



**O'CONNOR**  
SOLICITORS

# **ADVOCACY AND WHISTLEBLOWING**

**IMO AGM**

**31<sup>st</sup> March 2016**

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# Introduction:

1. Context
2. Advocacy
3. Required Disclosures
4. Whistleblowing
5. Protected Disclosures Act, 2014
6. Whistleblowing Codes
7. Case Studies



*A man does what he must – in spite of personal consequences, in spite of obstacles and dangers and pressures – and that is the basis of all human morality*

Sir Winston Churchill

*If liberty means anything at all, it means the right to tell people what they do not want to hear.*

(Original preface to [Animal Farm](#);  
as published in [George Orwell](#) :  
Some Materials for a Bibliography,  
1953, by Ian R. Willison)



## CONTEXT

- H.S.E./H.I.Q.A., Investigations
- Protected Disclosures Act, 2014
- Industrial Relations Act, 1990 (Code of Practice on Protected Disclosures Act, 2014) Order 2015

# FOR MEDICAL PRACTITIONERS

- Advocacy
- Mandatory Disclosures
- Whistleblowing (Protected Disclosures)





# ADVOCACY

Healthcare Resources:

49.1 Subject to your duty to act in the best interests of patients, you have a responsibility to engage and advocate with the relevant authorities to promote the provision of appropriate healthcare resources and facilities

BUT:

New Ethical Guide due soon!



## Required/Mandated Disclosures

- S.176 Criminal Justice Act 2006
- Criminal Justice (withholding of information on offences against children and vulnerable persons) Act 2012
- Children First Act 2015



## **S.176 Criminal Justice Act 2006**

**Introduces criminal charge of “reckless endangerment of children”**

*“A person, having authority or control over a child or abuser, who intentionally or recklessly endangers a child by –*

*(a) Causing or permitting any child to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse, or*

*(b) failing to take reasonable steps to protect a child from such a risk while knowing that the child is in such a situation, is guilty of an offence.”*

# **CRIMINAL JUSTICE (WITHHOLDING OF INFORMATION ON OFFENCES AGAINST CHILDREN AND VULNERABLE PERSONS) ACT 2012**

**Act has been commenced**

**Sections 2 and 3 create offence of withholding information on certain offences from Gardaí against children (S.2) or certain vulnerable persons (S.3)**

**Defences to an offence under S.2**

**S.4(4)**

**S.4(8)**

**S.4 (10)**

**S.4(11)**



# **CHILDREN FIRST ACT 2015**

## Part 3 Reporting

Provides for Disclosures to the Agency by Mandated Persons including Medical Practitioners.

# Whistleblowing

*“The term used when a worker raises a concern about a relevant wrongdoing 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”.*

From Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015

# ADVOCACY / WHISTLEBLOWING

Advocacy	Whistleblowing/Protected Disclosures
<ul style="list-style-type: none"><li>● Advocacy on behalf of patients</li><li>● Promotion of appropriate resources</li><li>● Promotion of appropriate facilities</li><li>● Not necessarily subject of any protections</li></ul>	<ul style="list-style-type: none"><li>● Arise in connection with employment</li><li>● Relates to “relevant wrongdoing”</li><li>● Statutory protections</li></ul>

# **Whistleblowing / Protected Disclosures**

**(Its Not New!)**

## **Relevant Legislation for Whistleblowing/ Protected Disclosures in Healthcare Setting**

- Protection for Persons reporting Child Abuse Act 1998
- Health Act, 2004 (as amended by Section 103 Health Act, 2007)
- Safety Health and Welfare at Work Act, 2005
- Section 5 Protected Disclosures Act 2014



## Health Act 2007

**Section 103 provides that where an employee of a relevant body makes, in good faith, a disclosure to an authorised person and the employee has reasonable grounds for believing that it will show one or more of the following:**

- A. *that the health and welfare of the person who is receiving a health or personal social service in accordance with this Act has been, is, or is likely to be at risk;*
  - B. *that the actions of any person employed by or acting on behalf of the relevant body had posed, is posing, or is likely to pose a risk to the health or welfare of the public;*
  - C. *that to the relevant body or person employed by or acting on behalf of the relevant body failed, is failing, or is likely to fail to comply with any legal obligation to which the relevant body or person is subject in the performance of the relevant bodies of persons functions;*
  - D. *that the conduct of the relevant body or of a person employed by or acting on behalf of the relevant body had led, is leading, or is likely to lead to a misuse or substantial waste of public funds;*
  - E. *that evidence of any matter falling within any of paragraphs A to D has been, is being, or is likely to be deliberately concealed or destroyed;*
- the disclosure shall be a protected disclosure under this Act.***

## Section 5 of Protected Disclosure Act 2014

(1) For the purposes of this Act “protected disclosure” means, subject to subsection (6) and sections 17 and 18 , a disclosure of relevant information (whether before or after the date of the passing of this Act) made by a worker in the manner specified in section 6 , 7 , 8 , 9 or 10 .

(1) For the purposes of this Act information is “relevant information” if :-

(a) in the reasonable belief of the worker, it tends to show  
one or more relevant wrongdoings, and

(b) it came to the attention of the worker in connection with the  
worker’s employment

## Section 5 of Protected Disclosure Act 2014 *(continued)*

- (4) For the purposes of subsection (3) it is immaterial whether a relevant wrongdoing occurred, occurs or would occur in the State or elsewhere and whether the law applying to it is that of the State or that of any other country or territory.
- (5) A matter is not 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.
- (6) A disclosure of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is not a protected disclosure if it is made by a person to whom the information was disclosed in the course of obtaining legal advice.
- (7) The motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure.
- (8) In proceedings involving an issue as to whether a disclosure is a protected disclosure it shall be presumed, until the contrary is proved, that it is.

# Criteria to fulfil in order to seek protection

- Must be a reasonable belief
- Must come to the attention of the worker in connection with the worker's employment
- Should fall within Section 5 (3)(a-h) (relevant wrongdoing)
- As there is no prior guarantee that the disclosure will be treated as a protected disclosure thence the need to strictly follow the requirements of Section 5.

## Protected Disclosures Act 2014 s.5 (3)

“ (3) The following matters are relevant wrongdoings for the purposes of this Act -

(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, or

(h) 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.”

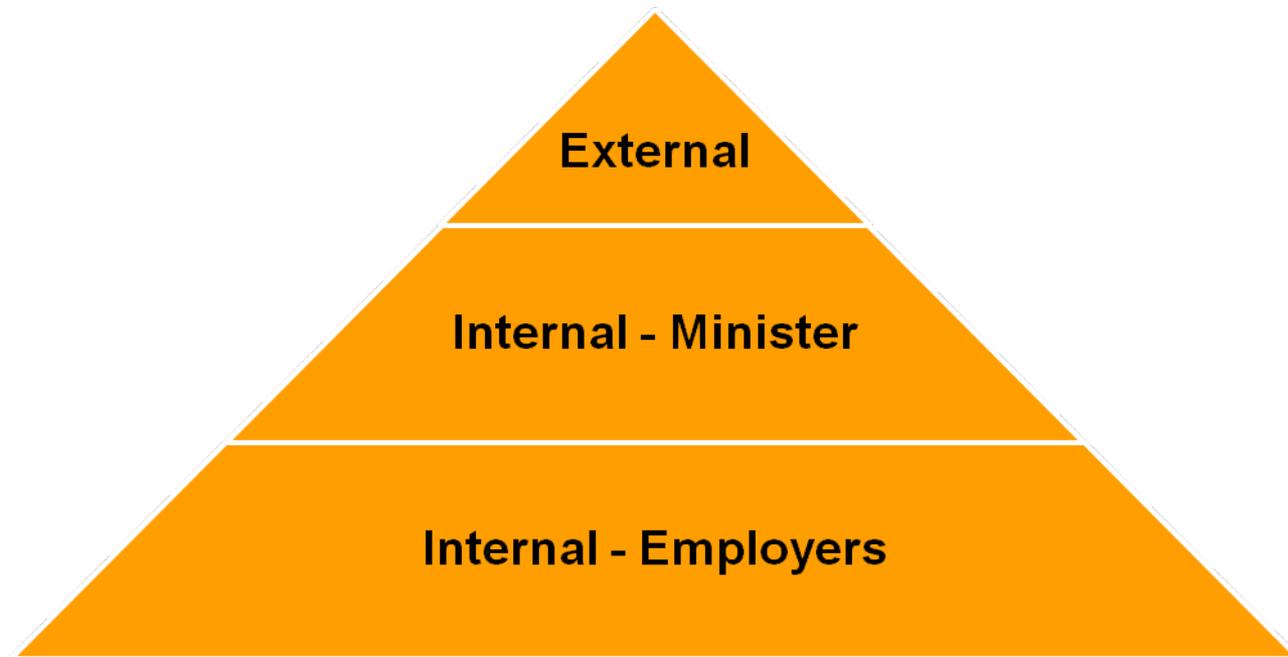


## Protections under 2014 Act

- Dismissal of worker for making “protected disclosure” is automatically unfair
- Can be complained of even if worker lacks 1 year continuous service normally required for unfair dismissals to apply
- If upheld, Court can award up to 5 years’ loss of earnings instead of 2 years under the Unfair Dismissals Act
- S.14(1) : No cause of action in civil proceeding, other than a defamation action, shall lie against a person in respect of the making of a protected disclosure
- Defamation Act amended to refer to protected disclosures

# Tiered channels for disclosure

Act and Code envisage tiered channels for disclosure





## CASES

### IRELAND

• *D.P. -v- Marymount University Hospital and Hospice Limited Circuit Court, Cork 2015/364*

### UK

• *NHS Manchester -v- Fecitt and Others, Respondents & Public Concern at Work [2011] EWCA CIV 1190*].

• *Martin -v- Devonshires Solicitors (2011) ICR 352*

• *Bolton School -v- M Evans (2007) ICR641 (CA)*

## HSE Approach

- HSE Protected Disclosures of Information Policy
- HSE also has Good Faith Reporting Policy
- HSE now have also appointed "*Confidential Recipient*"

## HSE Approach

- HSE has appointed Leigh Gath as “*Confidential Recipient*”
- “*Confidential Recipient*” = independent person appointed by HSE to receive concerns and allegations of abuse, negligence, mistreatment or poor care practices in the HSE or HSE funded residential care facilities
- Confidential Recipient will be independent and have authority to examine concerns to :-
  - Advise and assist individuals on best course of action
  - Assist with referral and examination of concerns
  - Ensure matters are appropriately addressed by HSE

## Recap

- Advocacy / Whistleblowing – Not the Same
- Must be “Protected Disclosure” to avail of protections.
- If there is an issue for a potential Protected Disclosure –  
Utilise Employers Whistleblowing Codes
- Note : Evidential criteria for making an external disclosure is set at a higher level than that applying to internal disclosure (S.1. 464 of 2015 – Code of Practice)
- If not a “protected disclosure”, it and you are not protected!