

PROTECTED DISCLOSURE POLICY

Introduction:

The Educational Research Centre (ERC) is committed to maintaining an open culture with the highest standards of honesty and accountability where our workers can report any concerns in confidence.

Whistleblowing is the term used when a worker raises a concern about a relevant wrongdoing, illegal practices or unethical conduct such as possible fraud, crime, danger or failure to comply with any legal obligation which came to the worker's attention in connection with the worker's employment.

The Protected Disclosures Act 2014 was enacted on 15 July 2014. The purpose of the Act is to provide a statutory framework within which workers can raise concerns and disclose information regarding potential wrongdoing that has come to their attention in the course of their work in the knowledge that they can avail of significant employment and other protections if they are penalised by their employer or suffer any detriment for doing so. It is important to note that in order to enjoy the protections of the Act, disclosures must be made in accordance with the provisions set out in the Act.

The Protected Disclosures Act, 2014 requires each public body to:

... establish and maintain procedures for the making of protected disclosures by workers who are or were employed by the public body and for dealing with such disclosures.

The Act also requires the public body to provide written information relating to these procedures to workers.

Our whistle-blowing/protected disclosure policy is intended to encourage and enable workers to raise concerns within our workplace rather than overlooking a problem or "blowing the whistle" externally. Under this policy a worker is entitled to raise concerns or disclose information without fear of penalisation or threat of less favourable treatment, discrimination or disadvantage. (There are circumstances where external disclosure may be more appropriate, please refer to the section entitled "External Disclosure" on page 4).

- ERC workers should feel comfortable and confident about reporting potential wrongdoing and the ERC will not tolerate the penalisation of a worker who discloses information in line with this policy. The ERC is committed to addressing concerns raised in an effective and timely manner.

Scope of the policy

This policy applies to workers of the organisation which are defined as any person who is working or has worked for the ERC including independent contractors, consultants, agency staff, trainees, temporary workers, interns and those on work experience. It also applies to members of the ERC and all its enabling structures including boards and subject development groups and committees.

It is important to note that should you have a concern in relation to your own employment or personal circumstances in the workplace it should be dealt with by way of our Grievance Procedure. Likewise concerns arising in regard to workplace relationships should generally be dealt with through our Dignity in the Workplace policy.

It is also important to note that this policy does not replace any legal reporting or disclosure requirements. Where statutory reporting requirements and procedures exist these must be complied with fully.

Purpose of the Policy

- To encourage ERC workers to feel confident and safe in raising concerns and disclosing information;
- To provide avenues for ERC workers to raise concerns in confidence and receive feedback on any action taken;
- To ensure that ERC workers receive a response where possible to concerns and information disclosed;
- To reassure ERC workers that they will be protected from penalisation or any threat of penalisation.

What is meant by a protected disclosure?

The Act provides that if a disclosure is made by a worker in line with the channels set out in the legislation, a worker is protected from penalisation by the employer. Penalisation is defined in the Act and includes for example:

- Suspension/Layoff/Dismissal;
- Demotion;
- Transfer of duties, change of location, change in working hours, reduction in wages;
- Imposition of reprimand, discipline or other penalty;
- Unfair treatment;
- Coercion, intimidation or harassment
- Discrimination; disadvantage or unfair treatment
- Injury, damage or loss,
- Threat of reprisal

Penalisation of workers who make disclosures will not be tolerated and workers who feel that they are being subjected to adverse treatment should report the matter to immediately to management. Such reports will be investigated and appropriate action, which may include disciplinary action, will be taken against supervisors or co-workers where necessary.

It should be noted that there are several pieces of legislation where reporting of certain matters is mandatory. The Act protects voluntary reporting and does not absolve any worker from a pre-existing mandatory reporting obligation. Likewise where additional protections apply these also remain in force.

What types of concerns can be raised?

A concern or disclosure should relate to a relevant wrongdoing such as possible fraud, crime, danger or failure to comply with any legal obligation which has come to a worker's attention in connection with his/her employment and about which he/she has a reasonable belief of wrongdoing.

Relevant wrongdoings are broadly defined in the Act and include the following:

- Commission of an offence — has happened, is happening, or is likely to happen;
- Failure to comply with any legal obligation (other than one arising under the worker's contract of employment);
- Miscarriage of justice;
- Health and safety of any individual;
- Misuse of public money;
- Gross mismanagement by public body;
- Damage to the environment;
- Destruction or concealment of information relating to any of the above.

(A matter is not regarded as a relevant wrongdoing if it is a matter which 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.)

How are protected disclosures made?

Whether a disclosure is protected or not will depend on the way in which the disclosure is made. The Act provides for a number of channels for those who wish to make a protected disclosure. Disclosure should be, wherever possible, made at the first tier, namely at workplace level to the most appropriate person, however, the Act provides for a tiered disclosure regime with a number of options for workers, both internal and external to the workplace, as internal disclosures may, in some circumstances, be inappropriate.

The various channels are as follows:

Disclosure to an Employer

It is in the best interests of all concerned in the ERC — management, workers and their representatives — that disclosures about potential wrongdoing are managed internally. The earlier the concern is expressed the easier it will be for us to deal with the matter quickly.

The Act provides for direct disclosure to the employer and the Code recognises the strong value to this route. A worker may make a protected disclosure to his/her employer where he/she reasonably believes that information being disclosed shows or tends to show wrongdoing.

Protected disclosures should normally be made in the first instance to the individual's immediate line manager at Research Associate/HEO level (or equivalent) or above. If an individual feels unable to raise the matter with their immediate line manager, the protected disclosure may be raised with their next immediate line manager or higher e.g. Research Fellow or CEO.

If the individual reasonably believes there are circumstances preventing him/her from reporting his/her concerns within the line management structure, he or she can raise the protected disclosure with the Chairperson of the Board of the ERC. In doing so, the individual should clearly set out the circumstances which prevent reporting to line management in the first instance.

There is no required format for making a disclosure. A disclosure can be made anonymously, verbally, electronically or in writing. Where a disclosure is made verbally, it will be documented by the recipient and agreed with the discloser (See Appendix II for guidance).

At a minimum, disclosures should include the following details:

- that the disclosure is being made under the Protected Disclosures Act, 2014
- the discloser's name, position in the organisation, place of work and confidential contact details
- the type of alleged wrongdoing
 - a criminal offence
 - a failure to comply with a legal obligation
 - a miscarriage of justice
 - the endangering of an individual's health or safety
 - damage to the environment
 - unlawful or otherwise improper use of funds
 - fraudulent activity
 - an act or omission that is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement
 - concealment or destruction of evidence relating to the above
- the date of the alleged wrongdoing (if known) or the date the alleged wrongdoing commenced or was identified
- whether or not the alleged wrongdoing is still ongoing

- whether the alleged wrongdoing has already been disclosed and if so, to whom, when and what action was taken
- information in respect of the alleged wrongdoing (what is occurring/ has occurred and how) and any supporting information
- 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 expose the wrongdoing disclosed)
- any other relevant information.

Although the emphasis of the Code is on addressing whistle blowing concerns within the workplace, there may be circumstances where it is appropriate for workers to make a disclosure externally. For instance if the employer fails to act on the information being disclosed or the worker does not wish to avail of the internal route.

Disclosure to a Minister: ERC workers may make a protected disclosure to the Minister for Education and Skills. The evidential criteria for making a disclosure to the Minister is the same as that which applies to a disclosure made internally to an employer i.e. the worker reasonably believes that the information being disclosed shows or tends to show wrongdoing.

External Disclosure:

The worker making the disclosure should ensure that the disclosure is limited to information relevant to the wrongdoing and does not unnecessarily disclose confidential company or confidential commercial information unrelated to the wrongdoing.

Prescribed Persons: The Act provides for the Minister to draft a list of “prescribed persons” (in effect Regulatory Bodies that have regulatory inspection and enforcement functions in their sector) whose roles and responsibilities are such as to be deemed appropriate to receive and investigate matters arising from disclosures relating to any of the wrongdoings in relation to which a disclosure may be made. Examples of such Bodies are the Central Bank, The Health and Safety Authority and the WRC. A full list of relevant Statutory Bodies has been prescribed in Statutory Instrument No. 339 of 21st July 2014.

Disclosure to a prescribed person will only be protected when the person making the disclosure believes that the information disclosed, and any allegation contained in it, is substantially true (Ref: sections six to ten of the 2014 Act which specify the circumstances in which alternative external disclosures qualify as protected disclosures under the Act.)

Legal Advisor: A disclosure made in the course of obtaining legal advice, including advice relating to the operation of the Act, from a barrister, solicitor or trade union official is protected.

Other Persons: There is also provision for disclosure in other circumstances i.e. disclosure potentially in the public domain, such as to the media. The evidential qualifying criteria are set at a higher level. In order for such a disclosure to be protected a worker must:

- Reasonably believe that the information disclosed and any allegation is substantially true;
- The disclosure is not made for personal gain;
- The making of the disclosure in public is in all the circumstances, reasonable.

In addition one or more of the following conditions must be met:

- At the time of making the disclosure the worker reasonably believes that he/she will be subjected to penalisation by the employer if they make the disclosure under the internal process or to a “Prescribed Person”;
- In a case where there is no appropriate prescribed person (Regulatory Body) in regard to the wrongdoing, the worker reasonably believes that evidence will be destroyed or concealed if the disclosure is made directly to the employer;

- No action was taken in regard to a previous disclosure of the same nature made by the worker;
- The relevant wrongdoing is of an exceptionally serious nature.

Support and Advice

When a worker seeks advice from a trade union, barrister or solicitor about the operation of the legislation, this discussion is also a “protected disclosure”. It is sufficient to be protected that the purpose of the discussion was that the worker was seeking advice about the operation of the legislation. Advice on the operation of the Act can be sought at any stage including in advance of making a protected disclosure and during the subsequent process in both internal and external channels.

Confidentiality

The ERC is committed to protecting the identity of the worker raising a concern (except where the person making the disclosure has made it clear that he/she has no objection to his/her identity being disclosed) and to ensure that relevant disclosures are treated in confidence. The focus will be on the wrongdoing rather than the person making the disclosure.

However there are circumstances, as outlined in the Act, where confidentiality cannot be maintained particularly in a situation where the worker is participating in an investigation into the matter being disclosed. Should such a situation arise, we will make every effort to inform the worker that his/her identity may be disclosed.

Raising a Concern Anonymously

Anonymous disclosures made by workers are not excluded from the protection of the 2014 Act. The ERC will act on anonymous disclosures to the extent that is possible, however, on a practical level, it may be difficult to investigate such a concern. The ERC would encourage workers to put their names to allegations, with our assurance of confidentiality where possible, in order to facilitate appropriate follow-up. It should also be clear that the important elements of this policy such as keeping the discloser informed and protecting the discloser from penalisation, may be difficult or impossible unless anonymity is lifted. It should also be noted that workers cannot obtain redress under the 2014 Act without identifying themselves.

Focus will be on the reported wrongdoing and not on the person making the disclosure.

Motivation

The motivation for making a disclosure is irrelevant as to whether or not it is a protected disclosure. What is required is that a worker has a reasonable belief as to wrongdoing and that this wrongdoing has come to the worker’s attention in connection with his/her employment. 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.

It is important to note that in situations where a worker makes a disclosure not in compliance with the Act, the protections under the Act will not be available to the worker. It is also important to note that deliberate false disclosure will not be protected and that a worker could leave him or herself open to disciplinary action in that regard.

How we will deal with your disclosure

1. Logging the disclosure

In the case of a concern expressed verbally, the person to whom the disclosure is expressed will listen carefully and give full attention to the person. In the case of a written disclosure, the matter will be acknowledged as quickly as possible.

A recipient will notify the protected disclosure to the CEO and the Chairperson who will maintain a confidential log of disclosures. The Chairperson will be notified in circumstances where the Chief Executive is the subject of the disclosure. The CEO will be notified in circumstances where the Chairperson is the subject of the disclosure.

2. Initial screening assessment

When a disclosure is made, the recipient will make an initial examination involving a screening assessment to determine whether or not it should be treated as a protected disclosure having regard to the 2014 Act, or is more appropriate to another procedure (e.g. grievance procedure). In the event that the recipient does not consider the matter to be a protected disclosure, the Act provides for alternative channels of disclosure.

Further communication with the discloser may be appropriate to clarify or seek further information. (It may be possible that the matter can be addressed to the satisfaction of the discloser at this point on foot of a discussion and clarification.)

Where the matter is being treated as a protected disclosure, the recipient (i.e. the person to whom the disclosure was made to) will consider whether the alleged wrongdoing is serious or minor, whether an investigation is warranted and what steps should be taken as part of that investigation.

Written feedback including any proposed action, will be provided to the discloser (except in the case of an anonymous disclosure) within 21 days.

3. Investigation

The recipient will convey the basis for a decision to proceed or not to proceed to investigation to the discloser. If the discloser is dissatisfied with this decision, he or she may request a review of the initial assessment, via the recipient, within 14 days of having received the decision (see 5 below).

Where an investigation is deemed appropriate, the recipient will consider the nature and extent of the investigation required. This might consist of an informal approach for less serious wrongdoings, a detailed and extensive investigation of serious wrongdoings or an external investigation by professional experts or another body. In certain circumstances, a referral to the appropriate external enforcement agency or An Garda Síochána may be appropriate.

Any examinations or investigations will be conducted using objective and fair principles with regard to the principles of natural justice. The outcome or conclusion of any such examination or investigation will be communicated to the worker making the disclosure.

The recipient will provide updates on the progress and outcomes of the investigation as appropriate having regard the matters under investigation. It is not possible to lay down precise timescales or steps required in an investigation, as this will depend on the nature of the issues disclosed.

4. Confidentiality / protection of identity

The 2014 Act imposes an obligation on the ERC to protect the identity of the person making a protected disclosure. The ERC will not disclose the worker's identity without their consent, unless it is required by law or necessary for the effective investigation of the relevant wrongdoing.

Where action is to be taken following a protected disclosure the recipient may consult with the discloser to gain his or her informed consent, prior to any action being taken that could reveal their identity. This may include the referral of disclosures to an external party.

Where it is decided that it is necessary to disclose information that may or will identify the discloser, the discloser will be informed of this decision in advance of the disclosure, except in exceptional circumstances.

These may arise where:

- the recipient shows that he or she took all reasonable steps to avoid such disclosure
- the recipient has a reasonable belief that the discloser did not object to their identity being disclosed
- the recipient had a reasonable belief that it was necessary to reveal the identity of the discloser
 - * for the investigation of the wrongdoing concerned
 - * to prevent serious risk to the security of the State, public health, public safety or the environment
 - * for the prevention of crime or prosecution of a criminal offence
- where the disclosure is otherwise necessary in the public interest or is required by law.

Any complaint of penalisation or breach of confidentiality will be assessed and or investigated as appropriate.

5. Protection of the rights of respondents

Where an allegation is made against an individual or respondent, the principles of natural justice and fair procedures will apply. Respondents will be made aware of the details of any allegations made against them in so far as is possible having regard to the requirements of confidentiality contained in the Act and will be given the opportunity, as part of a full investigation, to put forward their case in response to any allegation. Reasonable steps will be taken to protect the confidentiality of those who are the subject of allegations in a protected disclosure pending the outcome of an investigation. Respondents will be entitled to be accompanied by a colleague or staff representative should it be found necessary to interview the respondents during the course of an investigation.

6. Review

A review Group, nominated by the Chief Executive or Chairperson, as appropriate, will be convened where necessary to carry out reviews in respect of the matters listed at a) to d) below. The review group will have not more than three members (to include at least two Board members, one of which can be the Chairperson). Staff members, if involved, will be at the grade of Research Fellows or above).

a) A decision not to proceed to investigation

The group will review the initial assessment and a decision not to proceed to investigation. The outcome, will be notified to the discloser within 14 days. The outcome will be either:
agreement with the decision not to proceed with the investigation

or

disagreement with the decision of the recipient and either referring the disclosure back for investigation by the recipient or if appropriate to nominate a new investigating officer.

b) The outcome of the investigation

If unhappy about the outcome of an investigation, the discloser may request the recipient to refer the matter to the Review Group within 14 days of having been informed of the outcome. The Review Group will carry out an examination of the investigation process but will not re-investigate the disclosure.

c) A decision made to disclose the identity of the discloser

d) The outcome of any assessment or investigation in respect of any complaint of penalisation.

The outcome of any examination by the Review Group will represent a final internal decision on the matter.

7. Records

Records of protected disclosures raised, including outcomes, will be kept for a minimum of seven years after the matter has been finalised by the Chairperson (Or CEO if the disclosure is made against the Chairperson).

These records will be maintained in a confidential and secure form that does not compromise the confidentiality of the person making the disclosure.

8. General information

It is important to us that you feel assured that a disclosure made by you under this policy is taken seriously and that you are kept informed of steps being taken by us in response your disclosure.

In regard to confidentiality, it is important that there should be an awareness of respecting sensitive company information, which, while unrelated to the disclosure, may be disclosed in the course of a consultation or investigation process.

It is possible that in the course of an investigation you may be asked to clarify certain matters. To maximise confidentiality such a meeting can take place off site and you can choose whether or not to be accompanied by a colleague or trade union representative.

Where a concern is raised or a disclosure is made in accordance with this policy, but the allegation is subsequently not upheld by an investigation, no action will be taken against the worker making the disclosure and the worker will protected against any penalisation. **It is important to note that if an unfounded allegation is found to have been with malicious intent, then disciplinary action may be taken.**

How the matter can be taken further

The aim of this Policy is to provide an avenue within this workplace to deal with concerns or disclosures in regard to wrongdoing. We are confident that issues can be dealt with “in house” and we strongly encourage workers to report such concerns internally.

We acknowledge that there may be circumstances where an employee wants to make a disclosure externally, and the legislation governing disclosures — The Protected Disclosures Act 2014 — provides for a number of avenues in this regard.

It is important to note however that while you need only have a reasonable belief as to wrong doing to make a disclosure internally, if you are considering an external disclosure, different and potentially more onerous obligations apply depending on to whom the disclosure is made.

Communication, Monitoring and Review

This policy will be communicated as appropriate and will be subject to regular monitoring and review in consultation with our workforce and their representatives.

Appendix I / Frequently Asked Questions

What is the difference between a grievance and a protected disclosure?

A grievance is a matter specific to the worker i.e. that worker's employment position around his/her duties, terms and conditions of employment, working procedures or working conditions. A grievance should be processed under the organisation's Grievance Procedure.

A protected disclosure is where a worker has information about a relevant wrongdoing.

It is important that a worker understands the distinction between a protected disclosure and a grievance.

Examples of a grievance

- Complaint around selection criteria for a promotional post;
- Complaint around allocation of overtime.

Example of a whistleblowing disclosure

- In a hazardous work situation information regarding a failure to provide or wear protective clothing and adhere to health and safety guidelines;
- Information about the improper use of funds, bribery and fraud.

Can a disclosure made before the commencement of the Act be protected?

Yes, a disclosure made before the Act coming into force (14 July 2014) may still be a protected disclosure provided that penalisation or negative consequences for making the disclosure are suffered by the worker subsequent to the enactment of the Act.

What about disclosure in regard to wrongdoings occurring outside the State?

A disclosure made outside the State may qualify for protection. It is immaterial whether a relevant wrongdoing occurred or occurs in the State or elsewhere.

The following protections are available to all workers making a protected disclosure:

- Right of take action through the Civil Courts;
- Immunity from Civil Liability where a worker making a disclosure suffers detriment;
- Making a protected disclosure does not constitute a criminal offence;
- Right of confidentiality.

Safeguards and Penalisation

A worker who makes a disclosure and has a reasonable belief of wrongdoing will not be penalised by the ERC, even if the concerns or disclosure turn out to be unfounded (except where the disclosure is found to have been made with malicious intent, ref p8).

Penalisation includes suspension/dismissal, disciplinary action, demotion, discrimination, threats or other unfavourable treatment arising from raising a concern or making a disclosure on the basis of reasonable belief for doing so. If you believe that you are being subjected to penalisation as a result of making a disclosure under this procedure, you should inform your manager/senior manager immediately.

Workers who penalise or retaliate against those who have raised concerns under this policy will be subject to disciplinary action.

Workers are not expected to prove the truth of an allegation. However they must have a reasonable belief that there are grounds for their concern. It should be noted that appropriate disciplinary action may be taken against any worker who is found to have raised a concern or raised a disclosure with malicious intent.

Representation/Supports

When a worker seeks advice from a trade union official, solicitor or barrister, this discussion is treated as a protected disclosure including at early stages in contemplation of making a protected disclosure or seeking information on the operation of the legislation. The trade union official, solicitor or barrister is bound by a general duty of confidentiality. In regard to confidentiality, it is important that there should be an awareness of respecting sensitive company information, which, while unrelated to the disclosure, may be disclosed in the course of a consultation or investigation process.

Any worker making a protected disclosure or any worker against whom an allegation has been made must have their constitutional right to natural justice and fair procedures upheld in accordance with all relevant employment legislation. In this regard, appropriate representation, if requested, should be accommodated.

Protection from Dismissal

The Act provides that an employee who is penalised by dismissal following the making of a protected disclosure may claim that he/she has been unfairly dismissed. There are extensive protections set out in the Unfair Dismissals Acts for protection against unfair dismissals. In addition (a) there is no minimum service requirement to avail of the Unfair Dismissal Acts arising from making a protected disclosure and (b) compensation for unfair dismissal on grounds of making a protected disclosure can be up to a maximum of 5 years remuneration.

Furthermore, where an employee is dismissed on foot of having made a protected disclosure, protection in the form of “interim relief” on application to the Circuit Court is available to prevent an unfair dismissal proceeding in advance of an outcome being determined.

Protection from Penalisation

If an employee feels that the employer has penalised him/her for making a protected disclosure, the employee may refer the matter to an Adjudicator of the Workplace Relations Commission. Generally speaking such action by the employer would encompass any action which could be interpreted as penalisation by the employer against the employee for having made a protected disclosure.

An Adjudicator will hear the case and issue a decision. A decision could declare that the complaint was not well founded, or if declared well founded, require the employer to take a specified course of action, including payment of compensation. The decision of an Adjudicator may be appealed to the Labour Court.

Appendix II / Guidance for managers dealing with a protected disclosure

All reported disclosures about perceived wrongdoing in the workplace must be treated seriously.

The manager who is a recipient of a disclosure shall:

- record the disclosure and the steps taken to deal with it
- clarify the basis of the disclosure with the worker
- establish what evidence is available to support the disclosure
- consider any personal interest the worker might have in the matter disclosed
- assess the disclosure and take immediate action if the alleged wrongdoing involves a serious loss or danger to others
- carry out relevant enquiries promptly, sensitively and discreetly, taking all reasonable steps to protect the identity of the person making the disclosure
- consult the worker if it is deemed necessary to reveal his or her identity to undertake an effective enquiry
- obtain evidence from any relevant witness
- assess whether the disclosure is:
 - ✓ based on a reasonable belief and grounded
 - ✓ based on a reasonable belief but ungrounded
 - ✓ a deliberately false report
- take appropriate action if the disclosure is grounded
- consider taking action if the disclosure is deliberately false
- provide written feedback including any proposed action to the worker within 21 days
- report the outcome to the Chief Executive Officer and the Chairperson