

A BRIEF GUIDE TO WHISTLEBLOWING



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Introduction

This is a short Guide to the provisions in the Employment Act 2006 which protect workers who 'blow the whistle' about wrongdoing. The Guide contains information as to the persons who may be protected, the kinds of disclosures which may be protected, and the circumstances in which such disclosures are protected.

The basic requirements to be protected are as follows:

- the person making the disclosure must be a 'worker' (see 1.1);
- the information revealed must be of the right type (a 'qualifying disclosure') (see 3.1); and
- it must be revealed to the right person, and in the right way (making it a 'protected disclosure') (see 4).

In general, workers should be able to make disclosures about wrongdoing to their employer, so that problems can be identified and resolved quickly within organisations. Many employers have internal procedures for this purpose and the Department of Trade and Industry would encourage employers to adopt such procedures (see further at 8 below).

Workers who are unsure as to whether to make a disclosure, or as to whether a disclosure would qualify as a 'protected disclosure', may wish to obtain professional advice before proceeding (and note that anything that is said to a legal adviser in order to get such advice is automatically protected).

The booklet is written in general terms and is not intended to be a complete or authoritative statement of the law. In a work of this size, it is impossible to provide a definitive statement of the law, which, in any case, is the function of the Employment Tribunal and the High Court. Only the official wording of Acts, Regulations and Orders, and the interpretation given by the Courts, are authoritative.

No responsibility can be accepted for errors or omissions, or their consequences.

1. Who is protected?

The provisions within the Employment Act 2006 which deal with whistleblowing cover most **workers** over school leaving age.

1.1 Who is a 'worker'?

For the purpose of the provisions on whistleblowing, the Employment Act 2006 extends the usual definition of 'worker' used elsewhere in the Act so as to include all of the following:

- *employees*, that is, persons who have a contract of employment;
- *workers* who work under some other contract for a party to the contract (not being clients or customers);
- agency workers, that is persons supplied by an employment business to work for its client (including self employed agency workers);
- home workers, that is persons who do all or part of their work at home;
- NHS primary care providers (such as general practitioners, certain dentists, pharmacists and opticians);
- trainees or persons on work experience. This covers persons who are undertaking work experience as part of a training course or who are training for employment except where the course is run by an educational establishment (which includes any university, college or school).

Note that the Act uses an **extended definition of 'employer'** in respect of the provisions on whistleblowing so that:

- in the case of an agency worker, it includes the person who substantially determines or determined the terms on which the worker is or was engaged;
- in the case of a NHS primary care provider it includes the DHSS;
- in the case of a trainee or person on work experience it covers the person providing work experience or training.

In practice this means that a worker will be protected if he or she blows the whistle against a party that might not, were it not for the extended definition, technically be the worker's employer.

1.2 Qualifying periods and persons over retirement age

The Act protects employees and other workers who make a protected disclosure irrespective of their having served any minimum qualifying period whilst, in addition, employees and workers over the employer's usual retirement age are also protected.

2. Protection against detriment and dismissal

The Act protects workers from detriment for making or proposing to make a protected disclosure.

Detriment may take a number of forms, ranging from denial of promotion, facilities or training opportunities which the employer would otherwise have offered to termination of the contract.

2.1 Detriment other than termination of the contract

Where the detriment in question does not involve termination of the contract both employees and workers can bring a complaint under Part V of the Employment Act 2006 ('detriment').

2.2 Detriment involving termination of the contract

One important difference between the employment rights of employees and those of workers is that the right not to be unfairly dismissed applies only to employees.

- Where an employee is dismissed for making a protected disclosure he or she may make a claim for unfair dismissal under Part X of the Employment Act 2006. Where the reason for the dismissal (or, if more than one, the principal reason for dismissal) is that the employee made a protected disclosure the dismissal will be automatically unfair.
- Where the contract of a worker who is not an employee is terminated for making a protected disclosure his or her recourse is to bring a complaint of detriment under Part V of the Employment Act 2006.

3. What can be disclosed?

3.1 Qualifying disclosures

Certain kinds of disclosures qualify for protection ("qualifying disclosures"). Qualifying disclosures are disclosures of information which the worker reasonably believes tend to show one or more of the following matters is either happening now, took place in the past, or is likely to happen in the future:

- 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 five matters.

It should be noted that in making a disclosure the worker must have **reasonable belief** that the information disclosed tends to show one or more of the offences or breaches listed above ('**a relevant failure**'). The belief need not be correct - it might be discovered subsequently that the worker was in fact wrong - but the worker must show that he held the belief, and that it was a reasonable belief in the circumstances at the time of disclosure.

3.2 Disclosures about wrongdoing in the Isle of Man or overseas

Protection applies even if the qualifying disclosure concerns a relevant failure which took place overseas, or where the law applying to the relevant failure was not that of the Isle of Man.

3.3 Disclosures that involve an offence

Disclosure of information by a worker is not a qualifying disclosure if in making it he or she commits an offence (e.g., if the disclosure is prohibited under official secrets legislation).

3.4 Disclosures and legal professional privilege

A disclosure of information, which would be protected from disclosure because of legal professional privilege, cannot be a qualifying disclosure if made by the legal adviser (or, for example, a typist in the adviser's office) to whom the information was disclosed in the course of obtaining legal advice.

4. Circumstances in which disclosures are protected

The Employment Act 2006 sets out a number of circumstances in which disclosures are protected ("protected disclosures"). However, there are different sets of conditions as to when each of these disclosures will be protected. For example, the conditions covering more general disclosures (see 4.6) are more onerous than those which apply when the disclosure is made to the worker's employer.

The circumstances in which disclosures are protected are set out below.

4.1 Qualifying disclosures to the employer or other responsible person

A qualifying disclosure will be a protected disclosure where it is made:

- to the worker's employer, either directly to the employer or by procedures authorised by the employer for that purpose (e.g. a telephone hotline); or
- to a person other than his or her employer whom the worker reasonably believes exercises responsibility for and has legal control over the conduct of the person who is responsible for the relevant failure.

Example

- A nurse employed by an agency raises concerns about malpractice in the care home where she works.

In each case the only additional requirement on the worker is that he or she should act in good faith. No other requirement is necessary to qualify for protection.

Disclosure to the employer should in most cases ensure that concerns are dealt with quickly and by the person who is well placed to resolve the problem. In some small organisations, this may be the employer himself or herself.

4.2 Qualifying disclosures to a prescribed person

Workers who are concerned about wrongdoing or failures can make disclosures to a person or body which has been prescribed by the Department of Trade and Industry under *the Public Interest Disclosure (Prescribed Persons) Order 2007* for the purpose of receiving disclosures about the matters concerned. If a worker makes a qualifying disclosure to such a person or body, it will be a protected disclosure provided the worker:-

- makes the disclosure in good faith;
- reasonably believes that the information, and any allegation it contains, are substantially true; and
- reasonably believes that the matter falls within the description of matters for which the person or body has been prescribed. (For example, breaches of health and safety regulations

or environmental dangers can be notified to the Department of Local Government and the Environment).

A list of prescribed persons, the description of matters for which they are prescribed and contact details, are shown in Appendix 1. The persons listed have statutory functions and can provide authoritative advice and guidance to workers about matters properly disclosed to them.

4.3 Qualifying disclosures to a legal adviser

A qualifying disclosure will be a protected disclosure if it is made to a legal adviser in the course of obtaining legal advice. There are no further conditions attached.

Note that whereas this provision would cover a qualified advocate it can not be relied upon to cover lay advisers.

4.4 Qualifying disclosures to the Civil Service Commission

A qualifying disclosure made in good faith by a worker, appointed by the Civil Service Commission or Council of Ministers will be a protected disclosure if made to the Commission (either directly or via departmental officials).

4.5 Qualifying disclosure about an exceptionally serious failure

A qualifying disclosure made about a relevant failure which is exceptionally serious will be a protected disclosure if the worker:-

- makes the disclosure in good faith;
- reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
- does not act for personal gain.

In addition, it must be reasonable for the worker to make the disclosure in view of all the circumstances, having regard in particular to the identity of the person to whom the disclosure is made.

The relevant failure must be *exceptionally* serious. This will be a matter of fact, and not simply a matter of the worker reasonably believing it to be exceptionally serious.

4.6 More general qualifying disclosures

A qualifying disclosure will be a protected disclosure if the following conditions are met:

Firstly, the worker must:-

- make the disclosure in good faith;

- reasonably believe that the information, and any allegation contained in it, are substantially true, and
- not act for personal gain.

In addition, one or more of the following conditions must be met:

- that at the time the worker made the disclosure, he reasonably believed that he would be subjected to a detriment by his employer if the disclosure were to be made to the employer or to a prescribed person (see 4.2);
- in the absence of an appropriate prescribed person, the worker reasonably believed that disclosure to the employer would result in the destruction or concealment of information about the wrongdoing; or
- the worker had previously disclosed substantially the same information to his or her employer or to a prescribed person.

Finally, it must be reasonable for the worker to make the disclosure. The Employment Tribunal would decide whether the worker acted reasonably, in all the circumstances, but in particular would take into account:

- the identity of the person to whom the disclosure was made (e.g., it may be more likely to be considered reasonable to disclose to a professional body that has responsibility for standards and conduct in a particular field, such as accountancy or medicine, than to the media);
- the seriousness of the relevant failure;
- whether the relevant failure is continuing or is likely to occur again;
- whether the disclosure breaches the employer's duty of confidentiality to others (e.g. information that is made available by the worker may contain confidential details about a client);
- what action has or might reasonably be expected to have been taken if a disclosure had been made previously to the employer or a prescribed person; and
- whether the worker complied with any internal procedures approved by the employer if a disclosure had been made previously to the employer.

5. Other relevant matters

5.1 Disclosures about health and safety matters

The Employment Act 2006 provides overlapping protection for workers who, in certain circumstances, raise concerns about, or take action in connection with, health and safety matters (see sections 61 and 115 of that Act).

Under those provisions a worker (widely defined as for the protected disclosure provisions – see 1.1) has the right not to be subjected to any detriment for taking action of certain kinds in the interests of health and safety. The kinds of action by a worker which are protected are:

- carrying out activities in connection with reducing risks to health and safety, where the worker is designated by the employer to carry out such activities;
- performing functions as an acknowledged safety representative or member of an official or recognised safety committee;
- taking reasonable steps to bring risks to health and safety to the employer's attention, where either there is no safety representative or committee or it is not practicable to contact them;
- leaving, or refusing to return to, a place of work in case of serious and imminent danger;
- taking steps to protect himself or herself or others from serious and imminent danger (unless the employer can show that the steps were negligent and deserved the action taken by the employer).

The right may be enforced by complaint to the Employment Tribunal.

The provisions on protected disclosures provide protection, as noted at 3.1, to any worker who discloses information about a health or safety danger in accordance with the provisions. Clearly, where there is a recognised health and safety representative present, the worker should normally tell him or her about the problem, as it is part of the representative's role to raise such matters with the employer. The health and safety provisions and the protected disclosure provisions in the Employment Act 2006 are therefore complementary.

5.2 Contractual duties of confidentiality

The protected disclosure provisions override any provision in an agreement between a worker and his or her employer which would prevent the worker from making a protected disclosure. This applies to any agreement between the employer and worker (it might be a term in a contract of employment or a separate agreement), including agreements settling claims under the new provisions.

6. The Employment Tribunal and Remedies

Employees and other workers protected by the provisions can complain that they have been subjected to detriment by their employer for making a protected disclosure. As noted earlier at 2, an 'employee' can make a claim of unfair dismissal whereas a 'worker' who is not an employee and whose contract has been terminated by his or her employer for making a protected disclosure can claim that he or she has been subjected to a detriment.

The complaint should normally be made within three months of the dismissal or detriment but the Tribunal may also consider a complaint made outside the three month time limit if it was not reasonably practicable to have made the complaint within that limit but where it is made within such further period as the Tribunal considers reasonable.

In the case of an employee, where the Tribunal finds that a complaint of unfair dismissal is justified, it has powers to order re-instatement or re-employment, or the payment of compensation.

Where a worker complains that he or she has been subjected to a detriment or an employee complains that he or she has been subjected to a detriment less than dismissal and the Tribunal finds the complaint well-founded, it will make a declaration to that effect and may order the payment of compensation.

There is no limit to the amount of compensation that can be awarded in protected disclosure cases in either detriment or unfair dismissal cases. Compensation can include an award for injured feelings.

Contact details for the Employment Tribunal are as follows:

The Clerk to the Employment Tribunal
5th Floor
Victory House
Prospect Hill
Douglas
IM1 1EQ

Tel. 672942

Fax 687050

Web www.gov.im/dti/employmentrights/tribunals.xml

7. Conciliation

Whilst the protected disclosure provisions override any provision in an agreement between a worker and his or her employer which would prevent the worker from making a protected disclosure (see 5.2) this does not prevent the employer and worker from settling a detriment or unfair dismissal complaint.

Two considerations in arriving at a settlement are as follows:

- Any clause in such a settlement will be void in so far as it purports to preclude a worker from making a protected disclosure; and
- under section 164 of the Employment Act 2006 the settlement will only be legally binding if it is reached under the auspices of the Manx Industrial Relations Service (MIRS).

For contact details of the MIRS see 9 below.

8. Internal Policies

Whilst the Employment Act 2006 places no obligation on employers to have a whistleblowing policy or procedures the Department of Trade and Industry would recommend that employers consider drawing up internal whistleblowing policies. Internal procedures that are straightforward and which workers have confidence in and are encouraged to use are more likely to result in disclosure of concerns to the employer rather than to external sources. It is recommended that employers involve the workforce, or their representatives, when drawing up, communicating and reviewing such procedures.

A good whistleblowing policy should make the following points clear:

- the organisation takes malpractice seriously, giving examples of the type of concerns to be raised, so distinguishing a whistleblowing concern from a grievance;
- the subject matter of the kinds of disclosure that are covered by the policy. (If this is wider than the provisions in respect of which there is statutory protection (see 3.1) the policy should point this out);
- which categories of worker are covered by the policy (many organisations will have to consider persons other than employees - see 1.1);
- the designated person(s) to whom disclosures should be made (including where possible the option of raising concerns outside of line management) and the methods of disclosure (e.g. a telephone hotline);
- the response that can be expected from the designated person;
- a further stage to deal with the situation where the whistleblower is dissatisfied with the action taken by the designated person;
- when and how concerns may properly be raised outside the organisation (e.g. with a regulator);
- policy regarding openness, confidentiality and anonymity;
- that it is a disciplinary matter both to victimise a bona fide whistleblower and for someone to maliciously make a false allegation;
- workers' rights under the statutory régime; and
- sources of external, independent advice.

9. Further Advice and Information

9.1 The Manx Industrial Relations Service

Employees, workers and employers can obtain further advice about protected disclosures from the Manx Industrial Relations Service, contact details of which are as follows:

Manx Industrial Relations Service
5th Floor
Victory House
Prospect Hill
Douglas
IM1 1EQ

Tel. 672942

Fax 687050

Email iro@ir.gov.im

Web www.mirs.org.im

The service is available to any individual or organisation free of charge.

Any worker who contacts MIRS should bear in mind the distinction between seeking information about the relevant provisions of the Employment Act 2006, and the requirements attached to making a protected disclosure, as explained in section 4.

9.2 Public Concern at Work

In the United Kingdom, an independent organisation, Public Concern at Work (PCAW) provides guidance and training to employers on whistleblowing and can also advise persons who are unsure as to whether or how to raise a concern about workplace wrongdoing. (Whilst IOM legislation on protected disclosures is similar to UK provisions it should be noted that the prescribed regulators in the IOM (see Appendix 1) differ to those which are prescribed in the UK and there are other important differences between UK and IOM employment law).

The website of PCAW is www.pcaw.co.uk.

9.3 List of Publications

The following publications can be downloaded from the DTI website, www.emplaw.gov.im

Codes of Practice

- Time off for Trade Union Duties and Activities 1992
- Sex Discrimination in Employment 2001

- Recognition of Trade Unions 2001
- Disciplinary and Grievance Procedures in Employment 2007

Department of Trade and Industry Guides

- Isle of Man Employment Rights: A Guide for Employers, Employees and Workers
- Employment Act 2006 - Timetable Right by Right
- Maternity Rights - a Guide for Employers and Employees
- Paternity Rights - a Guide for Employers and Employees
- Adoption Rights - a Guide for Employers and Employees
- Parental Leave for Parents of Disabled Children - a Guide for Employers and Employees
- Flexible Working –The Right to Request and the Duty to Consider
- Employment Status and Employment Rights of Agency Workers
- Guidance on Written Particulars
- Holidays and Holiday Pay
- Equality at Work: a Short Guide to the Employment (Sex Discrimination) Act 2000
- A Detailed Guide to the Minimum Wage
- The Part-Time Workers (Prevention Of Less Favourable Treatment) Regulations 2007 and Connected Legislation

Manx Industrial Relations Service Guides

- A Guide to Redundancies
- A Guide to Preparing Written Statements of Terms and Conditions of Employment
- A Guide to Conciliation

Appendix 1: List of Prescribed Persons / Organisations

Person / Organisation and Contact Details	Functions
<p>Attorney General</p> <p>Attorney General's Chambers 3rd Floor St Mary's Court Hill Street Douglas IM1 1EU</p> <p>Tel. 685452 Fax 629162</p>	<p>The proper administration of charities and of funds given or held for charitable purposes.</p>
<p>Chief Registrar</p> <p>General Registry Deemsters Walk Douglas IM1 3AR</p> <p>Tel 685979 Fax 685976 Web www.gov.im/registries</p>	<p>Fraud, and other irregularities, relating to the financial affairs of trade unions and employers' associations (within the meaning of the Trade Unions Act 1991).</p>
<p>Communications Commission</p> <p>Salisbury House Victoria Street Douglas</p> <p>Tel. 677022 Fax 626499</p>	<p>The provision and use of telecommunication systems, telecommunication services and telecommunication apparatus (within the meaning of the Telecommunications Act 1984).</p>
<p>Department of Health and Social Security</p> <p>Markwell House Market Street Douglas IM1 2RZ</p> <p>Tel. 685028 Fax 685008 Web www.gov.im/dhss/</p>	<p>Matters relating to occupational pension schemes and other private pension arrangements.</p> <p>Matters relating to children's homes, child-minders, private fostering and day-care (within the meaning of the Children and Young Persons Act 2001).</p> <p>National insurance contributions.</p>

<p>Department of Local Government and the Environment</p> <p>Murray House Mount Havelock Douglas IM1 2SF</p> <p>Tel. 685954 Fax 685873 Web www.gov.im/dlge/</p>	<p>Acts or omissions which have an actual or potential effect on the environment or the management or regulation of the environment.</p> <p>Matters which may affect the health or safety of any individual at work, and matters which may affect the health or safety of any member of the public arising out of or in connection with the activities of persons at work.</p> <p>Matters which may affect the health of any member of the public in relation to the consumption of food (within the meaning of the Food Act 1996) and other matters concerning the protection of the interests of consumers in relation to food.</p>
<p>Department of Trade and Industry</p> <p>Hamilton House Peel Road Douglas IM1 5EP</p> <p>Tel. 682354 Fax 682355 E mail dti@gov.im Web www.gov.im/dti/</p>	<p>The enforcement of the minimum wage pursuant to the Minimum Wage Act 2001.</p>
<p>Department of Transport</p> <p>Sea Terminal Douglas IM1 2RF</p> <p>Tel. 686600 Fax. 686617 Web http://www.gov.im/transport/</p>	<p>Compliance with the requirements of civil aviation legislation, including aviation safety.</p>

<p>Financial Supervision Commission</p> <p>PO Box 58 Finch Hill House Douglas Isle of Man IM99 1DT</p> <p>Tel. 689300 Fax 689399 E mail fsc@gov.im Web www.gov.im/fsc/</p>	<p>The operation of building societies, industrial and provident societies and credit unions.</p> <p>The carrying on of banking business (within the meaning of the Banking Act 1998) and investment business (within the meaning of the Investment Business Act 1991).</p> <p>The carrying on of regulated activities (within the meaning of the Corporate Service Providers Act 2000).</p> <p>Money laundering, financial crime, and other serious financial misconduct, in connection with activities regulated by the Financial Supervision Commission.</p>
<p>Insurance and Pensions Authority</p> <p>4th Floor HSBC House Ridgeway Street Douglas IM1 1ER</p> <p>Tel. 646000 Fax 646001 E mail ipa.admin@ipa.gov.im Web www.gov.im/ipa/</p>	<p>The carrying on of insurance business and insurance management business (within the meaning of the Insurance Act 1986).</p> <p>The operation of a retirement benefits scheme (within the meaning of the Retirement Benefits Schemes Act 2000).</p> <p>The carrying on of regulated activities (within the meaning of the Insurance Intermediaries (General Business) Act 1996).</p> <p>Money laundering, financial crime, and other serious financial misconduct, in connection with activities regulated by the Insurance and Pensions Authority.</p>

<p>Isle of Man Office of Fair Trading</p> <p>Government Buildings Lord Street Douglas IM1 1LE</p> <p>Tel. 686500 / 686520 Fax 686504 E mail iomfairtrading@gov.im Web www.gov.im/oft/</p>	<p>Matters concerning the sale of goods or the supply of services which adversely affect the interests of consumers.</p> <p>Matters relating to unfair terms in consumer contracts and misleading advertising.</p> <p>Anti-competitive practices (within the meaning of Part 2 of the Fair Trading Act 1996).</p> <p>Compliance with the requirements of consumer protection legislation.</p> <p>The carrying on of a business of lending money (within the meaning of Part I of the Moneylenders Act 1991) otherwise than by an exempt person (within the meaning of that Act).</p>
<p>Office of the Data Protection Supervisor</p> <p>PO Box 69 Willow House Main Road Onchan IM99 1EQ</p> <p>Tel. 693260 E mail enquiries@odps.gov.im Web www.gov.im/odps/</p>	<p>Compliance with the requirements of the Data Protection Act 2002.</p>
<p>A public auditor (within the meaning of the Audit Act 1983) or an auditor appointed under section 3 of the Audit Act 2006).</p>	<p>The proper conduct of public business, value for money, fraud and corruption in bodies, or by persons, whose accounts are required to be audited in accordance with the Audit Act 1983 or the Audit Act 2006, as the case may be.</p>

The Treasury

Treasury Administrator
Treasury
Government Office
Buck's Road
Douglas
IM1 3PU

Tel. 685982
Fax 686662
Web www.gov.im/treasury

Value added tax and duties of excise.

The import and export of prohibited or restricted goods (within the meaning of the Customs and Excise Management Act 1986).

Income tax.

Insider dealing.

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