A&L Goodbody

EMPLOYMENT AND
WHITE COLLAR CRIME

Upcoming changes to Ireland's Whistleblowing Regime - *Why businesses should start preparing*

On 12 May 2021, the Minister for Public Expenditure and Reform published the General Scheme of the Protected Disclosures (Amendment) Bill (the **General Scheme**).

The General Scheme provides a broad outline of the proposals for the contents of the actual Bill. It is intended that the Bill will transpose the EU Whistleblowing Directive into Irish law before the end of this year, amending the Protected Disclosures Act 2014 and perhaps the whistleblowing provisions of the Central Bank (Supervision and Enforcement) Act 2013. While Ireland already has one of the strongest regimes of whistleblower protection in the EU, there are nonetheless some significant changes on the horizon. We set out below the key changes and implications for businesses.

5 MIN READ

Who will be covered?

The definition of "worker" will be expanded to include an individual who is a shareholder, member of the company's administration or management including a non-executive member, a volunteer or unpaid trainee or a job candidate. The definition of "employee" will be expanded to include all of these, with the exception of a shareholder. This is a material broadening of the sphere of individuals who can make protected disclosures.

Compensation for employees who have been penalised for whistleblowing is currently calculated by reference to their remuneration. This poses a problem for some of these new categories of whistleblower, who may not receive remuneration. The General Scheme recognises this by proposing that such persons who are not in receipt of remuneration may be awarded up to €13,000 if penalised for whistleblowing. They will have access to the Workplace Relations Commission (and Labour Court on appeal) for redress.

What wrongdoings will be covered?

The General Scheme proposes an amendment to the definition of "relevant wrongdoing". These are the types of wrongdoing that a person may whistleblow about and obtain immunity for doing so. The General Scheme provides for the inclusion of breaches of EU law that are within the scope of the Whistleblowing Directive, such as in the areas of public procurement, product safety and compliance and public health.

It is debatable whether some or all of these matters are already covered by the existing definition of 'relevant wrongdoing'. However, the General Scheme provides some useful clarity in that regard.

Importantly, from an employer's perspective, a grievance about interpersonal conflicts between the reporting person and another worker which could be channelled through another HR procedure will be expressly excluded from the definition of relevant wrongdoing. This is a helpful addition, which may bring further clarity for employers in categorising a report.

Claims in respect of penalisation

Penalisation is currently widely defined as any act or omission that affects a worker to their detriment. The definition includes examples, such as unfair treatment, or the imposition of a disciplinary sanction.

The General Scheme envisages new examples being added to this list, such as a negative performance assessment; failure to convert a temporary employment contract into a permanent one; and psychiatric or medical referrals. Again, it is debatable if these matters would be covered by the current definition of 'penalisation'. Either way, employers will need to ensure any such measures taken in respect of a whistleblower are entirely unrelated to their making of a protected disclosure.

Complainant employees will be allowed to seek interim relief, i.e. an injunction from the Circuit Court, in respect of all forms of penalisation. Currently, interim relief applies only in the context of alleged dismissal for having made a protected disclosure. This expansion will be a significant development, not least because such applications for

relief must be brought within 21 days of the penalisation, whereas a WRC complaint takes significantly longer; complaints must usually be filed within six months, with the hearing not taking place until some months after that.

While not referenced in the General Scheme itself, it is noteworthy that the Minister, in his press release indicated that the legislation will reverse the burden of proof; it will be assumed that the alleged act of penalisation occurred because the worker made a protected disclosure, unless the employer can prove otherwise. This would be a significant development and it remains to be seen what shape it will take in the detail of the legislation.

Anonymous disclosures

Importantly, the General Scheme provides that there is no obligation to accept and follow up on anonymous disclosures. However, if an anonymous whistleblower's identity subsequently becomes known, they will be protected.

The absence of any legal requirement to follow up on a whistleblowing report could provide a false sense of security to businesses. Just because there is no legal requirement to follow up does not mean there is no reputational exposure for not doing so. In our experience, if an anonymous whistleblowing report is sufficiently serious and capable of verification, then businesses who fail to investigate it may later regret that decision if the matter becomes public.

Protecting the identity of the whistleblower and the person concerned

Under the General Scheme, the person to whom the protected disclosure is made or referred, must not disclose any information that might identify the whistleblower beyond to those authorised to receive or follow-up on the disclosure. This is very similar to and represents only a minor modification of the existing requirement to keep a whistleblower's identity confidential. However, the General Scheme also provides that the same protection applies to a "person concerned", i.e. a person who is referred to in a protected

disclosure as someone involved or associated with the wrongdoing. This is a very significant change. Businesses already find it challenging to keep a whistleblower's identity confidential. Also keeping confidential the identity of the 'accused' will, in practice, be very challenging.

In the current legislation, there are certain exceptions to this requirement, such as where the recipient reasonably believes that disclosing any such information is necessary for:

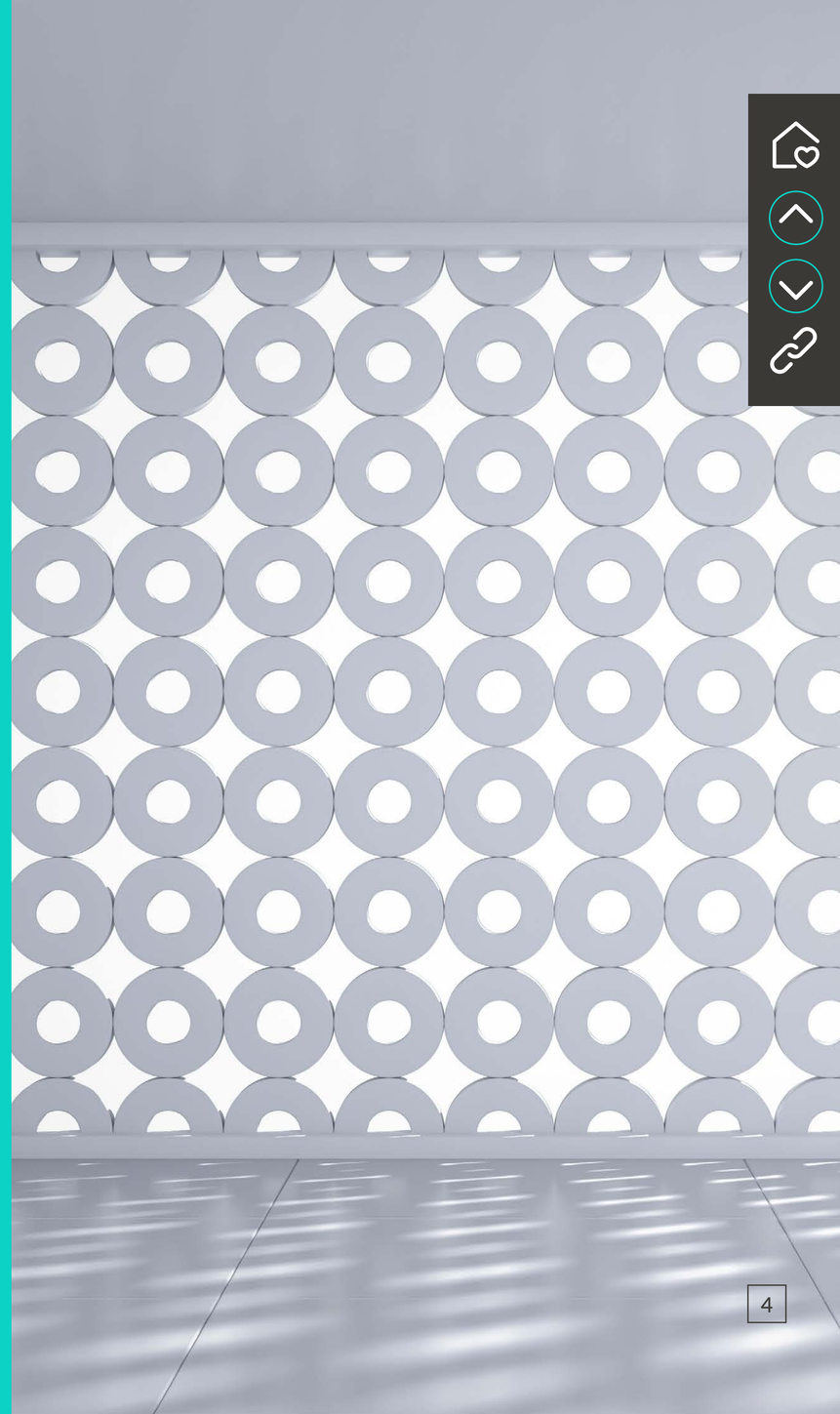
- the effective investigation of the relevant wrongdoing
- the prevention of serious risk to the security of the State, public health, public safety or the environment, or
- the prevention of crime or prosecution of a criminal offence.

The General Scheme retains these exceptions but provides that in such a case the whistleblower must be informed before their identity is disclosed, unless such information would jeopardise the related investigations or judicial proceedings.

Internal reporting channels

While currently only public bodies must have procedures for the making of protected disclosures, this is about to change. When the Bill is enacted all employers with 250 or more employees will have to have internal channels and procedures for the making of protected disclosures. This threshold will reduce to employers with 50 or more employees from 17 December 2023.

Internal reporting channels may be operated by a person or department designated for that purpose or provided externally by a third party. It will be imperative that the persons tasked with operating the procedure are in a position to perform their functions competently and therefore receive appropriate training.



This step plan provides an outline of the new procedures

01

Channels must be secure to ensure the confidentiality of the identity of the reporting person and any third party mentioned is protected and prevent access by non-authorised persons

02

Acknowledge receipt of the protected disclosure within 7 days of that receipt

03

Designate an impartial person or persons competent to follow-up on protected disclosures

04

Diligent follow-up by the designated person

05

A reasonable timeframe to provide feedback, not exceeding 3 months from the acknowledgement of receipt or, if no acknowledgement was sent, 3 months from the expiry of the 7 day period after the report was made

06

Ensure provision of clear and easily accessible information regarding:

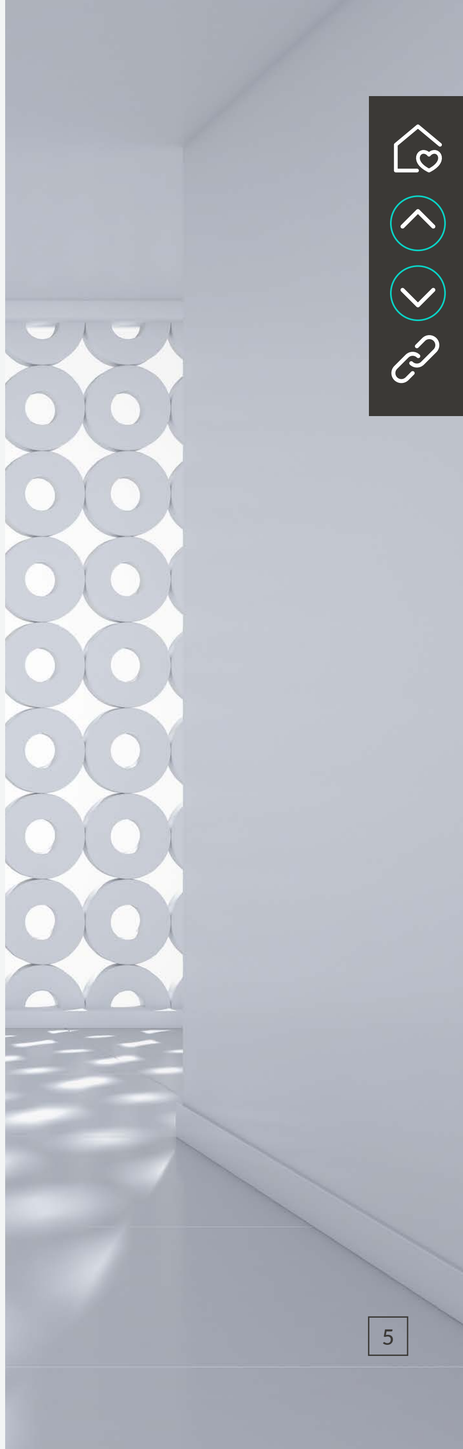
i. The procedures for making a protected disclosure using the channels established; and

ii. The procedures for making a protected disclosure to a prescribed person

The channels and procedures must enable a protected disclosure to be made in writing, orally, or both. Oral reporting should be possible by telephone or through a voice messaging system and, upon request by the whistleblower, by means of a physical meeting within a reasonable timeframe. In addition, where a protected disclosure is made orally, the whistleblower must be given the opportunity to check, rectify and agree the minutes recording their protected disclosure by signing them. This is a sensible provision which should help to avoid disputes about what was or was not reported further down the line.

Records will have to be kept and stored for no longer than is necessary and for a period proportionate to comply with the provisions of the legislation.

While in practice most employers already have whistleblowing policies and procedures in place, the new requirements are considerably more prescriptive than the current market standard. Therefore businesses will need to review and update their existing policies and procedures to ensure compliance.



External reporting channels

Currently, individuals making a disclosure to a prescribed person[1] only qualify for protection under the protected disclosures regime if they reasonably believe the contents of their disclosure to be "substantially true". Under the new regime, the test will be changed to a reasonable belief that the information and allegations are "true". Arguably, this is a slightly higher threshold to meet.

The General Scheme imposes a timeframe within which prescribed persons must follow-up on protected disclosures they receive, but also preserves some level of flexibility for prescribed persons in circumstances where they receive considerable volumes of protected disclosures. If necessary, prescribed persons may deal with disclosures of serious wrongdoing as a matter of priority, without prejudice to the prescribed timeframe. Disclosures may be made in writing and orally. Prescribed persons must publish certain information in an easily identifiable and accessible section on their website.

Likewise for disclosures to a Minister or for public disclosures, the General Scheme outlines details of proposals to amend the thresholds, arguably increasing the threshold a worker has to meet for the disclosure to qualify as a protected disclosure.

Establishment of a protected disclosures office

A dedicated and independent protected disclosures office will be established within the office of the Ombudsman. It will act as a prescribed person of last resort to address situations where there are gaps in the provision of a prescribed person or where assistance is required in directing the disclosure to an appropriate prescribed person. The protected disclosures office will also support Ministers who receive disclosures by conducting an initial assessment and recommending the appropriate authority to deal with it or carry out the follow up itself.

[1] *The Protected Disclosures Act 2014 (Disclosure to Prescribed Persons) Order 2020 prescribes the prescribed persons; such as the Data Protection Commission and the Workplace Relations Commission.*

Penalties

The General Scheme provides for the imposition of new penalties for (i) hindering or attempting to hinder a worker in making a protected disclosure; (ii) penalising a worker; (iii) bringing vexatious proceedings against a worker for having made a protected disclosure; or (iv) breaching the duty of confidentiality to protect the identity of the whistleblower and/or the "person concerned".

The level of the penalties is still to be decided in consultation with the office of the Attorney General. However, the EU Whistleblowing Directive prescribes that they must be "effective, proportionate and dissuasive", which is likely to mean the new regime will have more teeth than its predecessor.

Conclusion

In short, the key change for businesses will be a requirement to have more detailed, advanced processes for managing whistleblowing complaints, which include certain strict requirements. Given the proximity of the changes, we recommend that businesses start preparing for them now so that the new whistleblowing culture envisaged by the General Scheme is embedded by the time the new laws take effect.

For more information in relation to this topic, please contact Kenan Furlong, Partner, Michael Doyle, Partner, Triona Sugrue, Knowledge Lawyer, Clara Gleeson, Solicitor, or any member of the ALG Employment and White Collar Crime teams.

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