A&L Goodbody

EMPLOYMENT AND
WHITE COLLAR CRIME

The EU Whistleblowing Directive:
Blowing the whistle means added compliance for employers

The Protected Disclosures (Amendment) Bill 2022 (the Bill) was recently published and is currently making its way through the Irish legislative process.

The Bill has been introduced to transpose the EU Whistleblowing Directive.

Once enacted, it will extend the scope of the Protected Disclosures Act 2014 (the 2014 Act) and will provide protections to new categories of "worker", such as volunteers, shareholders, board members and job applicants.

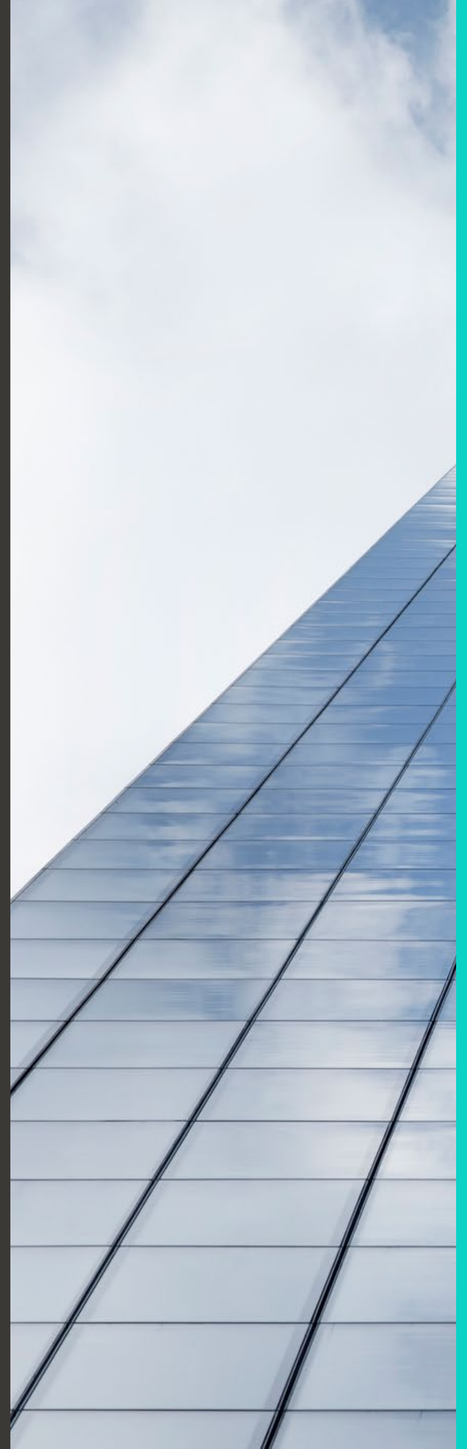
12 MIN READ

A key change in the Bill is a requirement for private sector employers with 50 or more employees to establish formal channels and procedures for the making of protected disclosures. Failure to do so will constitute a criminal offence.

Other noteworthy provisions from an employer's perspective include the reversal of the burden of proof in penalisation claims and the curtailment of the scope for an employee to make a protected disclosure about matters that are purely personal to them.

In this briefing we take a look at some of the key provisions of the Bill and their implications for employers.[1]

[1] *You can read our briefing on the General Scheme of the Bill here.*



What wrongdoings will be covered?

A protected disclosure is a disclosure of "relevant information". The Bill provides that information is "relevant information" if:

a. in the reasonable belief of the worker, it tends to show one or more "relevant wrongdoings"

b. it came to the attention of the worker in a "work-related context"

The term "work-related context" replaces "in connection with the worker's employment", which features in the 2014 Act. It is a term used in the EU Whistleblowing Directive to reflect current or past work activities through which a person acquires information on a relevant wrongdoing and within which that person could suffer penalisation if they reported it.

There are currently eight "relevant wrongdoings" and these will be expanded to include breaches of EU law.

What about wrongdoings exclusively affecting the reporting person?

In our briefing on the Supreme Court's decision in *Baranya* v *Rosderra Irish Meats Group Limited*[2] we outlined how the Supreme Court recently determined that, under the 2014 Act, a complaint of a failure to comply with a legal obligation that is personal to an employee may be a protected disclosure. This is in contrast with the EU Whistleblowing Directive, which references whistleblowers as those who report illegal situations "harmful to the public interest."

The Bill endeavours to address this apparent inconsistency by excluding the following from "relevant wrongdoing":

A matter concerning interpersonal grievances exclusively affecting a reporting person namely grievances about interpersonal conflicts between the reporting person and another worker, or a matter concerning a complaint by a reporting person to, or about, their employer which concerns the worker exclusively.

[2] *2021 IESC 77*

The Bill states these individual concerns may be dealt with through any agreed procedures applicable to such concerns to which the reporting person has access or such other procedures, provided in accordance with any rule of law or enactment[3] to which the reporting person has access.

In *Baranya* v *Rosderra Irish Meats Group Limited*, the Supreme Court also said it is perfectly clear that a complaint about the health or safety of any individual does not have to relate to the health or safety of other employees or third parties. Therefore, under the current whistleblowing regime, a complaint made by an employee that their own personal health and safety is endangered by workplace practices would qualify as a protected disclosure.

Significantly, the Bill does not purport to amend the relevant wrongdoing relating to the "health and safety of any individual". Therefore, notwithstanding that the Bill seems intent on removing the scope for individual employees to make protected disclosures about matters purely personal to them, the fact a disclosure can be made about the health and safety of "*any*" individual means that there is at least some scope for an employee, who makes a disclosure about their own health and safety concerns, to claim they have made a valid protected disclosure. Furthermore, the fact the Bill states that an employee's concerns about their employer, which concern them "*exclusively*", will not constitute protected disclosures will mean it is quite likely that employees who have these concerns will be careful when making their disclosures not to express their concerns as solely relating to themselves but also colleagues.

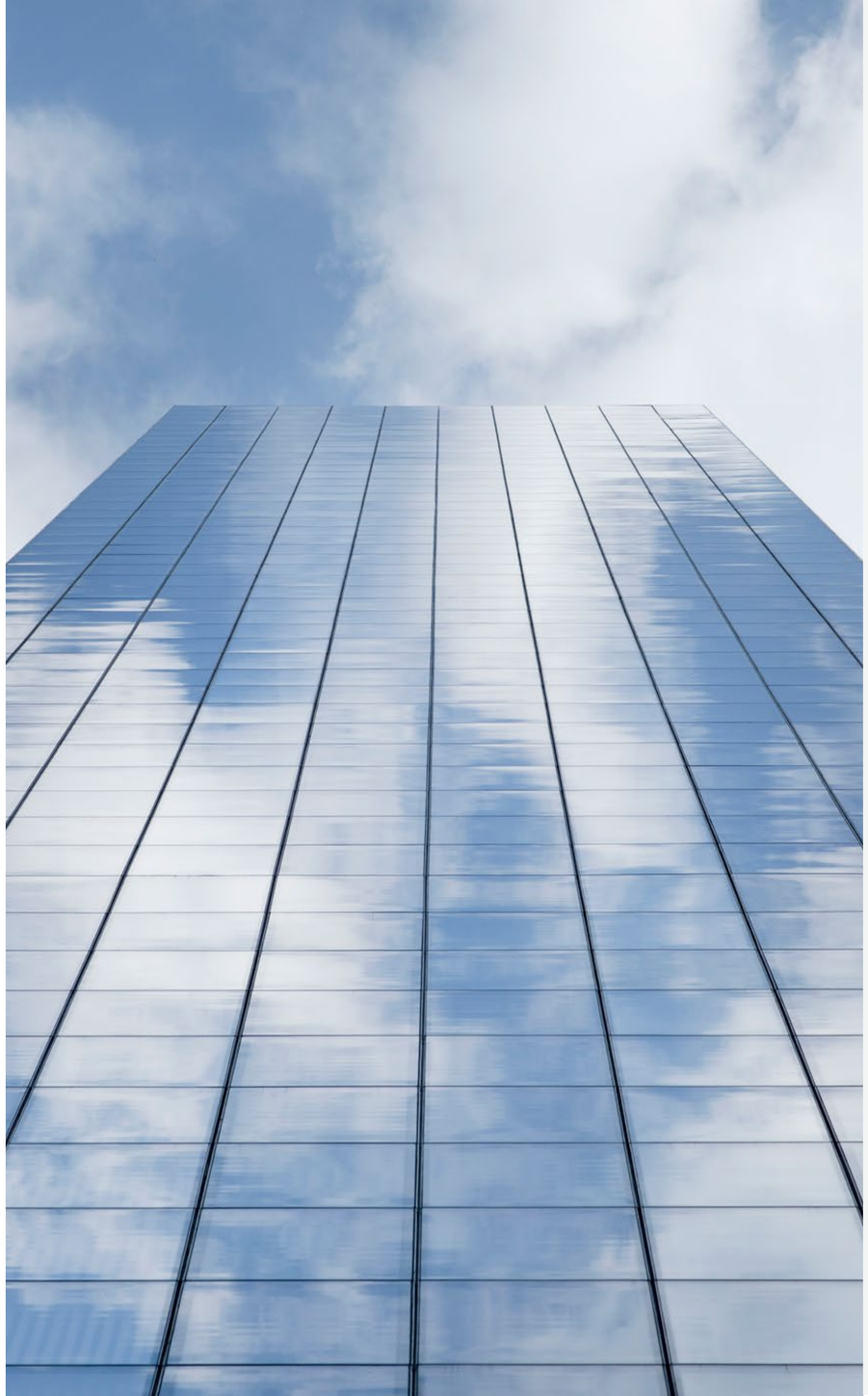
Penalisation claims – a new lease of life

Whereas penalisation under the 2014 Act was defined as "*any act or omission that affects a worker to the worker's detriment*", the Bill contains a brand new definition:

"*Any direct or indirect act or omission which occurs in a work related context, is prompted by the making of a report and causes or may cause unjustified detriment to a worker*".

It includes existing examples such as suspension, lay-off or dismissal and also some new examples such as a negative performance assessment; failure to convert a temporary employment contract to a permanent one and a medical referral.

[3] *Other than the 2014 Act*



An employee who claims to have suffered penalisation can take a claim to the Workplace Relations Commission (**WRC**) and may be awarded up to five years' remuneration. Applicants for employment can also be awarded compensation, up to a statutory cap of €15,000.

The Bill provides a significant new avenue of redress to employees who claim they have been subject to penalisation. Employees will be able to apply to the Circuit Court for interim relief to restrain an alleged act of penalisation within 21 days following the last instance of penalisation or such longer period as the Court may allow. Currently interim relief is only available in the context of an alleged dismissal for having made a protected disclosure.

The Bill also raises the bar for employers when it comes to defending penalisation claims in that, where an employee brings a penalisation claim, the Bill provides that the penalisation will be deemed to have been as a result of the employee having made a protected disclosure, unless the employer proves that the act or omission concerned (i.e. the act/omission allegedly constituting the penalisation) was based on duly justified grounds. The reversal of the burden of proof in this regard accords with the requirements of the EU Whistleblowing Directive, which provides that subject to a reporting person establishing that they made a disclosure and suffered a detriment; it shall be presumed that the detriment was made in retaliation for the disclosure. This bar is likely to be a relatively high bar in practice and if employers are not in a position to point to objective factors in support of decisions they have made (for example, evidence of underperformance justifying a negative performance appraisal), they are likely to struggle to shift the burden of proof back to the employee.

While not a panacea, employers can take some limited comfort from the fact the Bill provides that where the investigation of the relevant wrongdoing was not the sole or main motivation for the employee making the protected disclosure, any compensation they may be awarded may be reduced by up to 25%.

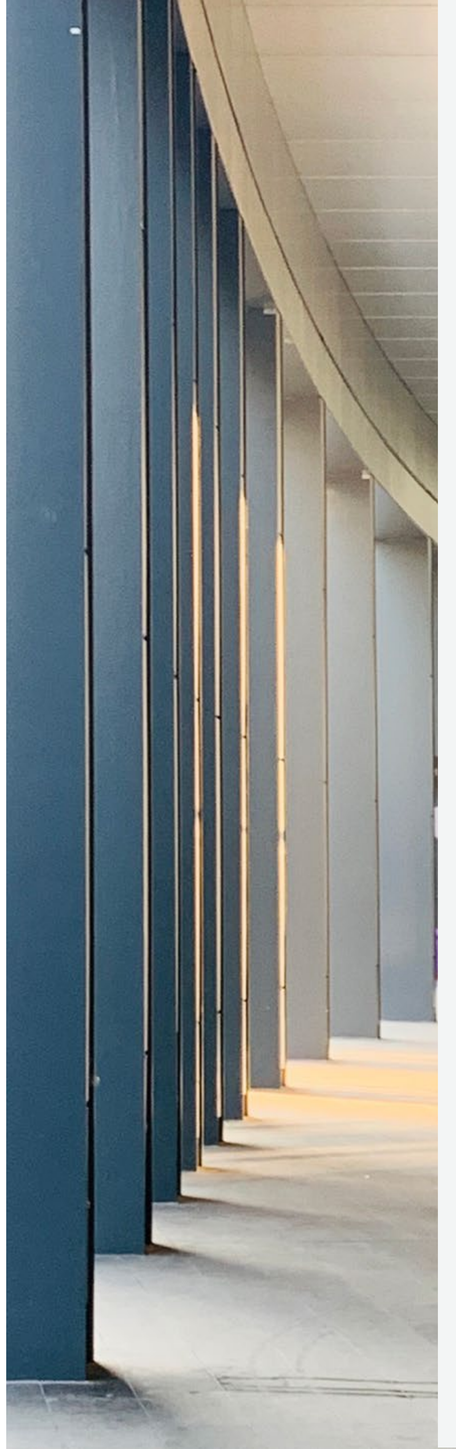
Employer reporting channels

A key change for employers will be the requirement to have internal reporting channels and procedures for the making of protected disclosures. As things stand, only public sector employers are obliged to have such procedures in place. Initially, the requirement will only apply to private sector employers with 250 or more employees. However, from 17 December 2023, this obligation will be imposed on all private sector employers with 50 or more employees.[4]

Internal reporting channels and procedures may be:

- operated internally by a person or department designated for that purpose, or
- provided externally by a third party

In either case it will be very important that the internal person/department or external third party has the necessary skills and competence to perform this function and has undertaken appropriate training.



[4] *The threshold of 50 employees does not apply where the employer falls within the scope of EU law in areas such as financial services. The list of relevant EU laws is in Schedule 2 of the Bill.*

This step plan provides an outline of what needs to be put in place by way of internal reporting channels and procedures:

01

Channels must be designed, established and operated in a secure manner which ensures:

- the protection of the confidentiality of the identity of the reporting person and any third party mentioned
- the prevention of access by non-authorised persons

02

Acknowledge receipt of the protected disclosure within seven days

03

Designate an impartial person or persons who:

- are competent to follow up on reports
- will maintain communication with the reporting person
- where necessary, will request further information from, and provide feedback to, that reporting person

04

Diligent follow-up by the designated person which necessitates "*at least*" the following:

- the carrying out of an initial assessment to assess whether there is prima facie evidence that a relevant wrongdoing may have occurred
- if, after the initial assessment, the designated person decides that there is no *prima facie* evidence that a relevant wrongdoing may have occurred

i. they may close the procedure or refer the matter to another applicable procedure (eg grievance procedure)

ii. they should notify the reporting person, in writing, as soon as practicable, of the decision and the reasons for it.

- if, after the initial assessment, the designated person decides that there is prima facie evidence that a relevant wrongdoing may have occurred, they should take appropriate action to address the relevant wrongdoing

05

A reasonable timeframe for the provision of feedback to the reporting person, not exceeding three months from the acknowledgement of receipt of the report or, if no acknowledgement was sent, not more than three months from the expiry of the seven day period after the report was made.

06

Ensure provision of clear and easily accessible information regarding:

- the procedures for making a protected disclosure using the internal reporting channels and procedures
- in relation to anonymous reports, the conditions under which such reports may be accepted and follow-up undertaken
- the procedures for making a protected disclosure to a prescribed person or the Office of the Protected Disclosures Commissioner.

The internal reporting channels and procedures must enable a protected disclosure to be made in writing or 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.

While in practice many employers already have whistleblowing policies and procedures in place, the new requirements are considerably more prescriptive than the current market standard. Therefore, while some employers will need to roll out policies and procedures for the first time, many others will need to undertake a detailed analysis of their current policies and procedures and update them as necessary to ensure compliance with the requirements of the Bill.

Many group companies across the EU might query whether a centralised reporting channel meets the requirements of the Bill. The Commission Expert Group on the EU Whistleblowing Directive has indicated that the basic rule is that each legal entity is required to have its own reporting channels and procedures. While the Bill provides that reporting channels and procedures shall be accessible by workers of the entity concerned and *of the group*, the Commission Expert Group's firm view is that *only* having a centralised reporting channel at group level is not compliant with the Directive. It is worth noting however that both the Directive and the Bill provide that employers with less than 250 employees may share resources as regards the receipt of reports and any investigation to be carried out as part of the process of follow-up.

Anonymous disclosures

A welcome confirmation is that there is no obligation to accept and follow up on anonymous reports. However, where a whistleblower makes a disclosure anonymously and is subsequently identified and they are penalised for having made the protected disclosure, they will be entitled to statutory protections against penalisation.

Employers would be well advised not to take too much comfort from the fact there is no mandatory obligation to follow up on anonymous disclosures. There could be material reputational exposure for a business that does not investigate an anonymous disclosure which subsequently makes its way into the public domain. The failure to investigate, merely on the grounds it was an anonymous disclosure, may be even more damaging than the content of the original disclosure itself.

Confidentiality

One of the biggest challenges for employers managing and investigating protected disclosures is respecting the duty of confidentiality to protect the identity of the reporting person. Importantly, the Bill creates a new offence for breach of this confidentiality requirement. It also modifies the existing right of action such that a reporting person will be able to take proceedings against a person who fails to comply with this duty seemingly without any proof of loss. The removal of the requirement to show loss will make such proceedings easier to bring in practice and therefore likely more common.

The Bill does not substantively amend the existing requirement to protect the reporting person's identity. Even so, there are some significant changes proposed, including the imposition of an obligation on the recipient of a disclosure to obtain the "explicit consent" of the reporting person to the disclosure of their identify, other than in limited circumstances. In many instances, engaging with a reporting person to obtain their consent to the disclosure of their identity is very likely to prompt pushback and challenge from the reporting person. The individuals within an organisation managing a protected disclosure who make the decision to disclose in the absence of this consent will need to ensure that they can stand over whatever exception is being relied on in order to do so if they are to avoid exposing the organisation to a claim that they breached their duty of confidentiality.

Of relief to employers will be the retention of the scope for employers to disclose a reporting person's identity without their explicit consent where this is reasonably considered necessary for the purposes of the receipt or transmission of, or following up on, reports as required under the Bill.

While the focus of the Bill is on protecting the identity of the reporting person, it should also be remembered that those mentioned in reports also enjoy rights. In this regard, employers should be aware that their internal reporting channels for receiving reports must protect the identity of both the reporting person and *any* other party mentioned in a report. For that reason, employers would be well advised to design their internal reporting policies and procedures in such a way so as to protect, to the extent reasonably practicable, the identity of all persons mentioned in whistleblowing complaints, with information disclosed to broader stakeholders on a need to know basis only.

Penalties

The Bill creates a number of new criminal offences, many of which attract very serious criminal sanctions (e.g. fines of up to €250,000 and/or up to two years' imprisonment). Employers therefore not only need to worry about the civil ramifications of not complying with the new whistleblowing regime but also the very real and serious criminal sanctions that could arise as well. The fact the Bill has real teeth is almost certainly going to ensure that compliance with the new regime becomes a core focus for employers within scope and, in particular, in boardrooms of large employers.

Specifically, the offences created by the Bill include the following:

- failing to comply with the requirement to establish, maintain and operate internal reporting channels
- breaching the duty of confidentiality to protect the identity of the reporting person
- penalising or threatening penalisation against a reporting person and certain persons connected with them or bringing vexatious proceedings against them
- hindering or attempting to hinder a worker in making a protected disclosure

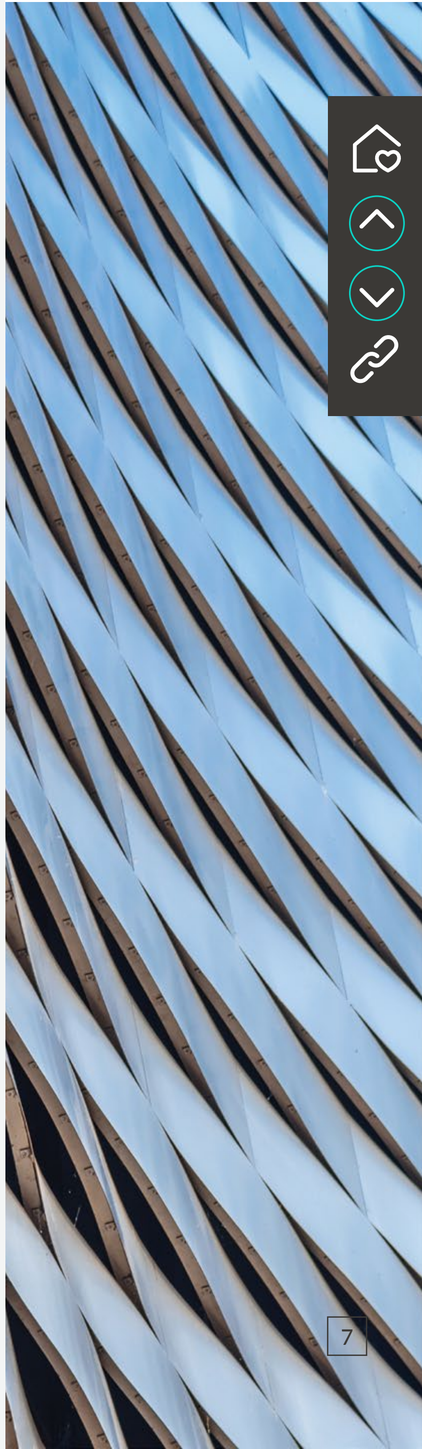
Interestingly, the Bill also creates an offence of knowingly reporting false information and a right of action in tort for any person who suffers detriment as a consequence of such false information being reported. This might be considered by some as a welcome development in that it might go some way towards deterring spurious disclosures that might be made. However, given the apparent requirement to prove the subjective intent of an employee, these cases are likely to be rare in practice and only pursued in the most egregious of cases.

External reporting channels

The Bill provides for similar procedures for external reporting channels as for internal reporting channels. External procedures apply when an individual makes a disclosure to a prescribed person (this is a very broad range of persons undertaking a public function, including the Data Protection Commissioner and the Director General of the WRC). While the arrangements are similar, the prescribed persons have an additional degree of flexibility 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. In addition, the three month deadline for the prescribed person to provide feedback may be extended to six months due to the particular nature and complexity of the report.

The threshold for an individual making a disclosure to a prescribed person to qualify for protection is due to change from having a reasonable belief that the information disclosed is "substantially true" to having a reasonable belief that the information disclosed is "true". This is arguably a higher threshold for the individual to meet to qualify for protection.

Likewise for disclosures to a Minister or for public disclosures, the Bill proposes to amend the knowledge threshold, again arguably increasing the threshold a worker has to meet for the disclosure to qualify as a protected disclosure.



Office of the Protected Disclosures Commissioner

The Bill also provides for the creation of a new Office of the Protected Disclosures Commissioner (the **Commissioner**) with the role of Commissioner to be held by the Ombudsman. This will serve as an additional external channel via which workers can make a protected disclosure, in addition to the existing option to make protected disclosures to a prescribed person.

This is designed to facilitate the making of protected disclosures by providing an alternative route, particularly where it is unclear to the worker who is the appropriate prescribed person to whom a disclosure should be directed. The Commissioner will operate channels and procedures for the making of reports similar to those which the Bill requires prescribed persons to maintain.

When the Commissioner receives a protected disclosure, the Commissioner must identify and transmit the disclosure to the appropriate prescribed person or "*other suitable person*" who are then required to diligently follow-up and provide necessary feedback to the worker who made the disclosure. Where an appropriate prescribed person or other suitable person cannot be identified, the Commissioner will be obliged to accept and investigate the protected disclosure itself.

The Bill creates a number of new powers for the Commissioner and / or its authorised officers for the purposes of conducting follow-up and investigations – for example, the Commissioner will have powers to compel the provision of records from businesses and powers to enter premises and require information from any person found on the premises. These powers are significant and will ensure that the Commissioner has the necessary investigative tools at its disposal that are broadly equivalent to those available to prescribed persons who are tasked with investigating disclosures made to them.

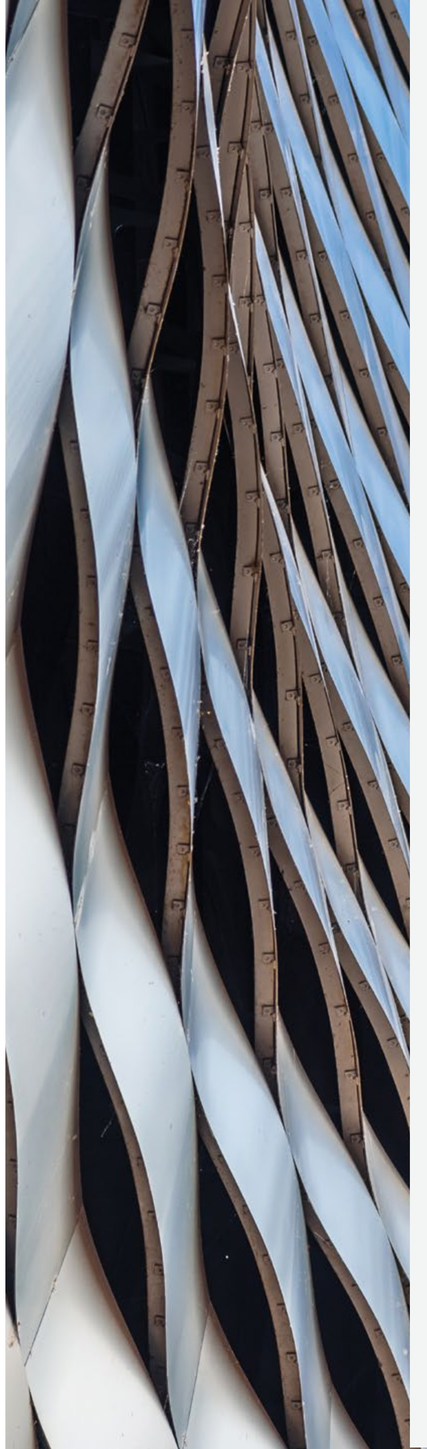
Conclusion

Employers should take steps now to establish the necessary internal channels and procedures, which will involve designating the appropriate staff to receive protected disclosures in a secure and confidential manner and providing them with training. Employers should commence reviewing their whistleblowing policies promptly and update as necessary when the legislation is finalised.

The Bill is currently being progressed through the Oireachtas (the Irish Parliament). On publication of the Bill the Minister for Public Expenditure and Reform stated "*it will further strengthen the protections for whistleblowers and maintain Ireland's position as a leader in this area. I look forward now to progressing this legislation through the Oireachtas and working with colleagues there so we can get it enacted as soon as possible.*"

While it remains to be seen how quickly the Bill will be enacted, preparing now for the changes that the Bill will introduce will ensure employers are well placed to deal with the challenges that the Bill, once enacted, is going to present in practice.

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



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