

Higher Education Authority
PROTECTED DISCLOSURES PROCEDURES

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1. WHAT IS A PROTECTED DISCLOSURE?

- 1.1 Making a protected disclosure refers to a situation where a worker discloses information in relation to wrongdoing. This is sometimes referred to as “whistleblowing”. For the purposes of these Procedures such a worker is referred to as a “worker” or “discloser” and disclosing information in relation to alleged wrongdoing in accordance with the Protected Disclosures Act 2014 (the 2014 Act) is referred to as “making a disclosure”.
- 1.2 The 2014 Act provides specific remedies for workers who are penalised for making a disclosure in the public interest and for connected purposes. For the purpose of these Procedures the term “penalisation” includes dismissal and causing detriment to a worker. A person to whom a disclosure is made must also take reasonable steps to protect the identity of the discloser. The 2014 Act provides significant forms of redress for penalisation and also allows a claim for loss suffered as a result of a failure to protect a discloser’s identity.
- 1.3 These procedures replace the HEA’s good faith reporting policy approved by the HEA board in November 2009. Separate procedures have been prepared for staff of Higher Education Institutions who make disclosures in accordance with S.I. 339 of 2014.

2. PURPOSE OF PROCEDURES AND BOARD/MANAGEMENT COMMITMENT

- 2.1 These Procedures sets out the process by which a worker in the Higher Education Authority (HEA) or the Irish Research Council can make a disclosure, what will happen when a disclosure is made and what the HEA will do to protect a discloser.
- 2.2 The Board of the HEA is committed to the following:
 - (a) Facilitating the disclosure of wrongdoing;
 - (b) Encouraging workers to make protected disclosures at the earliest possible opportunity;
 - (c) Providing workers with guidance as to how to make protected disclosures;
 - (d) Assisting, supporting and protecting workers who make protected disclosures;
 - (e) Protecting a worker’s identity in a manner consistent with the requirements of the 2014 Act and taking action where those requirements have been breached;
 - (f) Assessing any disclosure made, conducting an investigation, where warranted, and addressing all findings that require attention;

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- (g) Providing that workers are not to be penalised for reporting relevant wrongdoings; and
- (h) Taking appropriate action against workers who make disclosures without a reasonable belief in the truth of the disclosure.

3. RESPONSIBILITY

- 3.1 Overall responsibility for these Procedures rests with the Board of the HEA. Day-to-day responsibility for these Procedures is delegated to the Head of Corporate Affairs.

4. APPLICATION

- 4.1 These Procedures apply to all workers as defined in section 3 of the 2014 Act, which includes current and former employees, independent contractors, trainees and agency staff in the HEA and the IRC. While the Act only applies to workers; volunteers and members of the public may disclose wrongdoing and any such disclosures will be appropriately assessed and investigated.

5. PROTECTED DISCLOSURES: GUIDANCE ON TERMINOLOGY

- 5.1 A protected disclosure is defined in the 2014 Act as a disclosure of information which, in the reasonable belief of the worker, tends to show one or more relevant wrongdoings, which came to the attention of the worker in connection with the worker's employment and is disclosed in the manner prescribed in the Act.

5.2 Relevant wrongdoing

- 5.2.1 Section 5 of the 2014 Act provides protection for workers who disclose information in relation to the following wrongdoings:

- (a) The commission of an offence;
- (b) The failure of a person 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) A miscarriage of justice;
- (d) A danger to the health and safety of any individual;
- (e) Damage to the environment;
- (f) An unlawful or otherwise improper use of funds or resources of a public body, or of other public money;
- (g) An act or omission by or on behalf of a public body that is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement; or
- (h) Information tending to show any matter falling within any of the preceding paragraphs (a) to (g) has been, is being, or is likely to be concealed or destroyed.

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5.2.2 It is immaterial whether a relevant wrongdoing occurred, occurs or would occur in Ireland or elsewhere and whether the law applying to it is that of Ireland or that of any other country or territory.

5.3 Disclosure of information

5.3.1 A disclosure should contain “information” which tends to show wrongdoing. The ordinary meaning of disclosing “information” is conveying facts, such as stating that particular events have occurred. This is different to simply making an allegation, for example, that a law is being breached.

5.3.2 Workers are not required or entitled to investigate matters themselves to find proof of their suspicion and should not endeavour to do so. All workers need to do, and should do, is disclose the information that they have, based on a reasonable belief that it discloses a wrongdoing. Workers should also be satisfied that the information is necessary to disclose that wrongdoing and should not access, process, disclose or seek to disclose information about individuals that is not necessary for the purpose of disclosing the wrongdoing.

5.4 Reasonable belief

5.4.1 A worker must have a reasonable belief that the information disclosed tends to show a wrongdoing. The term “reasonable belief” does not mean that the belief has to be correct. A worker is entitled to be mistaken in their belief, so long as their belief was based on reasonable grounds.

5.4.2 It may be quite reasonable for a worker to believe that a wrongdoing is occurring on the basis of what he or she observes. A worker may not know all the facts of the case and as noted above in section 5.3, the worker is not obliged to find proof of their suspicion. In such a case the worker may have reasonable grounds for believing that some form of wrongdoing is occurring, but it may subsequently turn out that the worker was mistaken.

5.4.3 No worker will be penalised simply for getting it wrong, so long as the worker had a reasonable belief that the information disclosed showed, or tended to show, wrongdoing.

5.5 In connection with their employment

5.5.1 The information must come to the attention of the worker in connection with their employment, but a disclosure of any wrongdoing which is the worker’s, or the worker’s employer’s, function to detect, investigate or prosecute does not come within the terms, or attract the protections and redress, of the 2014 Act.

6. MAKING A DISCLOSURE

6.1 A worker must make a disclosure in the manner set out in the 2014 Act to gain the protections of the Act. Different standards apply depending on the person or body to whom the worker discloses. A disclosure can be made in the following ways:

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6.1.1 To the employer

We encourage all workers to make disclosures internally to their employer and to use the internal procedures. Such disclosures will be taken seriously and the worker making a protected disclosure will receive appropriate protection.

A disclosure should in the first instance, if appropriate, be reported to the worker's line manager.

If the worker feels compromised or unable to make the disclosure to his/her line manager, (s)he may raise the matter with the Head of Corporate Affairs or if necessary another member of the Senior Management Team including the CEO.

The HEA will ensure that all managers are made aware of their responsibilities as recipients of a protected disclosure. See appendix B.

Before electing to make a disclosure to a person outside the HEA the worker may wish to make a protected disclosure to the Chairman, Deputy Chair, Chair of the Audit Committee or any other Member of the Board.

6.1.2 Disclosure outside the employer

The 2014 Act allows a worker make a disclosure to persons other than their employer in certain circumstances. Different requirements need to be met in different cases, as set out at (a) to (e) below:

(a) Other responsible person

Where the worker reasonably believes that the wrongdoing relates to the conduct of a person other than the worker's employer, or to something for which that other person has legal responsibility, then the worker can disclose to that other person.

(b) A prescribed person

Certain persons are prescribed by Statutory Instrument 339 of 2014 ("SI 339") to receive disclosures ("prescribed persons"). This includes the heads or senior officials of a range of statutory bodies.

A worker may make a disclosure to a prescribed person if the worker reasonably believes that the relevant wrongdoing falls within the description of matters in respect of which the person is prescribed under SI 339. However, the 2014 Act also provides an additional requirement in this case. The worker must believe that the information disclosed, and any allegation contained in it, are substantially true.

In particular SI 339 provides that the Secretary General of the Department of Education and Skills may receive a protected disclosure on "all matters relating to the operation and development of the education system in the State including the administration of relevant enactments, the formulation of policy, the setting of standards and the monitoring and evaluation of education programmes."

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(c) A Minister of the Government

If a worker is or was employed in a public body, they may make a disclosure to the Minister for Education and Skills.

(d) A legal adviser

The 2014 Act allows a disclosure to be made by a worker in the course of obtaining legal advice from a barrister, solicitor, trade union official or official of an excepted body.

(e) Alternative external disclosures (in very limited circumstances)

It is preferable in most circumstances to disclose to the employer and, if that is not appropriate, to one of the disclosure options at (a) to (d) above. It will rarely be appropriate to make alternative external disclosures where the disclosure could be dealt with through one of the other disclosure options above. There are stringent requirements for alternative external disclosures to qualify as protected disclosures under the 2014 Act.

The protections will only be available if the following conditions are met:

- The worker must reasonably believe that the information disclosed, and any allegation contained in it, are substantially true; AND
- The disclosure must not be made for personal gain; AND
- At least one of the following conditions at (i) to (iv) must be met:
 - (i) At the time the disclosure was made the worker reasonably believed that they would be penalised if they made the disclosure to the employer, a responsible person, a prescribed person or a Minister; or
 - (ii) Where there is no relevant prescribed person, the worker reasonably believed that it was likely that evidence would be concealed or destroyed if the worker made the disclosure to the employer or responsible person; or
 - (iii) The worker has previously made a disclosure of substantially the same information to the employer, a responsible person, a prescribed person or a Minister; or
 - (iv) The wrongdoing is of an exceptionally serious nature;

AND

- In all these circumstances, it is reasonable for the worker to make an alternative external disclosure.

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The assessment of what is reasonable takes account of, among other things, the identity of the person to whom the disclosure is made, the seriousness of the wrongdoing, whether the wrongdoing is ongoing or likely to occur in future, whether any action had been taken in cases where a previous disclosure was made and whether the worker complied with any procedures in place when making that previous disclosure.

7. PENALISATION (INCLUDING DISMISSAL AND DETRIMENT)

- 7.1 The 2014 Act provides specific remedies for workers who are penalised for making a disclosure. Penalisation means any act or omission that affects a worker to the worker's detriment and includes suspension, lay-off, dismissal, demotion, loss of opportunity for promotion, transfer of duties, change of location of place of work, reduction in wages, change in working hours, the imposition or administering of any discipline, reprimand or other penalty (including a financial penalty), unfair treatment, coercion, intimidation, harassment, discrimination, disadvantage, injury, damage, loss or threat of reprisal.
- 7.2 Penalisation can also include a detriment suffered by an individual because that individual, or a third party, has made a disclosure. A detriment in this context includes coercion, intimidation, harassment, discrimination, disadvantage, adverse treatment in relation to employment (or prospective employment), injury, damage, loss or threat of reprisal.
- 7.3 All reasonable steps will be taken to protect workers from penalisation. Workers who experience any act of penalisation should notify their employer and the notification will be assessed / investigated and appropriate action taken where necessary.

8. CONFIDENTIALITY / PROTECTION OF IDENTITY

- 8.1 The 2014 Act provides that a disclosure recipient (which in this context includes any person to whom a disclosure is referred in the performance of their duties) must not disclose to another person any information that might identify the discloser, except where:
- (i) the disclosure recipient shows that he or she took all reasonable steps to avoid so disclosing any such information,
 - (ii) the disclosure recipient reasonably believes that the discloser does not object to the disclosure of any such information,
 - (iii) the disclosure recipient reasonably believes that disclosing any such information is necessary for —
 - (a) the effective investigation of the relevant wrongdoing concerned,
 - (b) the prevention of serious risk to the security of the State, public health, public safety or the environment, or

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(c) the prevention of crime or prosecution of a criminal offence,

OR

(iv) the disclosure is otherwise necessary in the public interest or is required by law.

8.2 Where action is to be taken following a disclosure, except in exceptional cases, the disclosure recipient should contact the discloser and, where possible, gain the informed consent of the discloser, prior to any action being taken that could identify them.

8.3 Where it is decided that it is necessary to disclose information that may or will disclose the identity of the discloser, the discloser should be informed of this decision, except in exceptional cases. The discloser may request a review of this decision and a review should be carried out, where practicable.

8.4 All reasonable steps will be taken to protect the identity of the discloser, except as set out in clause 8.1 above. Workers who are concerned that their identity is not being protected should notify their employer. Such notifications will be assessed and/or investigate and appropriate action taken where necessary.

9. ANONYMOUS DISCLOSURES

9.1 There is a distinction between an anonymous disclosure (where identity is withheld by the discloser) and confidential disclosures (where identity is protected by the recipient). Anonymous disclosures made by workers are not excluded from the protection of the 2014 Act and we will act upon such disclosures to the extent that this is possible.

9.2 We encourage workers to provide as much information as possible in relation to the alleged relevant wrongdoing. This may allow us to engage with the worker and seek further information as required.

9.3 Workers should note that important elements of these Procedures (e.g. keeping the discloser informed and protecting a discloser from penalisation) may be difficult or impossible to apply unless the worker is prepared to identify themselves. Also, a worker cannot obtain redress under the 2014 Act without identifying themselves.

10. PERSONAL COMPLAINTS VS PROTECTED DISCLOSURES

10.1 The 2014 Act is intended to deal with disclosures in the public interest and for connected purposes. This normally involves wrongdoings that are likely to cause harm to the organisation itself or to the public at large, as opposed to personal complaints.

10.2 These Procedures are not intended to act as a substitute for normal day to day operational reporting or other internal employment procedures. Personal

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complaints should generally be dealt with under the HEA's policies and procedures such as the Dignity at Work Policy or Staff Grievance Policy.

- 10.3 For example, a worker may complain that there is a breach of the worker's own terms and conditions. That type of complaint should generally be dealt with under the Staff Grievance Policy. Alternatively, a worker may claim that they are being bullied or harassed by a colleague. That type of complaint should generally be dealt with under the Dignity at Work Policy or the HEA Policy on Bullying and Harassment. If a complaint is made of penalisation contrary to the 2014 Act, then that complaint will be dealt with under these Procedures (in accordance with paragraph 9.3) so as to ensure that the obligation to protect the identity of the discloser is complied with.

11. MOTIVATION

- 11.1 The motivation of the worker for making a disclosure is irrelevant when determining whether or not it is a disclosure protected by the 2014 Act. All disclosures will be dealt with regardless of the worker's motivation for making the disclosure, and the worker will be protected so long as the worker reasonably believes that the information disclosed tended to show a wrongdoing.
- 11.2 However, a disclosure made in the absence of a reasonable belief will not attract the protection of the 2014 Act and this may result in disciplinary action against the discloser. In addition, disclosure of a wrongdoing does not confer any protection or immunity on a worker in relation to any involvement they may have had in that wrongdoing.

12. ASSESSMENT AND INVESTIGATION

- 12.1 When a disclosure of alleged wrongdoing is made, an initial screening process involving a risk assessment should be undertaken. The screening process will involve an assessment of the disclosure to seek to determine whether or not it should be treated as a potentially protected disclosure. If it is unclear whether information qualifies as a potentially protected disclosure, the recipient should treat the information as a protected disclosure (and protect the identity of the discloser, subject to clause 8.1) until satisfied that the information is not a protected disclosure.
- 12.2 It may be necessary, as part of the screening process, to differentiate between protected disclosures and personal complaints. For example, where the information provided may involve a personal complaint and a protected disclosure. In these circumstances, it may be necessary to disentangle the different elements of the complaint/disclosure and determine whether any specific disclosure of information relating to a relevant wrongdoing has taken place.
- 12.3 The risk assessment should consider whether the alleged wrongdoing is serious or minor, whether it is something that can be investigated or not, and, if it can be investigated, what steps should be taken as part of such an investigation. If an

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investigation is required the HEA will consider the nature and extent of the investigation. This could consist of an informal approach for less serious wrongdoings, a detailed and extensive investigation of serious wrongdoings possibly undertaken by the HEA's internal auditors, or an external investigation by another body.

12.4 It is important to note that some matters may be of such seriousness that the investigation will more appropriately be carried out externally or by professional experts in a particular area. In some cases the matter may need to be reported to, and investigated by, An Garda Síochána or another body with the statutory power and function of investigation of particular matters.

12.5 If, after an appropriate investigation has been undertaken, it is determined that wrongdoing has occurred then the findings will be addressed and appropriate action will be taken where necessary.

13. PROTECTION OF RIGHTS OF RESPONDENTS

13.1 Where an allegation is made against an individual (the respondent), the principles of natural justice and fair procedures will be complied with, as appropriate. This includes affording the person(s) against whom protected disclosures have been made against the right to be informed of the alleged wrongdoing, the right to respond to such allegations and the right to have a work colleague or SIPTU representative attend all hearings.

14. DISCIPLINARY RECORD OF DISCLOSER AND OTHER RELATED MATTERS

14.1 Where a worker makes a disclosure of alleged wrongdoing it will be given appropriate consideration. We will generally focus on the disclosure made (the message), as opposed to any disciplinary (or other) issues related to the person making the disclosure (the messenger).

14.2 In general where a disclosure is made during an investigation, disciplinary or other process, this should not affect those distinct processes. However, an exception might be made where the worker can demonstrate that the investigation, disciplinary or other action is found to be a form of penalisation for making a protected disclosure.

15. REVIEW

15.1 The discloser may seek a review of the following:

15.1.1 Any decision made to disclose the identity of the discloser (except in exceptional cases);

15.1.2 The outcome of any assessment / investigation undertaken in respect of the disclosure; and/or

15.1.3 The outcome of any assessment / investigation in respect of any complaint of penalisation.

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15.2 Any review will be undertaken by a person who has not been involved in the initial assessment, investigation or decision. Where a decision is taken to disclose the identity of the discloser, where at all possible, the discloser should be offered a review before their identity is disclosed, subject to clause 15.1.3 above.

15.3 There is no entitlement to two reviews in respect of the same issue.

16. FEEDBACK

16.1 Workers making disclosures will be provided with periodic and appropriate confidential feedback in relation to the matters disclosed and will be advised when consideration of the disclosure is complete, except in exceptional cases. When providing feedback no information will be communicated that could prejudice the outcome of the investigation or any action that ensues (e.g. disciplinary, or other legal action, including prosecution).

17. SUPPORT AND ADVICE

17.1 Workers are advised that the HEA's Employee Assistance Programme is available should they require support or advice. Details of the programme are available on the HEA's intranet pages.

17.2 Workers who want to make a protected disclosure under these procedures may wish to contact Transparency International Ireland, which operates a confidential free-phone service for anyone considering reporting a concern, or making a protected disclosure. The speak up helpline operates from 10 am to 6 pm Monday to Friday.

Contact details:

Freephone: 1800 844 866

Email: helpline@transparency.ie

Website: www.speakup.ie

A guide to making a protected disclosure is also available at:

https://transparency.ie/sites/default/files/14.12.02_speak_up_safely_final.pdf

18. IT IS NOT POSSIBLE TO CONTRACT-OUT OF THE 2014 ACT

18.1 The 2014 Act provides that it is not permitted to have clauses in agreements that prohibit or restrict the making of protected disclosures, exclude or limit the operation of any provision of the Act, preclude a person from bringing any proceedings under, or by virtue of, the Act and/or precluding a person from bringing proceedings for breach of contract in respect of anything done in consequence of the making of a protected disclosure.

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19. MANDATORY REPORTING

- 19.1 The 2014 Act does not oblige a worker to make a disclosure and it also does not absolve any worker from pre-existing mandatory obligations to report contained in other legislation. There are several other pieces of legislation which contain mandatory reporting provisions. Workers should in particular have regard to the reporting requirements outlined in the HEA's Child Protection Guidelines.

20. THE INFORMATION THAT SHOULD BE PROVIDED IN A DISCLOSURE

- 20.1 Workers should be able to make disclosures in accessible formats e.g. verbally, electronically or in writing. When a disclosure which appears to be a protected disclosure is made verbally it should be documented by the recipient. Where practicable, the discloser should be asked to confirm the information provided to avoid dispute at a later date in relation to the information disclosed.
- 20.2 A list of the details that it is recommended should be included in a disclosure is to be found at Appendix A of these Procedures. All records of disclosures should be securely maintained so as to comply with the requirements of confidentiality under the 2014 Act and with relevant obligations under Data Protection legislation.

21. AMENDMENTS

- 21.1 These Procedures may be revoked, replaced or amended at any time and you will be informed of any changes that are implemented.

APPENDIX A

It is recommended that, at a minimum, disclosures should include the following details:

- (a) That the disclosure is being made under the "Procedures for Making a Protected Disclosure to the Higher Education Authority.
- (b) The discloser's name
- (c) The date of the alleged wrongdoing (if known) or the date the alleged wrongdoing commenced or was identified.
- (d) Whether or not the alleged wrongdoing is still ongoing.
- (e) Whether the alleged wrongdoing has already been disclosed and if so, to whom, when, and what action was taken.
- (f) Information in respect of the alleged wrongdoing (what is occurring / has occurred/ is likely to occur and how) and any supporting information.

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(g) Any other relevant information.

Appendix B:

Guidance for Managers in dealing with disclosures

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

The manager to whom a concern is disclosed should:

- Record the disclosure and the steps taken to deal with it.
- Clarify the basis of the concerns raised with the worker.
- Establish what evidence is available to support the concern.
- Consider any personal interest the worker might have in the issue concerned.
- Risk assess the issue and take immediate action if the alleged wrongdoing involves a serious loss or danger to others.
- Carry out relevant enquiries promptly, sensitively and discretely, taking all reasonable steps to protect the identity of the maker of the disclosure.

At this stage, depending on the nature of the disclosure, the Manager should ascertain if it may be necessary to reveal the worker's identity. In doing so the manager may consult the CEO.

- If it is necessary to reveal the worker's identity to undertake an effective enquiry, consult with the worker.
- Obtain evidence from any relevant witnesses.

Assess whether the disclosure report is based on a reasonable belief but ungrounded, based on a reasonable belief and grounded or a deliberately false report.

Take appropriate action if the disclosure is grounded.

If the disclosure is deliberately false consider whether action under the HEA's Disciplinary Policy may be appropriate.

Provide written feedback to the worker within 20 days, including any proposed action.

Report the outcome and forward all records to the Head of Corporate Affairs.

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