their identity confidential, with certain exceptions. The Act also provides that penalisation and breaching of the confidentiality provisions is a criminal offence, among other offences in the Act.

12.1 Protection against Penalisation

The Act provides for specific remedies for workers who are penalised for making a protected disclosure.

The definition of penalisation in section 3(1) of the Act is very comprehensive and this should be included in the Procedures. Penalisation means any direct or indirect act or omission occurring in a work-related context, due to the making of a report, and which causes (or may cause) an unjustified detriment to a worker.

The Act and this Guidance set out wider examples of what may constitute penalisation than were given when the Act was first introduced. This wider non-exhaustive list of examples consists of:

- suspension, lay-off or dismissal,
- demotion, loss of opportunity for promotion, or withholding of promotion,
- transfer of duties, change of location of place of work, reduction in wages or change in working hours,
- the imposition or administering of any discipline, reprimand or other penalty (including a financial penalty),
- coercion, intimidation, harassment or ostracism,
- discrimination, disadvantage or unfair treatment,
- injury, damage or loss,
- threat of reprisal,:
- withholding of training;
- a negative performance assessment or employment reference;
- failure to convert a temporary employment contract into a permanent one, where the worker had a legitimate expectation that he or she would be offered permanent employment;
- failure to renew or early termination of a temporary employment contract;
- harm, including to the worker's reputation, particularly in social media, or financial loss, including loss of business and loss of income;
- blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry;

- early termination or cancellation of a contract for goods or services;
- cancellation of a licence or permit, and
- psychiatric or medical referrals.

It should be noted that this list is not exhaustive. Any form of penalisation is prohibited and the fact that a type of behaviour or penalisation is not specifically referenced in the Act does not mean that it cannot be penalisation under the Act. Procedures should include a commitment that penalisation of workers who make a report will not be tolerated. The Procedures should set out how and to whom a complaint of penalisation should be made. The Procedures should further contain a commitment to assess / investigate such notifications and to take appropriate action (which may include disciplinary action against supervisors and co-workers) where necessary.

It is important to note that the obligation not to penalise or threaten penalisation against a reporting person lies with the employer. Employers are obliged to address complaints of penalisation made by reporting persons. Penalisation can be an omission as well as an act, and a failure to investigate a complaint of penalisation may constitute further penalisation.

An employer also may not cause or permit any other person to penalise or threaten penalisation against a reporting person. Therefore, any claim of penalisation in the Workplace Relations Commission, or Circuit Court injunction proceedings regarding penalisation, will be brought against the employer rather than the individual employee's responsible.

If a person causes detriment to another person because the other person (or a third person) made a protected disclosure, the person to whom the detriment is caused may bring a civil claim in the Courts against the person who caused the detriment. This may include against individual employees. Detriment consists of any of the acts or omissions that are listed above as examples of penalisation.

It is important that any complaint of penalisation is dealt with promptly by the employer, as a delay runs the risk of the reporting person making a complaint to the Workplace Relations Commission while the internal process is still underway, if the statutory deadline to complain to the Workplace Relations Commission is about to expire.

Complaints of penalisation should be treated separately to the actual report itself. Such complaints can be handled by the HR function of the public body, unless this is inappropriate in the circumstances. Public bodies should review their HR policies to ensure that they are fit for purpose to handle penalisation complaints, particularly as regards the requirement to protect the identity of the discloser. Such HR policies should be amended as necessary to ensure they are aligned with the public body's protected disclosures policy. If mediation is provided for as part of the public body's existing HR processes, then the use of mediation as part of a response to a complaint of penalisation may also be considered, where appropriate.

Procedures should also include information in relation to the external remedies available to workers who believe they have been penalised for making a protected disclosure. These include a claim before the Workplace Relations Commission and a claim for injunctive relief in the Circuit Court. The relevant time limits that apply for bringing a penalisation claim to the Workplace Relations Commission (within 6 months of the penalisation) and the Circuit Court (within 21 days of last instance of penalisation) should be set out.

In claims for penalisation before the Workplace Relations Commission, the alleged penalisation shall be deemed to have been as a result of the reporting person having made a protected disclosure, unless the employer proves that the act or omission was justified on other grounds. This reverses the normal burden of proof under the Act prior to amendment, where the person alleging penalisation was required to prove that the penalisation was for having made the disclosure.

12.2 Preventing penalisation

Public bodies should put in place measures to help prevent penalisation of reporting persons where their identity is disclosed or becomes known.

The identity of the reporting person may end up being revealed in accordance with the provisions of the Act. Even if this is not the case, there may be instances where if allegations contained in a report are put to a person concerned, it will be possible for the person concerned to work out the identity of reporting person.

On a general level, without reference to any specific disclosure, public bodies should strive to create a culture where the making of protected disclosures is seen as a positive thing, rather than having any negative connotations. Training and awareness on protected disclosures and on the Procedures should be provided to all employees, and regularly refreshed. The benefits for the public body and its employees resulting from the making of protected disclosures should also be emphasised. The prohibition against penalisation, and the redress provisions available under the Act should be made clear, including giving information about redress in the Workplace Relations Commission, the courts, and the fact that penalisation of a reporting person and connected persons is now a criminal offence.

On a more individual level, in anticipation of disclosures, public bodies should undertake an assessment of what is likely to happen once they act on a report received, and whether the identity of the reporting person may become known. It may be useful for the designated person to consult with the reporting person, and let them know of the steps intended to be taken if there is a risk of their identity becoming known. This will allow public bodies to put in place supports for the individual, such as being able to discuss any concerns with an appropriate person, or giving them the option of contacting an employee assistance programme or equivalent service. The reporting person should also be reminded of the process for reporting

any instances of penalisation. If the reporting person's line manager is aware of them having made a protected disclosure as part of the process to date, the line manager should also be made aware of the risk of any potential penalisation. However, the reporting person's identity should not be disclosed to the line manager if this is not already known.

12.3 Confidentiality & Protection of Identity

The Procedures should confirm that the Act imposes an obligation to protect the identity of the reporting person and set out the extent of that obligation.

Prescribed persons and the Commissioner are also required to protect the identity of any person referred to in the report of a disclosure as a person to whom the wrongdoing is attributed or associated with (known as a **"person concerned"**).

It is important that the Procedures set out the measures that will be taken to protect the identities of reporting persons and persons concerned. The measures should address such matters as document security, IT, digital and manual filing in the context of fulfilling the confidentiality obligation in the individual public body and within its systems.

12.3.1 IDENTITY OF REPORTING PERSON

The Procedures should set out that the designated person, any other person in the public body who receives a report, or anyone else to whom a report is shared with to allow them to carry out their functions in relation to the report, cannot disclose the identity of the reporting person to anyone else (or any information that might reveal the identity of the reporting person) without the explicit consent of the reporting person, other than strictly within the provisions permitted in the Act. However, this does not include people who the designated person reasonably considers it may be necessary to share the identity with for the purposes of the receipt, transmission, or follow-up of the report. This can include a member of a team involved in follow-up or investigating the report, and also, for example, another staff member who may have the necessary technical expertise to assist with the investigation of the report. The Procedures should make clear that such other persons also cannot disclose the identity of the reporting person. Notwithstanding the above, the designated person should always ensure that the identity of the reporting person is only ever shared on a "need to know" basis and only where it is necessary to carry out proper follow-up of a report. Where action is to be taken following a protected disclosure, it is recommended that a process is put in place for consulting with the reporting person and, where possible, for gaining the informed consent of the reporting person, prior to any action being taken that could identify them. This may include when reports are being referred by the public body to an external party.

It should be noted however that the Act allows the identity of the reporting person to be disclosed in certain prescribed circumstances even where the reporting person does not consent to their identity being disclosed.

A public body's Procedures should include an assurance that the identity of the reporting person must be protected under the Act, with the exception of a number of specific cases.

Apart from the situation described above relating to persons involved in follow-up or investigation of a report, these specific cases are where:

- I. The person to whom the disclosure was made or transmitted shows that he / she took all reasonable steps to avoid such disclosure.

NOTE: This relates to a situation where all reasonable steps were taken to avoid disclosure of the identity, but the identity has been revealed in some manner, for example through an unforeseeable error or other unavoidable occurrence.

- II. The person to whom the disclosure was made or transmitted had a reasonable belief that it was necessary for the prevention of serious risk to the security of the State, public health, public safety or the environment;

- III. Where the disclosure is otherwise required by law;

- IV. Where the disclosure is a necessary and proportionate obligation imposed by Union law or the law of the State in the context of investigations or judicial proceedings, including with a view to safeguarding the rights of defence of the person concerned.

NOTE: This relates to a statutory or criminal investigation or judicial proceedings. It does not relate to internal investigations conducted by the public body or prescribed person.

Where it is decided that it is necessary to disclose the identity of the reporting person or other information that may or will disclose the identity of the reporting person, in the cases referred to at II or IV above, the reporting person should be informed of this decision in advance of the disclosure, and the reasons for the disclosure, unless the notification would jeopardise:

- I. The effective investigation of the wrongdoing,
- II. The prevention of serious risk to the security of the State, public health, public safety or the environment, or
- III. The prevention of crime or prosecution of a criminal offence.

The reporting person should also be informed of the applicable internal review process, which may be invoked by the reporting person in respect of this decision. (See also section 10.4).

Procedures should also include: a request that workers who are concerned that their identity is not being protected notify their employer in an appropriate manner (such as HR or the manager of the designated person); a commitment to assess / investigate such notifications; and a commitment to take appropriate action where necessary.

The Procedures should also note that any attempt to identify the reporting person should not be made by persons within the public body to whom the identity has not been revealed as part

of the receipt and follow-up of the report of a disclosure. If such attempts are made, whether successful or not, the Procedures should make it clear that this will be dealt with under the public body's disciplinary process.

If a complaint is made of penalisation contrary to the Act, then that complaint will be dealt with, having regard to the continued obligation to protect the identity of the reporting person under the Act.

12.3.2 IDENTITY OF PERSONS CONCERNED

The identity of a person concerned must also be protected by a prescribed person, suitable person, or Commissioner for as long as any investigation triggered by the report is ongoing, unless disclosure of the identity is necessary for the purposes of the Act or is otherwise required by law.

A prescribed person's Procedures should include confirmation that the identity of a person concerned must be protected under the Act, while an investigation is ongoing.

The Procedures should include provisions for the protection of a person concerned's identity during the course of an investigation.

12.4 Motivation and disciplinary record of reporting persons

The Procedures should confirm that motivation is irrelevant when determining whether or not a report is a disclosure protected by the Act. All protected disclosures should be dealt with in the same manner regardless of the worker's motivation for making the report, and the worker should be protected so long as the worker reasonably believes that the information disclosed tended to show a wrongdoing.

However, a report made in the absence of a reasonable belief will not attract the protection of the Act and may result in disciplinary action against the reporting person. In addition, disclosure of a wrongdoing does not necessarily confer any protection or immunity on a worker in relation to any involvement they may have had in that wrongdoing.

Where a worker makes a report of alleged wrongdoing it should be given appropriate consideration, in line with the public body's Procedures. The public body should generally focus on the report made (the message), as opposed to any disciplinary (or other) issues related to the person making the report of a disclosure (the messenger).

In general where a protected disclosure is made by a worker during an investigation, disciplinary or other process involving the worker, this should not affect those distinct processes, except where the investigation, disciplinary or other action represents, in essence,

a form of penalisation for making a protected disclosure. This should be confirmed in the Procedures.

The Procedures should make clear that where a worker has made a report, whether or not that has been assessed or investigated, the worker is still required to conduct themselves professionally and to continue to carry out their duties as normal. As noted above, the worker is not required or entitled to investigate matters themselves to find proof of their suspicion and should not endeavour to do so. Normal management of a worker who has made a report does not constitute penalisation. This can include the taking of disciplinary action against the worker for matters unrelated to the substance of the report.

The Procedures should make clear that a worker who has made a report should not take it upon themselves to assume responsibility for promoting a culture of transparency within the organisation. While all workers should subscribe to such a culture, the promotion and implementation of such measures is a matter for the Board or other governance bodies of public bodies, and senior management in the organisation.

12.5 Criminal Offences

The Act sets out a range of criminal offences for breaches of the protections provided by the Act.

A person commits an offence if they:

- I. hinder or attempt to hinder a worker in making a report;
- II. penalise or threaten penalisation, or causes or permits any other person to penalise or threaten penalisation against a reporting person, a facilitator, a third person who is connected to the reporting person and who could suffer work related penalisation, or a legal entity the reporting person owns or works for or is otherwise connected with;
- III. bring vexatious proceedings against any person or legal entity referred to at II;
- IV. breach the duty of confidentiality regarding the identity of reporting persons;
- V. make a report containing any information that the reporting person knows to be false, or
- VI. fail to comply with the requirement to establish, maintain and operate internal reporting channels and procedures.

If an offence is committed by a public body, and is committed with the consent of, or is attributable to the neglect on the part of a director, manager or other officer of the public body, that person will also be liable for prosecution.

On conviction, fines up to €250,000 or imprisonment for up to 2 years, or both, may be imposed.

13. Implementation and Review of Procedures

13.1 Consultation & Provision of Information & Training

It is recommended that each public body consults with management and staff representatives in developing its Procedures having regard to this Guidance.

The Act provides that public bodies are required to provide clear and easily accessible information regarding their Procedures for making a report internally and externally. Therefore, public bodies should ensure that the Procedures are easily available to all categories of workers (including current and former employees, independent contractors, trainees, agency staff, volunteers and job candidates).

In addition to providing a copy of the Procedures to its workers, it is also recommended that the public body communicates the existence of the Procedures appropriately.

Where a substantial or significant level of work is carried out by contractors, public bodies should consider engaging with the employing body (if any) in order to encourage the contractor to also put in place its own Procedures.

General awareness training should be provided to all workers and public bodies should remind workers of the existence of the Procedures and workers should be informed if, and when, changes are made to the Procedures.

New workers joining the public body should be informed during induction training or otherwise of the existence and terms of the Procedures.

Specific training for persons who may be involved in the receipt and investigation of protected disclosures should be provided. In particular, detailed training should be provided to designated persons, and other persons who may be involved in the assessment or investigation of reports of a disclosure. These persons should be familiarised with the requirements of the Act, the obligations of the employer and designated person, and the conduct of assessments and investigations.

13.1.1 PUBLISHING OF INFORMATION BY PRESCRIBED PERSONS AND THE COMMISSIONER

Prescribed persons are required to publish on a website maintained by them or on their behalf, in a separate, easily identifiable and accessible section, the list of information set out at section 7A(10) of the Act.

The Commissioner is required to publish on a website maintained by them or on their behalf, in a separate, easily identifiable and accessible section, the list of information set out at section 10B(7) of the Act.

The information required to be published is the same for both prescribed persons and the Commissioner and consists of:

- (a) the conditions for qualifying for protection under the Act;
- (b) the contact details of the prescribed person to whom a report may be made or the Commissioner for the purpose of making reports to the Commissioner (as relevant) in the manner specified in section 7, in particular the electronic and postal addresses and the telephone numbers for making the report, indicating whether the telephone conversations are recorded;
- (c) the procedures applicable to the making of reports using the external reporting channels and procedures, including the manner in which the prescribed person / Commissioner may request the reporting person to clarify the information reported or to provide additional information, the period for providing feedback (including further feedback) and the type and content of such feedback;
- (d) the confidentiality regime applicable to reports and, in particular, the information in relation to the processing of personal data in accordance with section 16B and under applicable data protection law;
- (e) the nature of the follow-up to be given in relation to reports;
- (f) the remedies and procedures for protection against penalisation and the availability of advice pursuant to Article 20.1(a) of the Directive for persons contemplating making a report;
- (g) a statement clearly explaining the conditions under which persons making a report using the external channels and procedures are protected from incurring liability for a breach of confidentiality pursuant to sections 14 and 15;
- (h) contact details for the support services provided under section 21A;
- (i) such other information as the Minister may specify in guidance under section 21.

13.2 Support and Advice

All public bodies should give consideration to strategies for providing appropriate advice (which for the avoidance of doubt does not include legal advice) and support, such as access to Employee Assistance Programme (or equivalent services), to workers who make reports of wrongdoing. Information should be provided in the Procedures on the support available that may be of assistance to a worker.

13.3 Adaptation of Procedures – Evaluation & Review

Procedures introduced in a public body should be tailored to the needs of the particular public body taking into account the specific responsibilities, powers and requirements of that body. As is the case for any policy applicable to workers, the Procedures should be clear and accessible and should use simple language.

The control functions of the public body (such as Internal Audit or Compliance) should monitor the operation of the Procedures on an ongoing basis and report to the Audit Committee or equivalent on their findings. Such monitoring should not be conducted by the same person / area that has responsibility for the operation of the Procedures.

It is also recommended that senior management and the appropriate governance bodies of each public body carry out periodic reviews at least annually, and evaluate the Procedures where appropriate.

Prescribed persons

Prescribed persons must review their external reporting channels procedures at least once within 3 years after the date of first publication and at least once every 3 years after this.

The Commissioner

The Commissioner must review the external reporting channels and procedures regularly, but at least once within 3 years after the date of first publication and at least once every 3 years after this.

13.4 Non-restriction of Rights

The Act provides that it is not permitted to have clauses in agreements that prohibit or restrict the making of protected disclosures, exclude or limit the operation of any provision of the Act, preclude a person from bringing any proceedings under, or by virtue of, the Act and / or preclude a person from bringing proceedings for breach of contract in respect of anything done in consequence of the making of a protected disclosure. This should be explained in the Procedures.

14. Annual Reports

Each public body, prescribed person and the Commissioner is required under section 22 of the Act to provide an annual report to the Minister for Public Expenditure and Reform. This must be provided by 1 March in each year, to include information in respect of the preceding calendar year. The information must be provided in such a way that it does not enable the identification of reporting persons or persons concerned.

The following information must be included:

- (a) the number of reports made to the public body, prescribed person or Commissioner;
- (b) in the case of the Commissioner, the number of reports transmitted to the Commissioner under section 8 of the Act;
- (c) in the case of the Commissioner, the number of reports transmitted by the Commissioner under section 10C(1)(b) or 10D(1)(b)(ii) to another suitable person (within the meaning of section 10C or 10D, as the case may be);
- (d) the number of reports transmitted to the public body, prescribed person or Commissioner, as the case may be, under sections 7, 10B, 10C and 10D;
- (e) in respect of each report referred to in paragraphs (a) to (d), whether the relevant wrongdoing concerned was a breach;
- (f) the number of investigations and proceedings opened by the public body, prescribed person or Commissioner in relation to the relevant wrongdoings concerned as a result of the reports referred to in paragraphs (a) to (d);
- (g) the number of investigations and proceedings opened, in the years preceding the year in respect of which the report is being made, by the public body, prescribed person or Commissioner in relation to the relevant wrongdoings concerned that remain open;
- (h) the number of investigations and proceedings closed by the public body, prescribed person or Commissioner in relation to the relevant wrongdoings concerned as a result of the reports referred to in paragraphs (a) to (d);
- (i) in respect of each closed investigation or proceedings referred to in paragraph (h), the outcome of the investigation or proceedings and the decision taken by the public body, prescribed person or Commissioner;
- (j) where relevant and in so far as it can be ascertained, the estimated financial damage and the amounts recovered following any investigation and proceedings referred to in paragraph (h);
- (k) such other information relating to the performance of the functions of public bodies, prescribed bodies or the Commissioner, as the case may be under this Act, as may be requested by the Minister.

This information will be published online by the Minister, in aggregate form.

Each public body, prescribed person and the Commissioner must also publish a report by 31 March each year in respect of the previous calendar year on their website (and in any other format that may be appropriate). This report must contain the above information, and a statement confirming that the public body, prescribed person or Commissioner has in place either, or both, internal reporting channels and procedures and external reporting channels and procedures as required.

This information above can also be included in the public body's Annual Report.

The Commissioner shall, not later than 1 March in each year, provide to the Minister in respect of the immediately preceding calendar year, in a form which does not enable the identification of reporting persons or persons concerned, information regarding the number of reports transmitted by the Commissioner to other persons under sections 10C(1)(b) and 10D(1)(b).

The Minister may request, in writing, from a public body or prescribed person or the Commissioner, as the case may be, such further information relating to the performance of the functions of the public body, prescribed body or Commissioner concerning the implementation of this Act as the Minister may reasonably require for the purposes of this section.

15. Review of this Guidance

This Guidance will be reviewed by the Minister for Public Expenditure and Reform in light of the experience of public bodies in dealing with reports of disclosures under the 2014 Act, as amended. Any feedback or queries should be directed to: PDconsultation@per.gov.ie.

Note: This Guidance has been produced for information purposes only. It does not impose any legal obligations in itself, nor is it an authoritative statement of the law, which is set out in the Protected Disclosures Act 2014.

Appendix A: Information that should be included in a disclosure

It is recommended that, at a minimum, reports should include the following details:-

- a. that the report is a protected disclosure and is being made under the Procedures;
- b. the reporting person's name, position in the organisation, place of work and confidential contact details;
- c. the date of the alleged wrongdoing (if known) or the date the alleged wrongdoing commenced or was identified;
- d. whether or not the alleged wrongdoing is still ongoing;
- e. whether the alleged wrongdoing has already been disclosed and if so, to whom, when, and what action was taken;
- f. information in respect of the alleged wrongdoing (what is occurring / has occurred and how) and any supporting information;
- g. the name of any person(s) allegedly involved in the alleged wrongdoing (if any name is known and the worker considers that naming an individual is necessary to report the wrongdoing disclosed); and
- h. any other relevant information.

Appendix B: Checklist for protected disclosures procedures

The following checklist provides an overview of content that should be included in a Protected Disclosures Procedure that is made available to workers. For the specific details that should be included, public bodies should refer to the Guidance and the Act.

B.1 Internal Channels

Introduction

- Introduction to the procedures
- Policy statement, and commitment of management to procedure
- Responsibility for procedure
- Scope of procedures and to who. they apply to

Definitions

- Definition of key terms (relevant wrongdoing, worker, etc.)

Protected Disclosures

- Definition
- Requirements to constitute a protected disclosure and when a disclosure may not be a protected disclosure
- Motivation of the reporting person irrelevant
- Protected disclosures vs personal complaints - difference between these and how personal complaints will be handled

Making a Disclosure – Internally

- What it means to make a protected disclosure – must make a report in the manner set out by the Act to gain protections
- How to do so – in writing / orally / in person
- Details of postal address / email address / phone number
- Details of designated person
- What information should ideally be contained in a report
- Encourage workers to make reports internally

Making a Disclosure – Externally

- List of options for external disclosure

- Requirements needed to be met to be able to make external disclosure to the various recipients
- Details of prescribed person for public body

Protection of Identity

- Set out obligations of employer to protect identity of reporting person
- Measures that will be taken by the public body to protect identity
- Exceptions and when identity can be disclosed
- How a reporting person can make a complaint if their identity has been disclosed
- Efforts should not be made to attempt to identify reporting person by other individuals

Anonymous Disclosures

- How these are treated by the public body and limitations associated with anonymous disclosures

Process once a report of a disclosure is received

Acknowledgement

- Timelines and what acknowledgement will include

Initial Assessment

- What this will involve
- Who will conduct the initial assessment
- Potential outcomes

Investigation and Outcome

- If a report is a protected disclosure, details of the investigation process (if required)
- Set out the process to give flexibility to the public body
- Who will carry it out, entitlement to fair procedures, confidentiality provisions, etc.
- Outcomes of the investigation and interaction with the disciplinary process
- Public bodies may wish to provide for an informal process

Feedback

- Timelines,
- What will be included, what will not be included.
- Communication of final outcome - optional

Penalisation

- What is penalisation – include definition
- Protections under the Act
- Commitment from management that penalisation not tolerated
- How to complain internally of penalisation
- Redress available, including external redress and timelines
- Normal management of a reporting person does not constitute penalisation

Disciplinary Process,

- When this may apply in context of procedures, (e.g. making knowingly false disclosures, penalisation, cover up of wrongdoing)

Reviews of decisions

- When this will apply
- Review process

Annual Report

- Collection and publishing of information

Review of policy

- Frequency of review

Appendix – Form for making a report

B.2 External Channels

Introduction

- Introduction to the procedures
- Policy statement, and commitment of management to procedure
- Responsibility for procedure

Application

- Who the procedures apply to and in particular the matters which fall within the scope of the prescribed person

Definitions

- Definition of key terms (relevant wrongdoing, worker, etc)

Protected Disclosures

- Definition
- Requirements to constitute a protected disclosure to a prescribed person
- Protected disclosures vs personal complaints - difference between these
- Options for other methods of disclosure (internally, other external methods)
- Requirements needed to be met to be able to make internal / external disclosure to the various recipients
- Refer to list of all prescribed persons

Making a Disclosure to Prescribed Person

- What it means to make a protected disclosure – must make a report in the manner set out by the Act to gain protections
- Encourage workers to make reports internally first
- How to make disclosure to prescribed person – in writing and orally / in person
- Details of postal address / email address / phone number
- Details of designated person
- What information should ideally be contained in a report

Protection of Identity

- Set out obligations of employer to protect identity of reporting person and any person concerned
- Measures that will be taken by the public body to protect identity
- Exceptions and when identity can be disclosed

Anonymous Disclosures

- How these are treated by the prescribed person and limitations associated with anonymous disclosures

Process once a report of a disclosure is received

Acknowledgement

- Timelines and what acknowledgement will include

Initial Assessment

- What this will involve
- Who will conduct the initial assessment
- Potential outcomes of the assessment and options open to the prescribed person

Investigation and Outcome

- Details of the investigation process (if an investigation is required)
- Information on any statutory powers / process under which the investigation will be carried out

Feedback

- Timelines
- What will be included, what will not be included
- Communication of final outcome – restrictions on what can be provided

Penalisation

- What is penalisation – include definition
- Protections under the Act
- Inform of option to complain internally to employer if penalisation occurs
- Redress available, including external redress and timelines

Reviews of decisions

- When this will apply
- Review process

Annual Report

- Collection and publishing of information

Review of policy

- Frequency of review

Appendix – Form for making a report

Appendix C: Ministerial Reporting Channel

C.1 Overview

Subject to certain conditions, a worker who is or was employed by a public body can make a protected disclosure to a Minister or Minister of State responsible for the public body concerned.

Ministers are required to establish channels to receive protected disclosures and to publish information on how to access and use the reporting channel.

All reports received through the Ministerial reporting channel must be transmitted to the Protected Disclosures Commissioner who will ensure the report is sent to the most appropriate person to deal with the concern raised.

C.2 Conditions for reporting to a Minister

If a worker is or was employed in a public body, the worker may make a protected disclosure to a relevant Minister. A “relevant Minister” is defined as a Minister with responsibility for the public body concerned in whom functions, whether statutory or otherwise, as respects the public body, are vested, or a Minister of State to whom any such function is delegated. In general, this will be the Minister for the parent department of the public body.

In order to make a disclosure to a relevant Minister, the worker must reasonably believe that the information disclosed tends to show one or more relevant wrongdoings; and one or more of the following must also apply:

- I. The worker has previously made a disclosure of substantially the same information to their employer or a prescribed person, as the case may be, but no feedback has been provided to the worker in response to the disclosure within the period allowed, or, where feedback has been provided, the reporting person reasonably believes that there has been no follow-up or that there has been inadequate follow-up;
- II. The worker reasonably believes the head of the public body concerned is complicit in the relevant wrongdoing reported;
- III. The worker reasonably believes that the disclosure contains information about a relevant wrongdoing that may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage.

C.3 Design of the Ministerial reporting channel

The following key principles should underpin the design of the Ministerial reporting channel:

- It should ensure that the identity of the reporting person and any persons named in a report is kept confidential to the greatest extent possible;
- The reporting channel should operate separately from the ordinary channels of communication to the Minister; and
- Reports should be transmitted to the Protected Disclosures Commissioner as soon as reasonably practicable.

In practical terms, the following is recommended:

- Overall responsibility for the correct functioning of the Ministerial channel lies with the Minister. Practically, it will be a matter for the Secretary General of the Department to determine – with the Minister’s approval – how the channel should be best supported – i.e. through the Minister’s private office or through a corporate services function.
- Each Department should have a set of written procedures for the handling of reports made to Ministers.
- Each Department should designate a person (or persons) to handle any reports received by Ministers. This can be the same person (or persons) designated to handle internal reports per section 9.4.1 of this Guidance.
- At a minimum, a dedicated secure email and/or postal address should be provided so as to ensure separation of any protected disclosures from general correspondence sent to the Minister. Other means of reporting, such as, for example, a secure web form, can also be considered as appropriate.
- Access to any reports received and any other records relating to reports received should be restricted to designated persons.
- Designated persons should be suitably trained to handle reports received via the Ministerial channel. Staff in the Minister’s and Minister of State’s private and constituency offices should have sufficient awareness training to be able to direct relevant queries, correspondence etc. to the designated person(s) as appropriate.
- Records of the numbers of reports received through the Ministerial channel must be kept by the designated person(s) in order to fulfil the annual reporting obligations under the Act.

- A common set of procedures, designated persons, reporting channels and records can apply to Ministers and Ministers of State within a Department if required. Where a Minister of State has been assigned overall responsibility for a specific body (e.g. the Minister of State at the Office of Public Works), the Minister of State's office within that body should establish its own channels, procedures etc.

C.4 Operation of the Ministerial reporting channel

All reports – including all anonymous reports – received via the Ministerial reporting channel must be transmitted to the Protected Disclosures Commissioner within 10 calendar days of receipt.

The reporting channel must be appropriately monitored by the designated person(s) to ensure that all reports are transmitted within the statutory timeframe. If the statutory deadline is exceeded, the report must still be transmitted to the Commissioner. It is advised, however, that the reporting person be informed of the delay where possible.

Where an item of correspondence received via the dedicated channel is obviously not a protected disclosure or concerning a protected disclosure, there is no obligation on the designated person to transmit it to the Commissioner. If there is any doubt or uncertainty in this regard, the designated person should always transmit the report to the Commissioner.

In the event that a report is made outside of the formal Ministerial reporting channel (e.g. via ordinary correspondence channels to the Minister's private and/or constituency offices), the report should be transmitted as soon as possible to the designated person, who should handle it in the same manner as though it was sent through the dedicated channel.

Staff in Ministers' private and constituency offices who could potentially receive reports outside of the dedicated channel should be trained so that if an item of correspondence has the potential to be a protected disclosure, they should: (i) seek advice from the designated person(s) in this regard; and (ii) not disclose the identity of the reporting person or any persons named in said potential disclosure to anyone but the designated person.

There is no obligation under the Act for the Minister to acknowledge receipt of a report or to inform the reporting person their report has been transmitted to the Commissioner. Under the Act, the Commissioner must send an acknowledgement within 7 calendar days of receipt of the transmitted report, unless the reporting person requests otherwise or the Commissioner reasonably believes that to do so would jeopardise the protection of the reporting person's identity.

It is, therefore, a matter for individual Departments and/or Minister's private offices to decide if, in accordance with applicable quality customer service policy, whether an acknowledgement should also issue from the Minister's office. However, an acknowledgement should **not** be

sent if the reporting person requests that no acknowledgement be made or if the designated person reasonably believes that to issue an acknowledgment would jeopardise the protection of the reporting person's identity.

Departments may consider it of benefit (in the interest of clarity and to manage expectations) to craft a standard acknowledgement which sets out that the disclosure has been received and that it will be transmitted to the Commissioner who will acknowledge receipt to the reporting person. Such a standard template could be used on a case by case basis as required.

There is no obligation under the Act for a Minister to make any determination as to whether the reporting person has complied with the requirements for reporting to a Minister under section 8(2) of the Act (or any of the other conditions necessary to qualify for protection under the Act). It is a matter for the reporting person to ensure that all of the conditions for reporting to a Minister under the Act have been met.

Once the report has been transmitted to the Commissioner, all obligations on the Minister under the Act have been discharged. Any further queries or correspondence from the reporting person following transmission should be referred to the Commissioner.

C.5 Information to be published

Section 8(4) of the Act requires each Minister of the Government to make available clear and easily accessible information on how to make a protected disclosure to a relevant Minister or Minister of State in accordance with the manner specified by section 8 of the Act. This information should be published on the Department's website and include the following:

- The conditions applying to the making of reports to a Minister (see Section C.2).
- The means by which the report can be made and the relevant email, postal address, web form etc. (as appropriate) for making the report.
- The information that should be included in any report (see Appendix A).
- That the report will be transmitted to the Protected Disclosures Commissioner within 10 calendar days and that following transmission any queries or further correspondence should be directed to the Commissioner.
- The confidentiality and data protection regime applicable to reports.
- Contact details for the Transparency International Ireland Speak Up helpline where reporting persons can seek advice – including legal advice – on making a protected disclosure.

It is also recommended that this information is included in the Department's internal reporting procedures.



**An Roinn Caiteachais
Phoiblí agus Athchóirithe**
Department of Public
Expenditure and Reform

**Tithe an Rialtas. Sráid Mhuirfean Uacht,
Baile Átha Cliath 2, D02 R583, Éire**
Government Buildings, Upper Merrion Street,
Dublin 2, D02 R583, Ireland

T:+353 1 676 7571
@IRLDeptPer
www.per.gov.ie