

## **Guidance for Making a Protected Disclosure to HIQA for Persons other than HIQA Employees**

**This document is for guidance purposes only.**

### **1. Introduction**

The Health Information and Quality Authority (HIQA) is an independent statutory authority established to promote safety and quality in the provision of health and social care services for the benefit of the health and welfare of the public. HIQA's mandate extends across a wide range of public, private and voluntary sector services.

The following two Acts provide that HIQA may receive protected disclosures in certain circumstances:

1. The Protected Disclosures Act 2014 (the 2014 Act)
2. The Health Act 2004 (as amended by the Health Act 2007) (the Health Act)

Under the two Acts, various persons within HIQA may receive protected disclosures. The CEO of HIQA is a prescribed recipient of protected disclosures under the 2014 Act. Whereas, the Health Act provides that protected disclosures may be received by the Chief Inspector, an authorised person<sup>1</sup> or HIQA as a scheduled body.

All references to HIQA in this guidance shall include the CEO of HIQA, the Chief Inspector and authorised persons unless stated otherwise.

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<sup>1</sup> Appointed by HIQA in accordance with section 70 of the Health Act 2007 (as amended)

Both Acts provide certain protections for the disclosing party (the discloser) from penalisation if such penalisation results from the making of a protected disclosure. See Appendix A for more information in relation to protections for the discloser.

## 2. Purpose

The purpose of this document is to provide guidance to persons or workers, other than HIQA employees, who wish to make a protected disclosure to HIQA.

## 3. Scope

While our web page outlines how a person or worker, other than a HIQA employee, can make a protected disclosure to HIQA, this guidance explains what a protected disclosure is, who can make a protected disclosure to HIQA and who in HIQA can receive a protected disclosure as this varies under the two Acts as outlined above. It also sets out the protections under the two Acts for persons or workers who make a protected disclosure and explains the key terms in the 2014 Act.

## 4. What is a protected disclosure?

As outlined on our web page, in general terms, a protected disclosure is made when a person or worker discloses certain information in relation to a potential wrongdoing to a particular person in a particular way.

### The 2014 Act

For the purposes of the 2014 Act, a 'protected disclosure' means the disclosure of **relevant information** by a worker to certain persons which, in the **reasonable belief** of the worker, tends to show certain wrongdoing(s) which came to the attention of the worker **in connection with the worker's employment**. An explanation of the terms in bold is available at Appendix A.

By Statutory Instrument 339 of 2014, the CEO of HIQA was prescribed as a recipient of disclosures of **relevant wrongdoings** of all matters relating to the standards of safety and care of person receiving health and social care services in the public and voluntary health

care sectors and social care services in the case of the private health care sector as provided for by the Health Act 2007 (as amended).

This means that the CEO of HIQA can receive protected disclosures from a worker in relation to relevant wrongdoings relating to services that fall within HIQA's remit. For operational reasons, the 'Regional Manager, Information Management Unit' has been delegated the function to receive protected disclosures on behalf of the CEO.

## **The Health Act**

A protected disclosure is not defined under the Health Act. In certain circumstances, a disclosure made to certain organisations and persons about the standards of safety or quality of health and social services will qualify as a protected disclosure. The Health Act specifies a number of organisations and individuals to which a protected disclosure can be made.

The organisations or individuals to which you should report your concern depends on:

- Whether you are a health service employee or a member of the public and
- The organisation or individual about which you are making the disclosure

## **5. Who can make a protected disclosure**

### **The 2014 Act**

A '**worker**' can make a protected disclosure. A worker includes current or former:

- Employees including temporary employees
- Persons working under a contract for services
- Independent contractors or agency staff
- Trainees or interns on work experience

A volunteer is not considered to be a worker for the purposes of the 2014 Act and will not be afforded the legal protections under the 2014 Act as it stands. However, HIQA will accept disclosures from volunteers and treat them confidentially.

## The Health Act

### **1. *Protected disclosure from an employee of a Privately Run Designated Centre<sup>2</sup>***

An employee of a designated centre other than a designated centre provided by the HSE or on behalf of the HSE can make, in good faith, a protected disclosure to the Chief Inspector<sup>3</sup> where the employee has reasonable grounds for believing that the disclosure will show one or more of the following:

- That the actions of any person employed by or acting on behalf of the registered provider has posed, is posing or is likely to pose a risk to the health or welfare of a resident of the centre
- That the registered provider has failed, is failing or is likely to fail to comply with any of the Regulations made under the Health Act, standards made under the Health Act or any other statutory obligation
- That evidence of any matter falling within either of the above paragraphs has been, is being or is likely to be deliberately concealed or destroyed.

### **2. *Protected disclosure made to the chief inspector in the course of an inspection or an authorised person during a monitoring event, or investigation<sup>4</sup>***

Where a **person** (not just an employee) makes, in good faith, a disclosure to:

- (A) an authorised person as defined in section 70 of the Health Act to monitor compliance with standards in accordance with section 8(1)(c) or undertake an investigation under section 9 of the Health Act or
- (B) the Chief Inspector <sup>5</sup>who is in the course of an inspection carried out in accordance with section 41 of the Health Act

which the person has reasonable grounds for believing will show a risk to the health or welfare of the public, the disclosure is a protected disclosure under the Health Act.

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<sup>2</sup> Section 55C Health Act 2004 (Section 103(1) Health Act 2007)

<sup>3</sup> This function of the Chief Inspector will be delegated to Inspectors of Social Services

<sup>4</sup> Section 55G Health Act 2004 (Section 103(1) Health Act 2007)

<sup>5</sup> This function of the Chief Inspector will be delegated to Inspectors of Social Services

**3.** In certain circumstances, an employee of a relevant body<sup>6</sup>, can make a protected disclosure to HIQA or the Chief Inspector as Scheduled Bodies<sup>7</sup> if the employee has reasonable grounds to believe that:

- The disclosure is justified by the reason of the urgency of the matter

or

- There has been no investigation of the matter

Note – When making a protected disclosure, you should only disclose as much information as is necessary to report the 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.

## **6. Protections under the Acts for Persons or Workers who make a Protected Disclosure**

### **The 2014 Act**

When a worker makes a protected disclosure under the 2014 Act they attract certain protections which are outlined below:

1. **Confidentiality** - A person who receives a protected disclosure should not disclose to another person, except a person to whom it is referred in the performance of that persons duties, any information which might identify the worker who made the protected disclosure .This general rule does not apply if:
  - The person who received the protected disclosure shows that he or she took all reasonable steps to avoid disclosing the workers identity

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<sup>6</sup> A 'relevant body' means the HSE, a service provider, any other person who has received or is receiving assistance in accordance with section 39 of the 2007 Act or the Child Care Act 1991 or a body established under the Health (Corporate Bodies) Act 1961

<sup>7</sup> Section 55K Health Act 2004 (Section 103(1) Health Act 2007

- The person who received the protected disclosure reasonably believes that the person who made the protected disclosure does not object to the disclosure of any such information. For example, the person who made the protected disclosure states that they do not wish to remain anonymous
- The person who receives the protected disclosure reasonably believes that disclosing the worker's identity is necessary for:
  - The effective investigation of the relevant wrongdoing
  - The prevention of a serious risk to the security of the State, public health, public safety or the environment,
  - The prevention of a crime or prosecution of a criminal offence. For example, where an inspector receives information by way of protected disclosure that a child or vulnerable person has been assaulted and that assault caused harm, then the inspector is obliged to report this to An Garda Síochána under the provisions of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable People) Act 2012
- The disclosure is otherwise necessary in the public interest or is required by law

If a person who received a protected disclosure discloses the identity of the worker who made the protected disclosure and none of the above exceptions apply, the person who disclosed the worker's identity may be sued by the worker who made the disclosure .

2. **Penalisation** - An employer shall not penalise, threaten to penalise or cause the penalisation of an employee for making a protected disclosure , . This may include where an employee is dismissed, laid off or suspended.
3. **Detriment** - If any person causes a detriment to a person who made a protected disclosure or because a third party has made a protected disclosure, then the person to whom the detriment was caused may sue any person who caused such detriment . Unlike in the case of penalisation, this provision is not limited to employers. It may include coercion, intimidation or harassment.
4. **Liability for Damages** - A worker will not be liable for most types of damages in respect of making a protected disclosure . However, a worker may still be liable for damages in relation to a defamation action on foot of making a protected disclosure.

5. **Defence to a Criminal Offence of Disclosure** - Where disclosure of information is a criminal offence, it will be a defence to show that the disclosure of information was, or was reasonably believed by the person to be a protected disclosure

### **The Health Act**

In most instances, a discloser cannot be sued for damages as a consequence of making a protected disclosure.

If the discloser is an employee, they should not be penalised by their employer as a consequence of making a protected disclosure.

The protections under the 2004 Act do not apply where the protected disclosure is a protected disclosure within the meaning of the 2014 Act.

## **7. Explanation of key terms in 2014 Act**

### ***Relevant information***

The use of the word 'information' may be interpreted to mean that there should be some form of fact, rather than an unfounded suspicion. However, there is no onus on the worker to investigate any situation.

### ***Reasonable belief***

In order for the information to amount to a protected disclosure under this legislation, the worker must have a reasonable belief that the information disclosed shows or tends to show a wrongdoing. There is no requirement for the worker to be correct, simply that the worker had a reasonable belief at the time of disclosure. In addition, the motivation of a worker in making a protected disclosure is irrelevant, so long as there is a reasonable belief that the information disclosed shows or tends to show a wrongdoing.

### ***In connection with the worker's employment***

This means that the information must have come to the attention of the worker in connection with their work or employment. In addition, a disclosure will only be protected if it consists of an act or omission on the part of an employer.

It is worth emphasising, the wrongdoing must fall within the type of information the CEO of HIQA is prescribed to receive as outlined above in order for the information to amount to a protected disclosure.

***Relevant Wrongdoing***

- (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.