

# WHISTLEBLOWING LEGISLATION: A CONSULTATION

JUNE 2022



**Isle of Man**  
Government

*Reiltys Ellan Vannin*



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## Introduction

The Island Plan has set out the vision of a secure, vibrant and sustainable Island. Part of that vision includes looking at developments in employment rights that we can adopt in the Isle of Man to ensure that employees have secure jobs and the Island is an attractive place to work.

This consultation proposes a number of changes to the law on whistleblowing while seeking views on wider, more far-reaching changes to the statutory framework for whistleblowing in the Isle of Man, to ensure that we are doing our best to protect those who seek to address wrongdoing in the workplace.

It is being issued alongside two other consultations, one on regulation of zero hours contracts, and one on family leave rights. The other consultations are available on the Consultation Hub on the IOM Government website here:

<https://www.gov.im/about-the-government/government/government-consultations/>

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## About the consultation

Consultees are asked a number of questions. If you would like to respond to any or all of these questions please send a submission by email or post or to:

Steven Tallach

Legislation Officer

Email: [steven.tallach@gov.im](mailto:steven.tallach@gov.im)

Please note that the Department will assume, unless you tell us otherwise, that you **do not** object to your response or the name of your organisation (or your own name if you are responding as an individual) being made public. If you want all or any part of your reply to be treated as confidential, then please indicate this clearly in your reply.

The consultation period ends on **26 August 2022**.

Following consultation, the Department will:

- review and evaluate comments received from consultees; and
- publish a review of the comments received; and
- set out the next steps for any legislative changes.

## Section 1: Background

In December 2020 [the Tynwald Select Committee on Whistleblowing](#) published its findings.

Though the initial focus of the Committee's inquiry was the Isle of Man Government's whistleblowing policy it took evidence more widely on the framework for whistleblowing in the Island in general. The report suggested that the current legislative framework is "not fit for purpose".

Following a debate on the report, Tynwald agreed a number of recommendations. These were as follows:

### **"Recommendation 1**

The Manx legislation regarding protected disclosures should be amended to include a public interest test. The Department for Enterprise will consult on whether the Manx legislation should also be amended to include vicarious liability for employers and whether there need be good faith attaching to a disclosure.

### **Recommendation 2**

The Isle of Man Government Whistleblowing policy and guidance should be re-written to encourage reporting of concerns, make it clear and accessible to the lay person and remove duplication.

### **Recommendation 3**

The Isle of Man Government Whistleblowing policy training must be compulsory with a refresher session completed every five years.

### **Recommendation 4**

That Tynwald is of the opinion that as an interim measure the Tynwald Auditor General shall oversee the management of public interest concerns raised by public sector employees and workers stationed within Departments, Boards and Offices of Government to ensure that any such concerns raised have been addressed; to review the reasons for any cessation of employment or engagement with a whistleblowing element, to ensure that the original public interest concerns have been addressed; and to report annually to Tynwald; and that the Tynwald Auditor General will be adequately resourced to do this.

### **Recommendation 5**

That the Cabinet Office and the Department for Enterprise should jointly consult during 2021/22 on an all-encompassing statutory framework for Whistleblowing to cover:

- a) encouraging the raising of public interest concerns,
- b) the provision of monitoring and support,
- c) protection for whistleblowers and penalties for non-compliance, and
- d) the possible creation of an Isle of Man Concerns at Work service to provide oversight for the whole Island."

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While recommendations 2, 3 and 4 have been dealt with separately recommendations 1 and 5 concern changes to legislation.

Since the report was published further high profile whistleblowing cases have highlighted the need to make changes to the law.

The Department for Enterprise proposes that the changes set out in recommendation 1 be included in a Bill to be introduced to Tynwald later in 2022. This consultation seeks view on those changes. The proposals are set out in more detail in section 2.

However in section 3 we also seek views on potential wider changes to the statutory framework, in line with recommendation 5 of the Whistleblowing Committee report.

## Section 2: Whistleblowing

### *Current employment protection for whistleblowers*

The current employment protection for whistleblowers in the Isle of Man is set out in Part IV of the Employment Act 2006. This is similar to the provision in the UK contained in the Employment Rights Act 1996.

The intention behind protection for whistleblowers is to encourage employees to come forward and let employers, and if necessary, regulatory authorities know where wrongdoing or matters of public concern are not being properly addressed in a particular workplace.

Part IV of the Employment Act 2006 provides for a system whereby a member of staff in the public or private sector may make a whistleblowing disclosure to, for example, their employer or to another appropriate organisation which meets the criteria and conditions set out in Part IV. If that member of staff is subsequently dismissed or subject to detriment by their employer as a result of that disclosure, they may submit a complaint to the Employment and Equality Tribunal about that treatment. In the Employment Act 2006, as in the UK's Employment Rights Act 1996, a whistleblowing disclosure is referred to as a "protected disclosure".

Protected disclosures should be a matter of public interest, rather than a concern relating to an individual grievance at work. For example, a protected disclosure might be about:

- a criminal offence;
- the breach of a legal obligation;
- a miscarriage of justice;
- a danger to the health or safety of any individual;
- damage to the environment; or
- deliberate covering up of information tending to show any of the above matters.

However since the Isle of Man introduced the whistleblowing provisions in 2006, the comparable UK legislation has been amended in a number of ways. As the Tynwald Select Committee pointed out, this means that the Isle of Man's law:

- "does not have a public interest test requirement;
- retains a requirement for disclosures to be made in good faith; the UK legislation no longer has this but has the ability to reduce any compensation where this is not the case; and
- does not have 'vicarious liability' for employers if an employee is subjected to detriment by a co-worker for making a protected disclosure"

The whistleblowing provisions in the Bill will amend the Employment Act 2006 to address these issues.

The specific changes are:

- Amending the definition of a "qualifying disclosure" to specify that only disclosures made in the public interest will qualify for whistleblowing protection;

- Amend the provision to include vicarious liability – in other words to provide that an employer may be held responsible if another employee or “an agent” of the employer subjects the whistleblowing employee to detriment;
- Remove requirement that disclosures are made in 'good faith';
- Enable Tribunal to reduce compensation by up to 25% if it finds that a disclosure has not been made in good faith.

In addition, though not set out in the Tynwald Select Committee’s Whistleblowing report, we also consult on the following proposals:

- Introduction of provision to make it clear when a whistleblowing disclosure has been made;
- Power to make regulations requiring prescribed persons to report annually;
- Interim relief; and
- Maximum amount of compensation for unfair dismissal.

### *Public interest and protected disclosures*

In the UK, a public interest provision was inserted owing to a 2002 Employment Tribunal case which raised the possibility that a complaint about an individual’s employment contract, rather than an issue of wider public interest, could lay the foundation for a protected disclosure. This was not the intention of the legislation.

The Tynwald Committee reported that there was some confusion about what constituted a whistleblowing disclosure under the Employment Act 2006, as some individuals would regard a situation involving a grievance as a protected disclosure.

Insertion of the public interest test would make it clearer that a protected disclosure should be of wider public interest than a breach of an individual’s personal contract of employment.

The draft Bill will amend section 50(1) of the Employment Act 2006 to include the public interest provision.

**Q1:** Do you agree with the “public interest” amendment to section 50(1)? Please explain your view.

### *Vicarious Liability*

Currently the Employment Act 2006 provides that a worker has the right not to be subjected to any detriment only by his or her employer as a result of a protected disclosure. In the UK this has been extended so that the whistleblower may not be subjected to detriment by a co-worker or “an agent” of the employer. Employers are therefore “vicariously liable” if a co-worker or agent subjects the worker who has made a protected disclosure to detriment.

The Bill will amend the Employment Act 2006 to include the provision set out above.

**Q2:** Do you agree with the introduction of vicarious liability? Please explain your answer.



*Removal of requirement for disclosure to be in good faith but reduction of compensation by 25% where disclosure not in good faith*

Sections 51, 53, 54 and 55 of the Employment Act 2006 all refer to qualifying disclosures having to be made in "good faith".

In the UK, the requirement that a disclosure has been made in good faith has been removed. The UK courts have held that where the predominant motive of the individual making the disclosure was not directed at remedying one of the wrongs listed in the protected disclosure legislation, but was instead for some ulterior purpose, the disclosure is unlikely to have been made in good faith.

In line with the UK, the Bill will remove the requirement that a disclosure be made in good faith, but at the same time enables compensation to be reduced by up to 25% where a Tribunal determines that the disclosure was not made in good faith. This ensures that the issue of whether or not a disclosure is made in good faith does not deter whistleblowers, while at the same time allowing the issue to be considered by way of compensation.

**Q3:** Do you agree with the above proposal? Please explain your view.

*Introduction of provision to make it clear when a whistleblowing disclosure has been made*

The Employment and Equality Tribunal on more than one occasion has addressed the fact that there is no requirement in the legislation for the whistleblower to make clear that information that they are conveying to a recipient that is intended to be a protected disclosure. In paragraphs 267 and 268 of [the decision on the Ranson v Department of Health and Social Care](#) the Tribunal suggests that this creates difficulties not only from the perspective of evidence and interpretation in a whistleblowing case, but it also may be the case that "the recipient of the information may not treat what he or she is being told with the degree of seriousness that the maker of the allegations intends to get across" if it is not made clear that the disclosure is intended to be a protected disclosure and that "It would save time and expense if the recipient was made aware that the information being provided was to be received as a whistleblow."

The Bill will amend section 50 to require that a worker who makes a disclosure of information must identify to the recipient either verbally or in writing that the information is intended to be a protected disclosure.

**Q4:** Do you agree with the proposal to clarify when a protected disclosure has been made? Please explain your view?

### *Duty of prescribed person to report on disclosures*

In the UK, a duty for “prescribed persons” (i.e. bodies with regulatory or other responsibility for specific matters which have been listed as bodies to which a disclosure can be made by whistleblowers) to report on disclosures was introduced by the Small Business, Enterprise and Employment Act 2015.

This followed feedback that there was a lack of consistency in the approach taken by prescribed persons and a lack of communication by them in following up disclosures and reporting back on any actions taken.

The Tynwald Select Committee on Whistleblowing made similar points in its report. It is proposed that the Employment Act 2006 is amended to include the same provision, which seeks to address these problems by giving the Department power to require prescribed persons to report annually on whistleblowing disclosures received

**Q5:** Do you agree with the above provision? Please explain your view.

### *Interim relief*

In the UK’s Employment Rights Act 1996 there is a right for “interim relief” in some unfair dismissal cases. Where a tribunal considers that the employee has a good chance of success it may ask the employer if he or she is willing to reinstate or re-engage the complainant pending the full hearing or make a “continuation” order for the continuation of the employee’s contract of employment.

In the UK the right to interim relief only applies in certain cases of unfair dismissal, such as where the reason for dismissal is a protected disclosure, or in a health and safety case? It should be noted that in the UK Employment Tribunals only rarely order interim relief.

**Q6:** Do you have any views as to whether interim relief should be introduced in the Isle of Man?

### *Maximum amount of awards for compensation*

Though not strictly tied to the issue of whistleblowing, provisions for compensation where a complaint to the Employment and Equality Tribunal is successful are set out in sections 140 to 147 of the Employment Act 2006. Compensation is made up of:

- a basic award of one week's pay for each completed year of continuous employment up to the effective date of termination;
- a compensatory award based on the employee's loss, including any expenses reasonably incurred in consequence of the dismissal and any other benefits including pensions that might reasonably have been expected but for the dismissal; the award must not exceed a fixed maximum (currently £56,000) except in health and safety and whistleblowing cases; and

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- a compensation for injury to feelings award, if the Tribunal thinks it just and equitable, up to a fixed maximum of £5,000.

Though there is no limit for the compensation award in whistleblowing and health and safety cases it should be noted that the current maximum of £56,000 in other cases is a lot lower than in the UK, where, as of 6<sup>th</sup> April 2022, the maximum compensatory award is £93,878.

**Q7:** Do you have any views as to whether the maximum amount of compensation for unfair dismissal should be increased, and, if so, to what level?

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### Section 3: A new statutory framework for whistleblowing

Recommendation 5 of the Tynwald Select Committee, sought consultation on an “all-encompassing statutory framework to cover:

- a) encouraging the raising of public interest concerns,
- b) the provision of monitoring and support,
- c) protection for whistleblowers and penalties for non-compliance, and
- d) the possible creation of an Isle of Man Concerns at Work service to provide oversight for the whole Island.”

In particular the Committee report indicates that the Island should consider the model set out in the [Public Interest Disclosure \(Protection\) Bill](#), a Private Members Bill which was introduced into the House of Parliament in the UK in 2020. The Bill failed to obtain the support of the UK Government, and it fell in 2021.

Since then there have been two more attempts to introduce new whistleblowing legislation to the Houses of Parliament.

The [Office of the Whistleblower Bill](#) was introduced in May 2021 and a similar Private Member’s Bill, the Whistleblowing Bill was introduced to the Houses of Parliament in April 2022. Once again both Bills failed to make progress.

In addition, in 2019 the EU Whistleblowing Directive was agreed and Member States are currently in the process of enacting legislation to comply with the Directive. For example, in Ireland the [Protected Disclosures \(Amendment\) Bill 2022](#) is progressing through the Irish Parliament.

The UK whistleblowing support organisation Protect has also prepared a [model Bill](#) which is similar to those introduced to the UK Parliament. Additionally, it includes provisions similar to those in the Irish Bill referred to above.

The examples of legislation may differ in some ways but what they all have in common is the creation of a new, independent body with powers to investigate whistleblowing complaints and set standards for employers – an Office of the Whistleblower or a Whistleblowing Commissioner.

Given that the Irish legislation has the backing of its Government and is presently progressing through its Parliament, it is perhaps useful to use this legislation as a model for a “Concerns at Work” Service in the Isle of Man.

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*The Irish Protected Disclosures (Amendment) Bill 2022*

The Irish [Protected Disclosures \(Amendment\) Bill](#) amends its existing Protected Disclosures Act 2014 to:

- Extend the scope of whistleblowing legislation to protect volunteers, shareholders, board members and job applicants;
- Require private sector organisations with 50 or more employees to establish formal channels and procedures for employees to make protected disclosures;
- Require employers and “prescribed persons” (e.g. regulatory bodies to whom a disclosure is made) to acknowledge and follow up on disclosures and give feedback to the reporting person within three months;
- Establish an Office of the Protected Disclosures Commissioner, which will direct protected disclosures to the most appropriate body when it is unclear which body is responsible.

These proposals are examined in more detail below.

*Extending the scope of whistleblowing protection to volunteers, shareholders, board members and job applicants*

Currently in the Isle of Man, provision on whistleblowing covers workers for an employer, but the usual definition of worker is extended so that it includes employees, workers, agency workers, primary care providers and trainees or those on work experience. The Irish legislation extends its protection to volunteers, shareholders, board members and those who have acquired “information on a relevant wrongdoing during a recruitment process or other pre-contractual process.”

**Q8:** Do you have any comments on the addition of volunteers, shareholders, board members and job applicants to those who are covered in making a protected disclosure?

Consequently, the Irish Bill also provides for board members, volunteers, unpaid trainees and job applicants to have access to the mechanisms of the Irish Workplace Relations Commission (a body similar to the Manx Industrial Relations Service or ACAS in the UK) and to the Labour Court (the equivalent of the Manx Employment and Equality Tribunal) for claims of redress for penalisation for having made a protected disclosure.

Normally compensation to an employee related to protected disclosures would be connected to their remuneration. The Irish Bill also provides that if a complainant is not employed by the business in question, the maximum compensation to be awarded is €13,000.

**Q9:** Do you have any comments as to protections and compensation for volunteers, shareholders, board members and job applicants if they are to be covered by the protected disclosure framework and whether it would be appropriate for the Isle of Man?

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## *Anonymous disclosures*

In relation to confidentiality and anonymity, the Irish Bill makes clear that a worker who makes an anonymous disclosure but is subsequently identified and suffers penalisation, shall qualify for protection. However it also makes clear that the legislation does not impose an obligation on an employer or other body to accept or follow up on an anonymous disclosure.

**Q10:** Do you have any comments on the provisions relating to anonymity?

### *"Internal" reporting channels*

The Irish Bill requires employers with 50 employees or more (subject to a number of exemptions) to establish procedures for reporting and managing qualifying disclosures.

Those procedures include:

- setting up "channels" for receiving disclosures, both in writing or orally, which ensure the confidentiality of the reporting person and prevent access by unauthorised persons;
- documentation of whistleblowing concerns and actions taken as a result;
- designation of people with responsibility for reporting channels and for dealing with disclosures; and
- employers being required to report back to the person making a disclosure within 3 months.

The threshold of 50 or more employees applies only to the private sector – all public sector bodies, regardless of employee numbers, are required to establish procedures.

It should be noted that in the fourth quarter of 2021 there were 120 organisations, including Government bodies and businesses, in the Island with over 50 employees<sup>1</sup>.

**Q11:** Do you have any comments as to whether the requirement that all public sector bodies and private sector employers with 50 employees or more establish procedures for reporting and managing qualifying disclosures is appropriate for the Isle of Man?

### *"External" reporting channels*

The Irish Bill provides that prescribed persons must also establish reporting channels for handling protected disclosures, including procedures for:

- following up on disclosures and providing feedback to the reporting person on the outcome of investigations;
- designating one or more staff members as being responsible for receiving disclosures; and
- publication of information on the prescribed person's website about procedures for whistleblowing.

**Q12:** Do you have any comments on proposals around external reporting channels?

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<sup>1</sup> Figures provided by the Statistics Office, Cabinet Office.

### *Ministerial reporting channels*

In the Irish Bill specific provision is made for a protection in some circumstances where a worker is employed by a public body and the disclosure is made to a Minister with responsibility for the public body concerned. This depends on the worker:

- having previously disclosed to their employer or a prescribed person and no action has been taken;
- where the worker believes the head of the relevant public body is “personally complicit” in the wrongdoing reported; or
- the disclosure concerns “an imminent or manifest danger to the public interest”.

**Q13:** Do you have any comments on the ministerial reporting channels?

### *Public disclosures*

This concerns provision for making disclosures publicly, for example, through the media, and the circumstances in which an employee who makes such a disclosure may be protected. There is already, in the Manx legislation, provision for public disclosures, but there are a number of requirements attached to a “public” protected disclosure which are more onerous than in other cases of protected disclosure.

In Ireland, as in the Isle of Man, there is already existing provision to make a protected disclosure to the media. However the EU Whistleblowing Directive which underpins the Irish Protected Disclosures (Amendment) Bill 2022 requires a number of different conditions.

The Irish Bill provides that a disclosure to the media qualifies for protection if:

- The worker has made a disclosure to their employer or to a prescribed person and no action has been taken; or
- There is imminent danger or an emergency; or
- If the worker were to disclose to a prescribed person there is a risk of retaliation or a low prospect of the wrongdoing being addressed.

**Q14:** Do you have any comments on the proposal on public disclosures?

### *Record keeping*

The Irish Bill provides that public and private sector bodies must keep records relating to all protected disclosures received.

**Q15:** Do you have any comments on the requirement that public and private sector bodies must keep records relating to all protected disclosures and whether this is appropriate for the Isle of Man?

## *Establishment of an Office of the Protected Disclosures Commissioner*

The Irish Bill establishes a Protected Disclosures Office. The following functions of the Director of the Office are set out:

- transmit any disclosures to the Office to a prescribed person (i.e. the relevant body with regulatory or other responsibility for the matter in respect of which the disclosure has been made) ;
- where there is no specific body with responsibility relating to a disclosure the Commissioner may personally “follow up” the information contained in the disclosure.
- support the receipt and follow-up of disclosures made to Ministers – the existing Irish legislation, the [Protected Disclosures Act 2014](#), has specific provision for disclosure to Government Ministers.

In relation to “the follow up” of disclosures made to the Protected Disclosures Office in a case where there is no specific body with responsibility for the matter concerned, the Bill provides that the Director of the Office prepare a report recording the facts of the matter and making recommendations as to further action that could be taken to address the wrongdoing reported.

It further provides that in so doing, the Director “shall have all such powers as are necessary or expedient for, or incidental to, the performance of his or her functions”, though in particular the Director may:

- “(a) request a person to provide him or her with such information as he or she considers necessary for the performance of those functions;
- (b) request the attendance of a person or persons to provide information to the Director in person.”

**Q16:** Do you have any comments or views on the powers provided to the Protected Disclosure Office above? Would the above powers provided to an Isle of Man Concerns at Work Office create any difficulties? Would such powers be adequate?

### *Penalties*

The Protected Disclosure (Amendment) Bill 2022 provides for penalties for any person who:

- hinders or attempts to hinder a worker in making a protected disclosure;
- penalises or threatens penalisation against a worker or a facilitator or causes or permits any other person to penalise or threaten penalisation or threaten penalisation against a worker or a facilitator for having made a protected disclosure;
- brings vexatious proceedings against a worker for having made a protected disclosure or a facilitator for assisting a worker in making a protected disclosure;
- breaches the duties around keeping the identity of those who have made protected disclosures confidential.

The Irish Bill makes the above actions criminal offences which may result in either a fine or up to two years’ imprisonment.



**Q17:** Do you have any comments on the offences listed above?

**Q18:** Do you have any other comments on any of the above proposals, or the statutory framework for whistleblowing in general?

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## Section 4: Relevant documents

The following documents are relevant to this consultation:

Employment Act 2006 (of Tynwald):

[https://legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2006/2006-0021/EmploymentAct2006\\_14.pdf](https://legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2006/2006-0021/EmploymentAct2006_14.pdf)

Employment Rights Act 1996 (of Parliament):

<https://www.legislation.gov.uk/ukpga/1996/18/contents>

Tynwald Select Committee on Whistleblowing report:

<https://tynwald.org.im/business/pp/Reports/2020-PP-0199.pdf>

Protected Disclosures (Amendment) Bill 2022 (of the Irish Parliament):

[https://data.oireachtas.ie/ie/oireachtas/bill/2022/17/eng/ver\\_a/b17a22d.pdf](https://data.oireachtas.ie/ie/oireachtas/bill/2022/17/eng/ver_a/b17a22d.pdf)

Protect – Model Bill on Whistleblowing:

<https://public-concern-at-work.s3.eu-west-1.amazonaws.com/wp-content/uploads/images/2022/05/05163015/Protect-draft-Whistleblowing-Bill-reviewed-May-2022-1.docx>

