

# Protected Disclosures bill closer to enactment, retrospection explained

## ANDY PRENDERGAST

**The Protected Disclosures (Amendment) Bill 2022 is due to move to its last parliamentary stage before being signed into law, as the DPER Minister outlined how new protections will apply to ‘whistleblowers.’**

The Bill was before the Seanad last week, where a number of Government amendments were brought, namely on new retrospection provisions to apply for people who have already made protected disclosures but who have not yet instituted proceedings.

The Bill’s Report Stage in the Seanad is scheduled for next week and it is intended that the Bill will be enacted ahead of the summer recess in mid-July.

A new Schedule 7 details the retrospection provisions for the forthcoming law. DPER Minister Michael McGrath explained how these will apply to what he described as “old workers”, employees, contractors, agency workers and trainees, currently protected by the Protected Disclosures Act 2014, and “new workers” who will be covered by the 2022 Act, such as shareholders, board members, volunteers and job applicants.

“Old workers” who reported protected disclosures before enactment of the 2022 Bill, but suffered retaliation after enactment, will get the additional benefits of the reversal of the burden of proof during proceedings at the Workplace Relations Commission and the courts, and access to interim relief at the Circuit Court against penalisation.

“New workers” will get protection from penalisation (recourse to the WRC), including reversal of the burden of proof; the right to sue for damages in court, again including the reversal of the burden of proof during proceedings; and access to interim relief at the Circuit Court for dismissal and other forms of penalisation.

## STRETCH THE LIMIT

“Old workers” who reported and also suffered retaliation before enactment of the new law, provided the worker has not initiated proceedings at the WRC or the courts at the time of enactment, will be entitled to the reversal of the burden of proof during proceedings.

The Minister said there is no conflict with Article 15.5.1° of the Constitution because “old workers” were already covered by anti-penalisation measures in the 2014 Act. However, “it is

not possible to extend these protections to new workers because penalisation of this cohort was not prohibited under the 2014 Act at the time the penalisation occurred”, he said.

Any retrospective provisions to “new workers” would therefore be in conflict with Article 15.5.1° and be unconstitutional.

The Minister said he asked the Attorney General “to stretch the limit, insofar as possible, to retrospective application” and that what they arrived at “represents very significant progress.”

The key test, the Minister explained, is if somebody has initiated a case before the WRC or the courts, the new protections in the Act cannot constitutionally apply to him or her. In other cases, however, the protections can be applied retrospectively.

## **SUBSTANTIALLY TRUE**

The Government introduced an amendment to the bill to reinstate the requirement in the original 2014 Act that a worker making a public disclosure should reasonably believe that the information reported is “substantially true.”

The original text in the 2022 Bill was not a complete transposition of the public disclosure provisions in the directive, the Minister explained, and this needed to be corrected.

The original text of section 10 of the 2014 Act provided, at section 10(1)(a), that “the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true”.

This, the Minister said, “is a slightly more favourable test for the reporting person than is provided for under the directive. As allowed under the non-regression clause at Article 23 of the directive, I have decided to reinstate this provision and this is what this amendment provides for. From the point of view of the whistleblower, this is a favourable change relative to the directive.”

The Minister also moved an amendment to make sure that the identities of reporting persons and persons concerned are protected and to prevent the Freedom of Information Act “being misused to ‘out’ a reporting person or to impede or frustrate follow-up on a protected disclosure.”

Another Government amendment clarifies that penalties for knowingly making false reports shall apply only to the reporting persons and not to any other person who handles or transmits a false report, even if that person does not know the information is false.