Industrial Law Journal, *Vol. 53, No. 2, June*, 2024.
https://doi.org/10.1093/indlaw/dwad009

Whistleblowing Litigation and Legislation in Ireland: Are There Lessons to be Learned?

LAUREN KIERANS*

Acceptance Date April 11, 2023; Advanced Access publication April 26 2023

ABSTRACT

The Protected Disclosures Act 2014 is Ireland's main workplace whistleblowing legislation. It will be amended by the Protected Disclosures (Amendment) Act 2022 on 1 January 2023 on foot of Ireland's obligation to transpose into national law Directive 2019/1937/EU of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union law. This paper addresses the question of whether, in amending the 2014 Act, there were lessons that could have been learnt from the experience in the UK in the operation of its whistleblowing legislation. In answering this question, the findings of an analysis of the case law under the 2014 Act between 15 July 2014 and 15 July 2020 are presented and discussed. In conducting the case law analysis, specific issues were assessed, including, procedural issues concerning the forum for the taking of a claim, costs, fees, processing times, and time limits for presenting penalisation claims and substantive issues regarding the type of claim and the success rate. The research established that there are deficiencies in the 2014 Act, and in some of its amendments under the 2022 Act. It also established that there is an inequity in the treatment under the legislation of 'employees' and workers other than employees. The author concludes that to address these procedural and substantive deficiencies and inequities, Ireland should have gone beyond the minimum standards of the Directive and looked to the UK for guidance.

1. INTRODUCTION

The Protected Disclosures Act 2014 ('2014 Act') is Ireland's main workplace whistleblowing legislation and came into operation on 15 July 2014.[1]

*Maynooth University, Maynooth, Ireland. email: lauren.kierans@mu.ie. I am grateful to Professor Michael Doherty, Dr David Mangan, and Adjunct Associate Professor Anthony Kerr SC for their comments and suggestions. I remain responsible for any errors and omissions.

[1]Protected Disclosures Act 2014 (Commencement) Order 2014, SI 2014/327.

The purpose of the 2014 Act is described in its long title as being 'An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes'. By providing protection to workers who make a protected disclosure, the 2014 Act is intended to act as a deterrent to employers and others from taking retaliatory action against such workers. In order for a disclosure to fall within the scope of the 2014 Act, a worker must make a disclosure of 'relevant information' through one or more specific disclosure channels.[2] Information will be considered 'relevant information' if (i) in the reasonable belief of the worker, the information tends to show one or more relevant wrongdoings, and (ii) the information came to the attention of the worker in connection with their employment.[3]

When drafting the 2014 Act, the Irish legislature looked to the UK to take guidance from the operation of their whistleblowing legislation, the Public Interest Disclosure Act 1998 ('PIDA').[4] The sections of PIDA have been incorporated into the Employment Rights Act 1996 ('1996 Act').[5] In 2009, the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights deemed the UK legislation to be the model in this field of legislation as far as Europe was concerned.[6] However, the objective when drafting the Irish legislation was that the 2014 Act would represent the 'gold standard' in whistleblowing law.[7]

At an early stage, it was considered that the enactment of the 2014 Act had 'led to a significant change in the perceived environment for whistleblowing'.[8] Further, in a study carried out by Blueprint for Free Speech in 2018, which measured the whistleblower laws and policies for all EU countries against nine key European and international standards, Ireland scored the highest

[2] Protected Disclosures Act 2014 ('PDA 2014'), s 5(1).

[3] ibid s 5(2).

[4] Joint Committee on Finance, Public Expenditure and Reform Deb 18 April 2012. The reference to the 'UK' in this paper does not include Northern Ireland as The Public Interest (Northern Ireland) Order 1998, incorporated into The Employment Rights (Northern Ireland) Order 1996, applies there.

[5] Employment Rights Act 1996 ('ERA 1996'), Part IVA.

[6] Pieter Omtzigt, 'Explanatory Memorandum, The Protection of "whistle-blowers"' (*Council of Europe*, 29 September 2009) para 37 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12302> accessed 2 August 2022.

[7] Joint Committee (n 4).

[8] Organisation for Economic Co-operation and Development, *Committing to Effective Whistleblower Protection* (OECD Publishing 2016) 178.

mark, achieving a score of 67.7%,[9] whilst the UK was ranked joint third with France, both achieving a score of 51.9%.[10] In April 2018, the European Commission listed Ireland and the UK as being two of ten EU Member States that had comprehensive whistleblowing legislation in place.[11]

Despite being lauded in the international sphere, the 2014 Act had to be amended due to Ireland's obligation to transpose Directive 2019/1937/EU of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union law ('Directive') into national law. The Protected Disclosures (Amendment) Act 2022 ('2022 Act') transposes this Directive into Irish law and amends the 2014 Act. The 2022 Act was signed into law by the President of Ireland on 21 July 2022 and is due to commence on 1 January 2023.[12] The purpose of the Directive is contained in art 1 and provides that it is to 'enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law'. There was a commitment in the Programme for Government to 'use the opportunity of the EU consideration of reforms to European-wide whistleblowing provisions to review, update and reform our whistleblowing legislation and ensure that it remains as effective as possible'.[13] There is no obligation for the UK to transpose the Directive into its national law; however, there have been calls to reform PIDA[14] and also for its repeal[15] due to the perceived inadequacies of the legislation in protecting whistleblowers.

Notwithstanding these calls for reform/repeal of PIDA, the question arises, whether in amending the 2014 Act, there were lessons that could have been learnt from the experience in the UK in the operation of its

[9] Blueprint for Free Speech, 'Gaps in the System: Whistleblower Laws in the EU' (Blueprint for Free Speech 2018) Appendix 1: Table 2—part A.

[10] ibid part B.

[11] Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on strengthening whistleblower protection at EU level Brussels' COM(2018) 214 final.

[12] Protected Disclosures (Amendment) Act 2022 (Commencement) Order 2022, SI 2022/510.

[13] Department of the Taoiseach, 'Programme for Government—Our Shared Future' (*Department of the Taoiseach* 2020) 121 <www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/> accessed 4 February 2022.

[14] Protect, 'Whistleblowing Bill' (January 2022) <https://public-concern-at-work.s3.eu-west-1.amazonaws.com/wp-content/uploads/images/2022/01/20155442/Protect-draft-Whistleblowing-Bill-reviewed-20-Jan-22.pdf> accessed 22 July 2022.

[15] All Party Parliamentary Group Whistleblowing, 'Whistleblowing Bill' (26 April 2022) <www.appgwhistleblowing.co.uk/_files/ugd/4d9b72_4490728b5bc747e28770ed8efbe475e3.pdf> accessed 22 July 2022.

whistleblowing legislation? In answering this question, the findings of an analysis of the case law under the 2014 Act between 15 July 2014 and 15 July 2020 are presented and discussed below.[16] The case law research yielded 163 decisions. In conducting the case law analysis, specific issues were assessed, including, procedural issues concerning the forum for the taking of a claim, costs, fees, processing times, and time limits for presenting penalisation claims and substantive issues regarding the type of claim and the success rate. The research establishes that there are deficiencies in the 2014 Act, and in some of its amendments under the 2022 Act. It also establishes that there is an inequity in the treatment of 'employees' and workers other than employees under the legislation. The author concludes that in order to address these procedural and substantive deficiencies and inequities, Ireland should have gone beyond the minimum standards of the Directive and looked to the UK for guidance in certain circumstances.

2. PROCEDURAL ISSUES

A. Introduction

In conducting the case law analysis, certain procedural issues were analysed in respect of the taking of claims under the 2014 Act. An assessment of the fora where claims are initiated was undertaken. The forum where a claim under the 2014 Act can be brought is dependent on the status of the worker as either an 'employee' or a worker other than an employee. The 2014 Act introduced a new definition of 'worker' into Irish law and is undoubtedly quite a broad definition, covering employees, former employees, temporary employees, contractors, agency staff, members of the police and defence forces, and certain interns and trainees.[17] Employees can

[16]The case law analysis covers the period from the commencement of the PDA 2014 on 15 July 2014 up to 15 July 2020 for logistical reasons. The data from case law between 16 July 2021 to 31 December 2022 will inform future research, in particular, it will supplement the research herein in respect of an analysis of the pre-transposition and post-transposition case law data.

[17]PDA 2014, s 3(1) and (2). See also, Michael Doherty, 'Ireland' in Claudia Schubert (ed), *Economically-dependent Workers as Part of a Decent Economy International, European and Comparative Perspective* (Hamburg: Beck/ Hart/ Nomos, 2021) 66.

seek redress for unfair dismissal[18] and penalisation[19] before the Workplace Relations Commission ('WRC') and for detriment[20] in a tort claim before the civil courts, whilst workers other than employees can only avail of redress for detriment in a tort claim before the civil courts. Further, under the 2014 Act, employees who allege that they have been dismissed can also make an interim relief application before the Circuit Court.[21] In addition, all workers who have made a protected disclosure can bring a claim before the civil courts for any loss they suffer because of a breach of their confidentiality.[22] This definition of 'worker' is broadened even further due to the transposition of the Directive, which requires that additional persons with non-standard employment relationships fall within the scope of the legislation.[23] The 2022 Act amends the definition of 'worker' to include trainees, shareholders, volunteers, individuals who acquire information on a relevant wrongdoing during a recruitment process or other pre-contractual negotiations, and individuals belonging to the administrative, management or supervisory body of an undertaking, including non-executive members.[24] Under the 2022 Act, trainees, volunteers, and those who acquire information on a relevant wrongdoing during the recruitment process will also be able to bring a claim before the WRC for penalisation.[25] Under PIDA in the UK, all workers can bring their claims for dismissal[26] and detriment[27] before the UK Employment Tribunal ('ET').

In assessing the data establishing where claims are brought under the 2014 Act, certain procedural issues were identified, including the issue of costs orders, fees for presenting claims, the processing times of claims, and time limits for presenting penalisation claims. Lessons from the UK's operation of its whistleblowing legislation reinforce the approach taken in Ireland in relation to the non-imposition of costs orders and fees. However, lessons from the UK also highlight that, by requiring workers other than

[18] Unfair Dismissals Act 1977, s 6(ba), as inserted by PDA 2014, s 11(1)(b).
[19] PDA 2014, s 12 and sch 2.
[20] PDA 2014, s 13.
[21] PDA 2014, s 11(2) and sch 1.
[22] PDA 2014, s 16.
[23] European Parliament and Council Directive 2019/1937/EC of 23 October 2019 on the protection of persons who report breaches of Union Law [2019] OJL305/17, art 2 ('Dir 2019/1937').
[24] Protected Disclosure (Amendment) Act 2022 ['PD(A)A 2022'], s 4(a)(iii), amending PDA 2014, s 3.
[25] PD(A)A 2022, s 21, inserting PDA 2014, s 12(7B).
[26] ERA 1996, s 103A.
[27] ERA 1996, s 43B.

employees to go to the civil courts, the benefits for employees in Ireland in respect of these issues, as well as the processing times of claims, creates an unequal playing field. The case law analysis also establishes that the UK approach to the time limits for presenting detriment claims is more favourable to workers than the Irish approach to the time limits for employees to present penalisation claims.

B. Forum for Taking a Claim

Prior to October 2015, employment related claims in Ireland could be brought before a multiplicity of different employment law fora. This system, however, was described as being 'overrun with "legalism" and as a "cold and unfriendly" place for lay litigants and trade union officials'.[28] The old system was dismantled and replaced with a new system whereby claims are now to be initiated before the WRC,[29] with a right of full appeal to the Labour Court[30] and a right of appeal from the Labour Court to the High Court on a point of law only.[31]

All 163 cases between 15 July 2014 and 15 July 2020 were assessed for the purpose of analysing what fora are dealing with claims under the 2014 Act. The case law analysis identified that 80% (130) were made by the WRC, 16% (26) by the Labour Court, 2% (3) by the Circuit Court, 1% (2) by the High Court, 0.6% (1) by the Employment Appeals Tribunal ('EAT'), and 0.6% (1) by the Labour Relations Commission ('LRC'). Both the EAT and the LRC claims pre-dated the establishment of the WRC.

The majority of the cases under the 2014 Act were taken by employees for penalisation or unfair dismissal before the WRC. The WRC is designed with the objective that disputes can be resolved in a 'speedy, inexpensive and relatively informal' manner.[32] This mirrors the objective in the UK set out in the Donovan Report where it was recommended that labour

[28] Anthony Kerr, 'Changing landscapes: the juridification of the Labour Court?' (2015) 53 *Irish Jurist* 58, 72.

[29] Workplace Relations Act 2015, s 41 ('WRA 2015').

[30] ibid s 44.

[31] ibid s 46. Anthony Kerr, 'The Workplace Relations Reform Project' (2016) 7 *Eur Lab LJ* 126.

[32] Department of Business, Enterprise and Innovation, 'Blueprint to Deliver a World-Class Workplace Relations Service' (2012) 18.

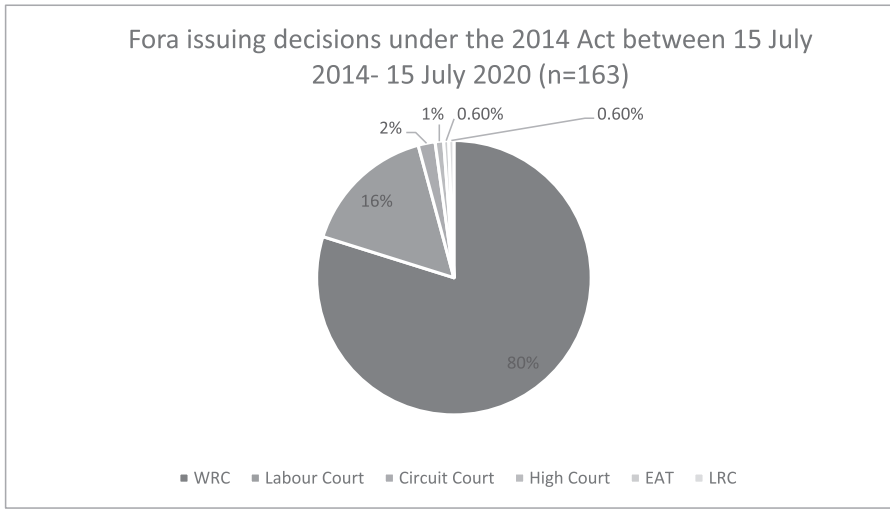

Figure 1. Fora Issuing Decisions Under the 2014 Act Between 15 July 2014 and 15 July 2020 (n = 163). Source: author's calculations.

tribunals should be established to provide 'an easily accessible, speedy, informal and inexpensive procedure' for the settlement of employment disputes.[33]

Research did not locate any detriment or breach of confidentiality claims before the civil courts. The lack of civil claims identified in the research underpins the position that there is an inequity in the treatment of 'employees' and workers other than employees under the 2014 Act in the enforcement of their rights. This is substantiated in the discussion below on the issue of costs, fees, and processing times. However, despite the advantageous position for employees, the case law analysis also raises concerns regarding the time limits for presenting claims by employees to the WRC.

[33]Lord Donovan, *Report of the Royal Commission on Trade Unions and Employers' Associations* (Cmd 36231968) 578. William and Vandekerckhove argue that ETs are not delivering on this objective and have become 'formal … adversarial, and inaccessible, with the need for representation central to the success of a case', see: Laura William and Wim Vandekerckhove, 'Fairly and Justly? Are ETs Able to Even Out Whistleblowing Power Imbalances?' (2021) 182 Journal of Business Ethics 365-76 <https://link.springer.com/article/10.1007/s10551-021-05023-8> accessed 21 July 2022.

C. Costs

The advantage for a complainant making a claim under the 2014 Act before the WRC is that if they are unsuccessful, there is no award of costs against them; each party bears their own costs, unlike the practice before the civil courts where the general rule is that 'costs follow the event'.[34] There are a limited range of circumstances under statute which provide for expenses to be awarded to a party to proceedings or a witness in proceedings before the WRC or the Labour Court, for example, under s 99A(1) of the Employment Equality Act 1998, s 21(4) of the Industrial Relations Act 1946, and s 26(1) of the National Minimum Wage Act 2000.

This position on costs is an attractive feature of the WRC as due to the imbalance of power and resources between an employer and an employee, the threat of a costs order against an employee could act as a disincentive to initiating a claim. However, there are countervailing arguments to the non-imposition of costs orders. Barry, for example, argues that potential costs orders focuses minds and addresses the risk of parties abusing the adjudicative process.[35] He suggests that a similar provision should be introduced in Ireland to that in the UK under The ETs (Constitution and Rules of Procedure) Regulations 2013 ('UK 2013 Regulations'). The UK 2013 Regulations, provides that the ET may make an order for costs where '(i) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (ii) any claim or response had no reasonable prospect of success'.[36] Barry suggests that such a provision in Ireland as that under the UK 2013 Regulations would 'strike a correct balance to ensure that the adjudication process is not open to abuse, without the costs issue becoming a barrier to adjudication'.[37]

However, despite the fact that under the UK 2013 Regulations costs should only be awarded in limited circumstances,[38] there has been

[34] Legal Services Regulation Act 2015, s 169(1); Courts (Supplemental Provisions) Act 1961, s 14(2).

[35] Brian Barry, 'The Workplace Relations Bill 2014—An Important Opportunity for Workplace Relations Reform' (2014) 11(4) *Irish Employment Law Journal* 106, 111.

[36] The ETs (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, reg 76(1).

[37] Barry (n 35).

[38] The ETs (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, reg 76(2)–(5).

concern expressed in relation to the costs orders that have been made in whistleblowing claims under PIDA in the UK. Protect have reported that in 2009–11, the total amount of costs orders made against claimants and respondents was £123,000 and £12,000, respectively, and that this increased substantially in 2011–13 with £753,135 being awarded in costs against claimants and £183,992 against respondents.[39] There is clearly a disproportionate amount of costs orders being made against claimants by ETs in PIDA claims. Protect argue that the regime of ET costs orders should be reviewed and specifically that PIDA claims should be reviewed separately to other ET cases on public interest grounds.[40] It points out that this trend of increasing costs orders in PIDA claims may undermine the objectives of the legislation, which are to protect workers from reprisal and to create a change of culture in organisations in relation to listening to concerns raised by workers, by discouraging them from pursuing claims under PIDA.[41] Lewis et al. argue that costs are more likely to be sought and awarded in PIDA claims than in some other areas of employment law on the basis that in such claims passions are aroused, much work goes into preparing a PIDA case, and due to the ingredients in the cause of action.[42] They emphasise that the power to award costs is not a compensatory power but is a disciplinary one.[43] It is worth noting, however, that costs orders by an ET are meant to be exceptional, as explained by Pill LJ where he stated that 'Costs remain exceptional … and the aim is compensation of the party which has incurred expense in winning the case, not punishment of the losing party …'[44]

Notwithstanding the exceptional nature of ET costs orders, the concerns raised by Protect as to the significant rise in costs orders in PIDA claims and the deterrent effect of costs on the filing of PIDA claims[45] underscores the necessity for the WRC to avoid adopting such a practice and to continue the regime that it already applies.

[39] Protect, 'Whistleblowing: Time for Change A 5 Year Review by Public Concern at Work' (Protect, July 2016) 28.

[40] Protect, 'Is the Law Protecting Whistleblowers? A review of PIDA claims' (Protect, 2015) 16.

[41] Protect July 2016 (n 39) 28.

[42] Jeremy Lewis and others, *Whistleblowing Law and Practice* 4th edn (Oxford: OUP, 2022) para 13.79.

[43] ibid para 11.61; *Scott v Commissioners of Inland Revenue* [2004] IRLR 713 (CA).

[44] *Lodwick v Southwark LBC* [2004] ICR 884 (CA) [23].

[45] Protect 2015 (n 40) 16.

D. Fees

Another feature of the WRC system that encourages the initiation of claims before this forum is that there are no fees for doing so. There is a range of fees that would have to be paid for applications filed before the civil courts.[46] The Workplace Relations Act 2015 ('2015 Act') does provide for the possibility for WRC fees to be introduced.[47] This provision has only been implemented insofar as if a complainant wishes to make an appeal to the Labour Court but fails to appear at the first instance hearing at the WRC, they will have to pay a fee of €300 when lodging their appeal.[48] The non-imposition of fees is a welcome approach when one looks at the negative consequences of the introduction of fees in the UK. ET fees were introduced in the UK on 29 July 2013.[49] The fees were introduced for three reasons: (i) to transfer some of the cost burden from general taxpayers to those that use the system, or cause the system to be used; (ii) to incentivise earlier settlements, and to disincentivise unreasonable behaviour, such as pursuing weak or vexatious claims; and (iii) to bring the ET and UKEAT into line with other similar parts of the justice system.[50] However, despite these objectives, in the year after the fees were introduced, there was a 78% reduction in the number of claims accepted by ETs compared to the year before their introduction and in the second year, there was a reduction of 62%.[51] When looking at whistleblowing claims under PIDA there was a fall of almost 20% of claims being received and accepted by the ET in the year after the fees were introduced.[52] The UK Ministry of Justice's 2017 review report of the introduction of fees determined that the reduction in cases was due to the fees.[53] Therefore, although the objectives of introducing ET fees were well-intentioned and legitimate, as acknowledged by the UK Supreme Court,[54] the significant reduction in complaints before the ET meant that the impact

[46] District Court (Fees) Order 2014, SI 2014/22; Circuit Court (Fees) Order 2014, SI 2014/23; Supreme Court, Court of Appeal and High Court (Fees) Order 2014, SI 2014/492.

[47] WRA 2015, s 71.

[48] The Labour Court, 'The Labour Court User's Guide' (2020) 2.

[49] The ETs and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893.

[50] Department for Business, Energy and Industrial Strategy, Tribunals Service, 'Resolving Workplace Disputes: A Consultation' (BEIS January 2011) 50. These objectives were reiterated in the Ministry of Justice's consultation paper, Ministry of Justice, 'Charging Fees in the ETs and the Employment Appeal Tribunal' (MOJ December 2011) 11–12.

[51] Ministry of Justice, 'Review of the Introduction of Fees in the ETs Consultation on Proposals for Reform' (2017) Annex E: ETs and Employment Appeal Tribunal caseload.

[52] Protect July 2016 (n 39) 17.

[53] Ministry of Justice (n 51) paras 104–105.

[54] *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2)* [2017] ICR 1037 (SC) [86].

of the introduction of the fees went far greater than anticipated and undoubtedly acted as a deterrent to individuals to file genuine claims. The UK Supreme Court ultimately found that ET fees were unlawful as they restricted a potential claimant's right of access to justice.[55] The experience in the UK of imposing ET fees underscores the necessity to preserve the status quo in Ireland.

E. Processing Times

A further advantage of a WRC claim is that the time frame within which a claim is generally processed is relatively short. The median time for decisions issued by the WRC from receipt of a complaint in 2019 is 230 calendar days, or just over eight months from the date of receipt of the complaint to the decision issuing.[56] From a complainant's perspective, the time for a claim to be processed before the WRC is significantly shorter than the average length of time it takes for a claim to be processed before the civil courts. For example, the average length of civil proceedings from issue to disposal in the High Court in 2019 was 785 days.[57] This means that workers seeking redress for detriment before the civil courts suffer harm for a protracted length of time than employees who are entitled to bring claims for unfair dismissal and penalisation before the WRC. If the practice was adopted of that in the UK, where all workers are entitled to seek redress for harm before the ET, so that all workers could bring claims for retaliation before the WRC, this would mean that workers in Ireland would have their cases heard more swiftly.

F. Time Limits for Presenting Penalisation Claims

The case law analysis established that of those penalisation claims that were lost on procedural grounds, 40% (10) were unsuccessful because they were deemed to be out of time. Complaints must initially be presented in writing[58] to the Director General of the WRC within 6 months of the date of the

[55] ibid [91]. It was reported in June 2020 that the Ministry of Justice had written to the Law Commission seeking recommendations on how to resurrect the legal fees scheme, see: Jonathan Ames, 'Ministers Plan to Bring Back Work Tribunal Fees' *The Times* (London, 15 June 2020).

[56] Workplace Relations Commission, 'Workplace Relations Commission 2019 Annual Report' (WRC 2019) 24. The data is used from 2019 as it pre-dates the delays in the justice system stemming from the COVID-19 pandemic.

[57] Courts Service of Ireland, 'Annual Report 2019' (2019) 100.

[58] WRA 2015, s 41(9)(a).

alleged contravention.[59] If a complaint is not received within the 6-month time frame, an extension may be granted by an Adjudication Officer up to a maximum time limit of twelve months where the complainant has demonstrated reasonable cause for the delay.[60]

This time limit for presenting a claim to the WRC has been applied stringently, and in a penalisation claim, the WRC will not take into consideration any act or omission that occurred outside of the six-month period (or twelve months if an extension is granted) prior to the receipt of the claim. For example, in *Accounts Administrator v A University*[61] the claim was received by the WRC on 28 June 2016, however, the complainant stated that the penalisation commenced when she was suspended on 12 June 2015. Therefore, the WRC held that it was prohibited to deal with the claim, as it had no jurisdiction because the claim was submitted out of time, holding that 'the date of contravention to which the complaint relates to began over twelve months before the claim was submitted to the WRC'. This decision was in spite of the fact that the complainant was still suspended from her employment at the time that she filed her penalisation claim.

In contrast, in the UK, where the claim must be presented before the end of the period of three months, beginning on the date of the act or failure to act to which the complaint relates,[62] the UKEAT held in *Tait v Redcar and Cleveland BC*[63] that a suspension is an act which extends over a period and therefore the last day of the suspension is considered to be the date on which the employee is informed that the suspension is at an end. The appellant herein relied on s 48(3)(a) of the 1996 Act which provides that where there may be a series of similar acts or failures, the time period for presenting a complaint begins on the date of the last act or failure. Section 48(4)(a) of the 1996 Act provides that 'where an act extends over a period, the "date of the act" means the last day of that period'. The UKEAT referred to the principal authorities on the meaning of the phrase 'an act extending over a period' in the equivalent provisions in discrimination legislation and held that:

[59] ibid s 41(6).
[60] ibid s 41(8).
[61] ADJ-00004380.
[62] ERA 1996, s 48(3). Section 48(3)(b) provides that this time period may be extended 'within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months'. The Law Commission has recommended that the three-month timeframe be extended to six months, see: Law Commission, 'Employment Law Hearing Structures: Report' (LC 2020) 23.
[63] UKEAT/0096/08/ZT, 2 April 2008.

> With the benefit of that elucidation, it seems to us that a disciplinary suspension is clearly 'an act extending over a period' within the meaning of the statute. Although there is no doubt an initial 'act' of suspension, the state of affairs thereafter in which the employee remains suspended pending the outcome of the disciplinary proceedings can quite naturally be described not simply as a consequence of that act but as a continuation of it.[64]

Unfortunately, neither the 2014 Act nor the 2015 Act provides for a time limit where there are a series of similar acts or failures, and it would not be open to an Adjudication Officer to rely on discrimination legislation, as the language used therein is different to that in the 2014 Act and the 2015 Act.[65] Therefore, even though the complainant in *Accounts Administrator* was still suspended at the time that the complaint was received by the WRC this, unfortunately, was not capable of being subject to a penalisation assessment. This is clearly a limitation under the 2014 and 2015 Acts. The inclusion of a provision similar to that in s 48(3)(a) of the 1996 Act in the 2015 Act would be a much more reasonable approach.

A further complication with the statutory time limits is that the 2022 Act requires that interim relief applications for penalisation (discussed below) must be made within twenty-one days immediately following the date of the last instance of penalisation.[66] This is a welcome introduction as regards the specification that time runs from the date of the 'last instance of penalisation'. However, the concern arises in relation to the timeframe for filing claims for penalisation before the WRC. The different treatment as regards when time starts to run for a penalisation claim and an interim relief application under the 2022 Act means that an employee may be 'in time' for their interim relief application, but 'out of time' for the hearing of the substantive penalisation claim before the WRC.

[64] ibid [2(6)]. The UKEAT has distinguished between a continuing act and a single act with continuing consequences and in *Ikejiaku v British Institute of Technology Ltd* (UKEAT/0243/19/VP, 7 May 2020)[32]–[33] it held that the imposition of a new contract to change the employment status of the complainant from an employee to self-employed was a 'plain example of a "one-off" act with continuing consequence' as it was not a rule or policy by reference to which decisions are made from time to time.

[65] Employment Equality Act 1998, s 77(5)(a), as inserted by Equality Act 2004, s 32, provides that 'a claim for redress in respect of discrimination or victimisation may not be referred under this section after the end of the period of 6 months from the date of occurrence of the discrimination or victimisation to which the case relates or, as the case may be, the date of its most recent occurrence'.

[66] PD(A)A 2022, s 21, inserting PDA 2014, s 12(7A).

3. SUBSTANTIVE ISSUES

A. Introduction

Key substantive issues were identified during the analysis of the case law under the 2014 Act between 15 July 2014 and 15 July 2020. These substantive issues concerned the type of claim taken under the 2014 Act and the success rate of cases. Again, this analysis highlighted the unfavourable treatment of workers, other than employees, particularly in respect of the different definitions of 'penalisation' and 'detriment' and the affording of interim relief, whilst also flagging issues that affect all workers, including the burden of proof, personal and interpersonal grievances, and compensation.

B. Type of Claim

The 2014 Act provides for various forms of redress for workers who suffer reprisal for having made a protected disclosure. The Directive highlights the need to have legislative measures to prohibit retaliation and states at Recital 88 that 'Where retaliation occurs undeterred and unpunished, it has a chilling effect on potential whistleblowers. A clear legal prohibition of retaliation would have an important dissuasive effect …'.

In order to determine the type of claim brought under the 2014 Act between 15 July 2014 and 15 July 2020, 140 of the 163 cases were assessed, as twenty-three WRC cases which were appealed to the Labour Court were the same claim. The analysis identified that 51% (72) of the claims were penalisation claims, 39% (54) of the claims were unfair dismissal claims, whilst 2% (3) of the claims were interim relief claims. Six percent (9) of the claims were both penalisation and unfair dismissal claims; however, the 2014 Act prohibits simultaneous claims for unfair dismissal and for penalisation,[67] so the hearing of both claims is erroneous. One percent (2) of claims were point of law appeals from the Labour Court to the High Court.

[67] PDA 2014, s 12(2).

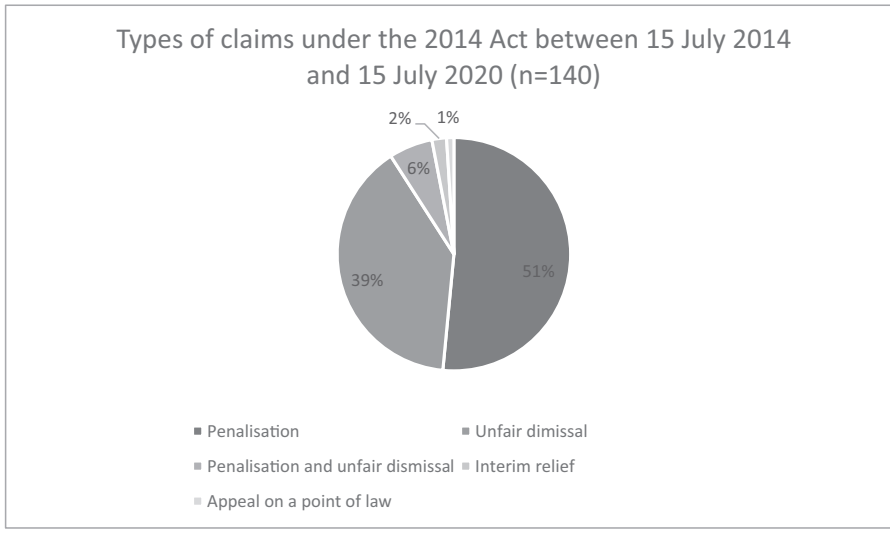

Figure 2. Types of Claims Under the 2014 Act between 15 July 2014 and 15 July 2020 (n = 140). Source: see Figure 1.

C. Definition of 'Penalisation' and 'Detriment'

The findings of the case law analysis indicate that the majority of claims are brought by employees for penalisation before the WRC. There is a wide definition of 'penalisation' under the 2014 Act. An employer is prohibited from carrying out any act or omission that affects a worker to the worker's detriment and this includes: (i) suspension, lay-off or dismissal; (ii) demotion or loss of opportunity for promotion; (iii) transfer of duties, change of location or place of work, reduction in wages or change in working hours; (iv) the imposition or administering of any discipline, reprimand or other penalty (including financial penalty); (v) unfair treatment; (vi) coercion, intimidation or harassment; (vii) discrimination, disadvantage or unfair treatment; (viii) injury, damage or loss; and (ix) threat of reprisal.[68] The definition of penalisation in the 2014 Act gives an open-ended list of various forms of treatment which may constitute penalisation as the definition uses the

[68] PDA 2014, s 3(1).

phrase 'in particular includes'[69] and on that basis additional matters could also be claimed as penalisation. The WRC has been receptive to extending what it considers 'penalisation', particularly in light of the term 'unfair treatment' falling within the scope of the statutory definition. For example, in *An Employee v A Public Body*[70] the WRC held that the complainant, a prison officer, had been subjected to unfair treatment because he had made a protected disclosure in respect of an inefficient use of taxpayers' funds. This unfair treatment was found to be a failure on the part of the respondent to inform the complainant that an extremely serious potential security threat to the complainant and his family did not exist, despite knowing for fifteen months that this was the case.

Notwithstanding the broad definition of 'penalisation' under the 2014 Act, the 2022 Act expands the list to reflect art 19 of the Directive and include inter alia withholding of promotion[71]; ostracism[72]; withholding of training[73]; harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income[74]; and psychiatric or medical referrals.[75]

The definition of 'detriment' for tort claims by workers under the 2014 Act is more restrictive than that of 'penalisation' and is defined as including: (i) coercion, intimidation or harassment; (ii) discrimination, disadvantage or adverse treatment in relation to employment (or prospective employment); (iii) injury, damage or loss; and (iv) threat of reprisal.[76] This is arguably an exhaustive list as it does not use the words 'in particular includes' but merely 'includes' thus limiting the forms of retaliation that

[69] *Ryan v Attorney General* [1965] IR 294 (SC) 313 where Kenny J conducted a literal/grammatical analysis of Article 40.3.1° and 2° of the Constitution and held that Article 40.3 contained a guarantee to protect an unspecified number of personal rights. Article 40.3.2° provides that 'The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen'. Kenny J stated that 'The words 'in particular' show that sub-s. 2 is a detailed statement of something which is already contained in sub-s. 1 which is the general guarantee. But sub-s. 2 refers to rights in connection with life and good name and there are no rights in connection with these two matters specified in Article 40. It follows, I think, that the general guarantee in sub-s. 1 must extend to rights not specified in Article 40.

[70] ADJ-00005583.

[71] PD(A)A 2022, s 4(a)(ii)(b), amending PDA 2014, s 3.

[72] ibid s 4(a)(ii)(e).

[73] ibid s 4(a)(ii)(i).

[74] ibid s 4(a)(ii)(m).

[75] ibid s 4(a)(ii)(q).

[76] PDA 2014, s 13(3).

workers can avail of redress for. Therefore, workers other than employees do not have as wide a range of harms for which they could seek redress for under the 2014 Act.

In the UK, all workers can claim for 'detriment', which is undefined in the legislation. The courts in the UK have established that the test for detriment is whether, in all the circumstances, a reasonable person would or might take the view that the treatment was to their detriment. It is given a wide meaning, and there is no requirement for there to be any physical or economic consequence arising from the treatment which was material and substantial. The test is one of materiality, considering all the circumstances, but from the perspective of the worker who is alleging that they suffered detriment.[77] Thus, the test is what a reasonable person in the shoes of the claimant would consider to be detriment but the impact of it must be looked at from the claimant's point of view.[78] The conferring of a wide meaning to the term 'detriment' means that workers in the UK have been afforded greater protection than workers bringing tort claims for detriment in Ireland.

Originally, it was not proposed to extend the definition of 'detriment' under the Protected Disclosures Bill 2022 ('2022 Bill'). However, the limited definition of 'detriment' conflicted with the position under art 19 of the Directive which provides that 'Member States shall take the necessary measures to prohibit any form of retaliation against persons …'.[79] Thus, the definition of 'detriment' did not prohibit 'any form of retaliation'. An amendment was made at Committee Stage of the 2022 Bill that the definition of detriment means 'an act or omission referred to in any of paragraphs (a) to (q) of the definition of "penalisation" in section 3 …'[80] This amendment ensures that, as in the UK, all workers have equal protection from all forms of retaliation under the legislation, irrespective of the nature of their employment status.

[77] *Moyhing v Barts and London NHS Trust* [2006] IRLR 860 (EAT) [15]–[17]; *Jesudason v Alder Hey Children's NHS Foundation Trust* (UKEAT/0248/16/LA, 29 June 2018) [27]–[28].

[78] *De Souza v Automobile Association* [1986] ICR 514.

[79] Dir 2019/1937, art 19.

[80] Select Committee on Finance, Public Expenditure and Reform, and Taoiseach Deb 23 March 2022. PD(A)A 2022 s 22(b), substituting PDA 2014, s 13(3).

D. Interim Relief

The provision of interim relief in whistleblowing legislation is considered to be an essential element of a comprehensive and robust statutory system of protection for whistleblowers. Interim relief is designed to ensure that a whistleblower who suffers retaliation for having made a protected disclosure is not exposed to prolonged suffering due to an inefficient litigation system. The value of interim relief protection for whistleblowers is acknowledged by the Directive, highlighting that it should be made available for workers '… in order to stop threats, attempts or continuing acts of retaliation, such as harassment or to prevent forms of retaliation, such as dismissal, which might be difficult to reverse after the lapse of lengthy periods and which can ruin the individual financially, a perspective which can seriously discourage potential whistleblowers'.[81]

The inclusion of interim relief remedies in whistleblowing legislation is also stressed by the Council of Europe Parliamentary Assembly[82] and in Transparency International's Principles for Whistleblower Legislation.[83] Interim relief provisions can be found in whistleblowing legislation internationally, for example, in Australia's Public Interest Disclosure Act 2013,[84] Serbia's Law on the Protection of Whistleblowers Act, no 128/2014,[85] and in the 1996 Act in the UK.[86]

Two percent (3) of the claims were interim relief claims. The 2014 Act provides that employees who bring a claim for redress for an unfair dismissal for having made a protected disclosure may also make an application for interim relief.[87] This is the first time that interim relief has been introduced into an employment law statute in Ireland.[88] An employee must

[81] Dir 2019/1937, Recital 96.

[82] Council of Europe Parliamentary Assembly, Resolution 1729 (2010) Protection of 'whistleblowers', para 6.2.5.

[83] Transparency International, 'International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest' (2013) 9.

[84] Public Interest Disclosures Act 2013, s 15.

[85] Law on the Protection of Whistleblowers Act, no 128/2014, arts 32–35.

[86] ERA 1996, s 128(1)(b), as amended by PIDA 1998, s 9.

[87] PDA 2014, s 11(2) and sch 1.

[88] Injunctions in employment disputes have been granted in Ireland since the decision of Costello J in *Fennelly v Assicurazioni Generali SpA* [1985] 3 ILTR 73 (HC). The test for securing interlocutory relief was tightened in *Maha Lingham v Health Service Executive* [2005] IEHC 186 where the High Court established a 'strong case' threshold for granting interlocutory injunctions. This test was restated by the Supreme Court in *Merck Shape & Dohme Corporation v Clonmel Healthcare Limited* [2019] IESC 65.

present their application for interim relief before the Circuit Court before the end of the period of twenty-one days immediately following the date of the dismissal.[89] The twenty-one-day time limit for the presentation of an interim relief application is arguably quite short as by the time the employee has been dismissed and seeks legal advice on the matter they may be out of time. Nonetheless, it is much more generous than the seven-day time limit in the UK for the bringing of such applications.[90] The Whistleblowing Commission in the UK recommended in 2013 that this time limit be increased to twenty-one days.[91] Unfortunately, this has not been adopted.

Under the 2014 Act, if the Circuit Court is satisfied that it is likely that there are substantial grounds for contending that the dismissal results wholly or mainly from the employee having made a protected disclosure[92] it can make an order that, pending the determination or the settlement of the claim, the employee is reinstated[93] or is re-engaged in another position on terms and conditions not less favourable[94] than those which would have been applicable to them if they had not been dismissed.[95] If on hearing the application, the employer fails to attend before the court or states an unwillingness either to reinstate or re-engage the employee, the court must make an order for the continuation of the employee's contract of employment.[96]

It is anticipated that there will be an increase in interim relief cases due to the fact that the 2022 Act extends access to interim relief remedies for claims of penalisation.[97] This amendment transposes art 21(6) of the Directive. The Department of Public Expenditure and Reform explained that this amendment is intended to facilitate an intervention by the courts to

[89] PDA 2014, sch 1, s 1(2).

[90] ERA 1996, s 128(2).

[91] Protect, 'The Whistleblowing Commission, The report of the Whistleblowing Commission on the effectiveness of existing arrangements for workplace whistleblowing in the UK' (Protect November 2013) 22.

[92] PDA 2014, sch 1, s 2(1).

[93] Ibid sch 1, s 2(3)(a) provides that in reinstating the employee, the employer must treat the employee in all respects as if the employee had not been dismissed.

[94] Ibid sch 1, s 2(4) provides that the phrase 'terms and conditions not less favourable than those which would have been applicable to the employee if the employee had not been dismissed' means, as regards seniority, pension rights, and other similar rights, that the period before the dismissal should be regarded as continuous with the employee's employment following the dismissal.

[95] Ibid sch 1, ss 2(3) and 2(5)–2(7).

[96] Ibid sch 1, s 2(9).

[97] PD(A)A 2022, s 21, inserting PDA 2014, s 12(7A).

protect whistleblowers from penalisation more quickly.[98] The provision was welcomed by the Bar of Ireland, whilst emphasising that 'The Circuit Court will have to be resourced properly, because if this type of litigation becomes popular, then the strain on the Circuit Court will continue to manifest'.[99]

Although this is a welcome extension of protection under the legislation, this proposal is imperfect due to its limited application to employees alleging penalisation and not to workers other than employees alleging detriment before the civil courts. There have been calls in the UK since 2013 for the extension of interim relief to all forms of detriment and not just for cases of unfair dismissal.[100] Although the extension under the 2022 Act does apply to all forms of penalisation it does not apply to all workers who suffer harm. Therefore, interim relief must be available for all workers who suffer retaliation and not just 'employees' who file claims for unfair dismissal or penalisation.

E. Success Rate

An assessment was undertaken of the number of cases under the 2014 Act that were successful and unsuccessful. It was ascertained that, taking 156 of the 163[101] decisions together, 88% (137) of the cases were unsuccessful and only 12% (19) of the cases were successful.

This finding is comparable with the analysis of ET decisions in the UK where 12% of the judgments handed down in 2011–13 were successful on PIDA grounds, whilst 62% of the cases were lost or struck out.[102] Further, a study of 603 ET cases in the UK from 2015–18 that went to preliminary hearing or beyond found that, on average, 12% of cases were successful.[103] In both Ireland and the UK this is a considerably low success rate. Despite

[98] Joint Committee on Finance, Public Expenditure and Reform, and the Taoiseach Deb 6 October 2021.

[99] Joint Committee on Finance, Public Expenditure and Reform, and the Taoiseach Deb 29 September 2021.

[100] Protect November 2013 (n 91) 22.

[101] One hundred and fifty-six decisions were used in the analysis as in six of the cases the complainant was successful in their unfair dismissal claim but not because they were dismissed wholly or mainly for having made a protected disclosure but because fair procedures were not afforded and in one of the cases the complainant was successful under their simultaneous Safety, Health and Welfare at Work Act 2005 complaint and not under the PDA 2014.

[102] Protect July 2016 (n 39) 28.

[103] All Party Parliamentary Group for Whistleblowing, 'Making Whistleblowing Work for Society' (2020) 18.

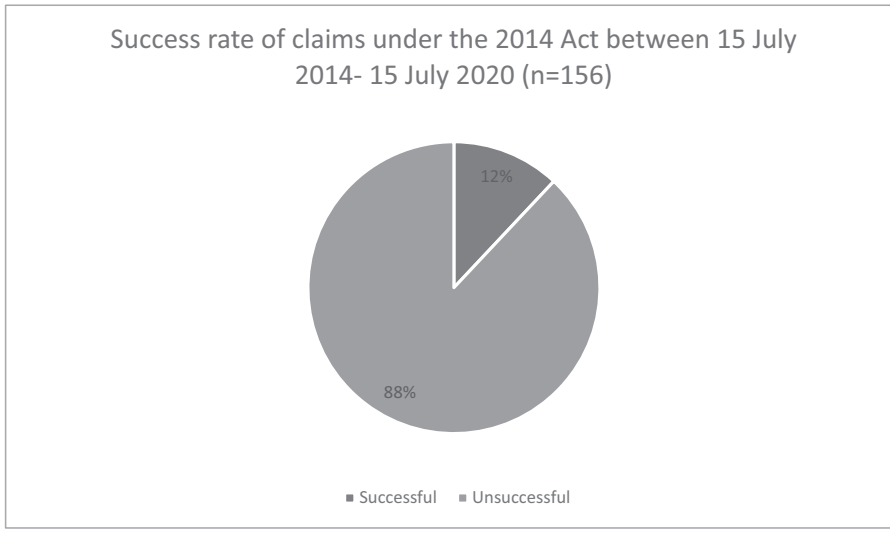

Figure 3. Success Rate of Claims Under the 2014 Act between 15 July 2014 and 15 July 2020 (n = 156). Source: see Figure 1.

these low rates, studies in the US have identified an even lower success rate, in particular, a study carried out of cases under the Whistleblower Protection Act 1989,[104] as determined by the Merit Systems Protection Board, identified that federal employees were successful in only 7% (7) of cases in fiscal year 2016.[105] However, the success rate increased to 17% (5) in private sector cases with final decisions in 2018 under fourteen US whistleblower statutes.[106]

There are certain statutory reasons underpinning this high rate of unsuccessful cases under the 2014 Act. Of the unsuccessful cases under the 2014 Act, 78% (107) of the cases were lost on the merits, whilst 22% (30) were lost due to procedural issues. Of those cases where the complainant was unsuccessful on the merits of the case, 53% (57) were lost as it was found that there was no unfair dismissal or penalisation, 45% (48) were lost as it was held that no protected disclosure had been made, and 2% (2) were lost as it was held by the High Court that there had been no error in law by the Labour Court in its decision under the 2014 Act. This demonstrates

[104] Whistleblower Protection Act 1989, as amended by the Whistleblower Protection Enhancement Act of 2012, 5 USC § 2302.

[105] International Bar Association Legal Policy and Research Unit and Government Accountability Project, 'Are Whistleblowing Laws Working? A Global Study of Whistleblower Protection Litigation' (2021) 41.

[106] ibid 42.

that over half of the complainants had made protected disclosures but were unable to prove that they had suffered harm because they had made a protected disclosure. Further, in 45% (48) of cases the employer was able to defeat the statutory presumption in legal proceedings that the disclosure was a protected disclosure. One of the reasons for this, is that certain disclosures were accepted by the WRC to be personal/interpersonal grievances and not protected disclosures and were deemed, therefore, to fall outside the scope of the 2014 Act. Of those cases that were successful, there is evidence that the awards being made by the WRC are low compared to the UK, which unlike the Irish approach, does not put a cap on awards that can be made by the ET. The issues of the burden of proof, personal/interpersonal grievances, and compensation are discussed in the next section.

F. Burden of Proof

There is a statutory presumption under the 2014 Act that in any proceedings involving an issue as to whether a disclosure is a protected disclosure, it is presumed that it is, until the contrary is proved.[107] This is a welcome provision from the perspective of a complainant as it is one less hurdle that they must surmount in legal proceedings under the 2014 Act. However, case law under the 2014 Act has imposed the burden of proof in retaliation claims, other than unfair dismissal, on the worker. Hyland J in *Conway v The Department of Agriculture, Food and the Marine*[108] confirmed that under the 2014 Act the worker bears the evidential burden of establishing detriment and penalisation.[109] The Directive proposed a shifting of the burden of proof to the person against whom the claim is brought.[110] Recital 93 of the Directive explains the rationale for the shifting of the burden of proof and provides that 'Retaliation is likely to be presented as being justified on grounds other than the reporting and it can be very difficult for reporting persons to prove the link between the reporting and the retaliation, whilst the perpetrators of retaliation may have greater power and resources to document the action taken and the reasoning'.[111] This position is supported in the UK by way of s 48(2) of the 1996 Act which provides that 'on [a

[107] PDA 2014, s 5(8).
[108] [2020] IEHC 664, [2021] ELR 142.
[109] ibid [74].
[110] Dir 2019/1937, art 21(5).
[111] ibid Recital 93.

complaint of detriment to a tribunal by a worker] it is for the employer to show the ground on which any act, or deliberate failure to act, was done'.

The 2022 Act amends the burden of proof in penalisation and detriment claims to provide that in any proceedings for penalisation or detriment, it will be deemed that they were as a result a protected disclosure being made, unless the employer or person whom it is alleged to have caused the damage proves that the act or omission concerned was based on 'duly justified grounds'.[112] The case law data under the 2014 Act underpins the necessity to shift the burden of proof to the employer where it can be seen that of the 95% (41) of unfair dismissal cases that were lost on the merits, the employer discharged their burden in 61% (25) of the cases, proving on the balance of probabilities that the complainant was not dismissed wholly or mainly for having made a protected disclosure. On the other hand, in respect of penalisation cases, the employee only discharged their burden in 23% (9) of cases,[113] proving on the balance of probabilities that the act or omission being complained of was incurred because of, or in retaliation for, the worker having made a protected disclosure. The shifting of the burden of proof is a welcome amendment under the 2022 Act as it is easier for an employer to demonstrate and substantiate the reason for any alleged retaliation because this should be something peculiarly within their knowledge. Nonetheless, the scope of the phrase 'on duly justified grounds' in the 2022 Act is ambiguous. The Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights explains that it is 'important for transposition laws to clarify this wording' and emphasises that the recitals of the Directive 'point the way forward' in this regard.[114] Recital 93 of the Directive explains that the person who took the detrimental action

[112] PD(A)A 2022, ss 21 and 22(a), inserting PDA 2014, ss 12(7C) and 13(2B).

[113] As regards penalisation cases, 90% (81) were unsuccessful and 10% (9) were successful. Of those that were unsuccessful, 69% (56) were unsuccessful on the merits, whilst 31% (25) were unsuccessful on procedural grounds. Of the cases that were unsuccessful on the merits, 45% (25) were unsuccessful on the ground that there was no protected disclosure, whilst 55% (31) were unsuccessful as it was held that the complainant was not penalised because of/in retaliation for/but for having made a protected disclosure. Therefore, the analysis of the data for assessment of the discharging of the burden of proof was of cases that were successful and those that were unsuccessful because there was no penalisation.

[114] Council of Europe Parliamentary Assembly, Draft Resolution 2300 (2019) 'Improving the Protection of Whistleblowers all over Europe', Explanatory Memorandum, para 3.6.3.62.

should be 'required to demonstrate that the action taken was not linked in any way to the reporting or the public disclosure'. This test should have been included in the 2022 Act.

G. Personal and Interpersonal Grievances

The issue of personal and interpersonal grievances has proved to be problematic for employers, workers, the WRC, the Courts, and the legislature in Ireland. Indeed, the case law analysis established that of those cases that were unsuccessful because there was no protected disclosure made, in 21% (10) of cases it was determined that the worker had disclosed a personal/interpersonal grievance and not a protected disclosure.

The 2014 Act sets out the types of wrongdoing that qualify as a relevant wrongdoing, and this covers an extensive range of acts, including criminal offences, miscarriages of justice, damage to the environment, and endangerment of any individual's health and safety.[115] The 2014 Act also provides in s 5(3)(b) that a relevant wrongdoing includes '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'.[116] A breach of the worker's contract of employment is explicitly excluded from the scope of the 2014 Act as an attempt to prevent it from being used as an alternative to existing grievance procedures for disputes on employment contracts, as occurred in the UK as a result of the decision in *Parkins v Sodexho*.[117] However, Hogan J in the Irish Supreme Court noted in *Baranya v Rosderra Irish Meats Group Ltd*[118] that 'Taken on its own, this might suggest that purely private complaints which are entirely personal to the worker making the complaint fall outside the scope of the Act. But even here the apparent width of the statutory exclusion is deceptive and, at one level, ineffective'.[119]

[115] PDA 2014, s 5(3)(a)–(h).

[116] ibid s 5(3)(b).

[117] *Parkins v Sodexho* [2002] IRLR 109 (EAT). The decision in *Parkins* was followed by the UKEAT in *Finchman v H M Prison Service* (UKEAT/0925/01/RN, 19 December 2001) and *Kraus v Penna plc* [2004] IRLR 260 (EAT).

[118] *Baranya v Rosderra Irish Meats Group Ltd* [2021] IESC 77, [2022] ELR 73. This case postdated the case law research and was not included in the relevant data, but its decision is crucial in addressing this particular issue.

[119] *Baranya* [25].

The approach adopted in Ireland under s 5(3)(b) was mooted in the UK, but this was rejected by the responsible Minister, Mr Norman Lamb, where he stated:

> [A]lthough our aim is to prevent the opportunistic use of breaches of an individual's contract that are of a personal nature, there are also likely to be instances where a worker should be able to rely on breaches of his own contract where those engage wider public interest issues. In other words, in a worker's complaint about a breach of their contract, the breach in itself might have wider public interest implications.[120]

This reservation expressed by former Minister Lamb is a valid one. There is a very real chance that in a disclosure there may be an intermingling of issues that may constitute both a personal grievance and a protected disclosure. For example, a worker may raise a concern that they are not being paid the minimum wage as agreed under the contract of employment. This is clearly a personal grievance; however, it is also a breach of the National Minimum Wage Act 2000, which deems it a criminal offence not to pay the national minimum hourly rate of pay.[121] Thus, disclosures of this nature, despite having a personal grievance dimension could arguably still fall within the ambit of the 2014 Act due to the public interest element, the commission of a criminal offence. The Supreme Court in *Baranya* confirmed that the approach adopted in Ireland as regards the exclusionary provision in the 2014 Act is unsuccessful, stating 'To that extent, therefore, it might be said that s. 5(3)(b) did not achieve the objective it sought to achieve by excluding only contractual complaints which are personal to the employee concerned and it is, to that extent, anomalous'.[122] Hogan J stated further that:

> The point nevertheless is that many complaints made by employees which are entirely personal to them are nonetheless capable of being regarded as protected disclosures for the purposes of the 2014 Act. This is also true of complaints regarding workplace safety under s. 5(3)(d), a point clearly illustrated by the sheer breadth of the language contained in the sub-section: 'health or safety of any individual'… 'has been, is being or is likely to be endangered'.[123]

Therefore, by extension, the Supreme Court found that when the disclosure concerns the worker's own health and safety, as it did in the case before it,

[120] Enterprise and Regulatory Reform Bill Deb 3 July 2012, col 388.
[121] National Minimum Wage Act 2000, s 35.
[122] *Baranya* [25].
[123] *Baranya* [27].

that this can constitute a protected disclosure. It found further that all that is required in such circumstances is that the worker's own health and safety is endangered by reason of workplace practices, without that conduct having to amount to a breach of a legal obligation, whilst acknowledging that this would generally probably be the case. It confirmed that if a worker's own health and safety is affected by being required to work in a particular manner or in respect of a particular task, that this can be a protected disclosure.[124]

Although the Supreme Court in *Baranya* quite logically found that a worker making an internal disclosure about their own health and safety fell within the scope of the 2014 Act, Charleton J in his judgment added his own observations to what he described as being 'how the state of the law clashes with common perceptions of what a whistleblower is' and went on to say that the situation in *Baranya* 'does not conform with what the ordinary understanding of the protection of whistleblowers requires and, furthermore, it may not be sensible'.[125]

This is a welcome decision by the Supreme Court where clarity on this issue was very much needed. It did not, however, resolve the issue that personal grievances, that were not intended to fall within the scope of the 2014 Act, could be subject to quite robust statutory protections, that would not normally apply except for the wide scope of the 2014 Act. The only reference in the Directive to 'interpersonal grievances' is contained at Recital 22, which provides that 'Member States could decide to provide that reports concerning interpersonal grievances exclusively affecting the reporting person, namely grievances about interpersonal conflicts between the reporting person and another worker, can be channelled to other procedures'.[126] The discretion under the Directive to deal with interpersonal grievances has been relied upon by the Irish legislature in introducing an exclusionary provision on 'interpersonal grievances exclusively affecting a reporting person, namely, grievances about interpersonal conflicts between the reporting person and another worker' and further it appears that the *Baranya* decision was also taken into consideration as the scope of the provision was broadened further than the recital to exclude matters concerning 'a complaint by a

[124] *Baranya* [28].
[125] *Baranya* (Charleton J) [1].
[126] Dir 2019/1937, Recital 22.

reporting person to, or about, his or her employer which concerns the worker exclusively'.[127]

There is evidence from the case law analysis that much time has been taken up with assessing the difference between a personal/interpersonal grievance and a protected disclosure and with whether the disclosure arises under the worker's contract of employment. This has resulted in disclosures that may have an intermingling of issues falling foul of the exclusion in s 5(3)(b) of the 2014 Act. It is too early to assess whether the new exclusionary provision will be effective but arguably a public interest test, as adopted in the UK in order to curtail the impact of *Parkins* and the subsequent rulings,[128] would have been a better approach to this issue.[129]

H. Compensation

As stated above, the case law research established that 12% (19) of cases under the 2014 Act were successful. Forty-seven percent (9) were penalisation claims, 42% (8) were unfair dismissal claims, and 11% (2) were interim relief claims. Compensation was ordered in all of the penalisation and unfair dismissal claims. In successful unfair dismissal and penalisation claims before the WRC, the 2014 Act provides that compensation that can be awarded to a successful complainant is capped at 260 weeks' remuneration.[130] There is no provision in the 2014 Act for an award of damages to be capped in a claim by a worker for detriment before the civil courts and the only limitation on the amount that can be awarded is the monetary

[127] PD(A)A 2022, s 6(d), inserting PDA 2014, s 5(5A).

[128] Enterprise and Regulatory Reform Act 2013, s 17 amending ERA 1996, s 43B(1)(b). *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979, [2018] ICR 731 laid down the test for 'in the public interest'. See also: *Ibrahim v HCA International Ltd* (UKEAT/0105/18/BA, 13 September 2018), [2019] EWCA Civ 2007, [2020] IRLR 224 (CA); *Parsons v Airplus International Ltd* (UKEAT/0111/17/JOJ, 13 October 2017); *Malik v Cenkos Securities Plc* (UKEAT/0100/17/RN, 17 January 2018); *Smith v Scapa Group Plc and others* (ET Case No 78 2400172/2017, 16 March 2018); *Gibson v (1) Hounslow LBC and (2) Crane Park Primary School* (UKEAT/0033/18/BA, 20 December 2018); *Elysium Healthcare No.2 Ltd v Ogunlami* (UKEAT 0116/18/RN, 12 February 2019); *Okwu v The Shrewsbury & Rise Community Action* (UKEAT/0082/19/00, 24 June 2019).

[129] Lauren Kierans, 'An Empirical Study of the Purpose of the Irish Protected Disclosures Act 2014' (PhD Middlesex University) 82, 87, 126, and 275 <https://eprints.mdx.ac.uk/26851/> accessed 22 July 2022.

[130] Unfair Dismissals Act 1977, s 7(1A), as inserted by PDA 2014, s 11(1)(d) and sch 2, s 1(3)(c).

jurisdiction of the particular court in which the claim is brought.[131] In contrast, in the UK, there is no cap on the amount of compensation that can be awarded to employees who suffer detriment[132] or who are dismissed where the reason or principal reason is that they made a protected disclosure.[133]

The analysis of the case law under the 2014 Act identified that the largest award in an unfair dismissal claim was €52,416 which equated to two years' salary,[134] whilst the largest award in a penalisation claim was €30,000.[135] The level of awards being made is relatively low when compared to those in the UK where there have been quite substantial awards made. For example, in *Best v Medical Marketing International Group Plc (in voluntary liq)*[136] the claimant was awarded £2,259,088 which equated to two years' and two months' pay, which is similar to the highest unfair dismissal award under the 2014 Act.[137] In both cases, there was also a finding of a failure to comply with disciplinary and dismissal procedures; however, in *Best* the award was increased by a further 50% to £3,402,245 to reflect this finding. In *Fernandes v Netcom Consultants UK Ltd*[138] the claimant was awarded £293,441 on the basis that as a fifty-eight-year-old chief financial officer he would not secure similar work in the future. This award represented just over four times his salary. In *Watkinson v Royal Cornwall NHS Trust*[139] the claimant, a chief

[131] The general monetary jurisdiction of the District Court is €15,000, Courts of Justice Act 1924, s 77(a)(i), (iii) and (v) carried forward by the Courts (Supplemental Provisions) Act 1961, s 33, and amended from time to time, most recently by the Courts and Civil Law (Miscellaneous Provisions) Act 2013; the general monetary jurisdiction of the Circuit Court is €75,000 or €60,000 for personal injury actions, Courts (Supplemental Provisions) Act 1961, Third Schedule, as amended by the Courts and Civil Law (Miscellaneous Provisions) Act 2013; the general monetary jurisdiction of the High Court is for claims of damages in excess of €75,000, or for personal injuries actions in excess of €60,000, there is no ceiling on the amount of damages that can be awarded.

[132] ERA 1996, s 49(2) provides that compensation awarded must be such as the tribunal considers to be just and equitable in all the circumstances having regard to '(a) the infringement to which the complaint relates, and (b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right'. Section 49(3) provides further that the loss referred to in s 49(2)(b) must be taken to include '(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and (b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act'.

[133] Ibid s 137(1).

[134] *An Employee v A Nursing Home* ADJ-00000456.

[135] *An Employee v A Public Body* ADJ-00005583.

[136] ET Case No 1501248/2008, 2 July 2013.

[137] *An Employee* ADJ-00000456.

[138] *Fernandes v Netcom Consultants UK Ltd* (ET Case No 22000060/00, 24 January 2000).

[139] *Watkinson v Royal Cornwall NHS Trust* (UKEAT/0378/10/DM, 17 August 2011).

executive of the respondent, was awarded £1,201,453, which amount included £569,158 for future loss of earnings for the damage to his career as a result of the dismissal and the various detriments he suffered, including suspension, failure to implement a salary increase, and libellous publicity by the respondent. This award represented just over eight times his salary. This award for gross loss of earnings was reduced to £815,903 on review.[140]

Article 21(8) of the Directive provides that 'Member States shall take the necessary measures to ensure that remedies and full compensation are provided for damage suffered by persons referred to in Article 4 in accordance with national law'.[141] It is arguable that the position in the UK is much more robust than the Irish position and is more in line with international best practice principles. For example, Transparency International recommends that a full range of remedies should be available for persons who suffer repercussions for having made a protected disclosure and that this must cover that 'all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower whole' and includes compensation for lost past, present and future earnings, and status.[142] The Mahon Tribunal in Ireland recommended in its Final Report that limits on the amount of compensation that may be awarded to a whistleblower be removed.[143] The Safety, Health and Welfare at Work Act 2005 provides that in a penalisation claim, the WRC can order an employer to pay an employee compensation of such amount (if any) as it considers just and equitable having regard to all the circumstances.[144] Thus, there is no cap on the amount of compensation that can be awarded and therefore the WRC already has jurisdiction to make awards for compensation that are not capped.

Unfortunately, the 2022 Act did not remove the cap on compensation awarded by the WRC but, in actuality, the General Scheme of the Protected Disclosures (Amendment) Bill 2021 proposed a limitation of €13,000 for an award of compensation for penalisation for members of the administrative, management or supervisory body of an undertaking, including

[140] *Watkinson v Royal Cornwall NHS Trust* (ET Case No 1702168/2008, 21 March 2011) [13]. The ET also applied a reduction of £9,000 in respect of future pension contributions and the multiplier of 0.85, which produced a reduced amount of £685,867.

[141] Dir 2019/1937, art 21(8).

[142] Transparency International, 'International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest' (TI 2013) 9.

[143] Tribunal of Inquiry into Certain Planning Matters and Payments, *Final Report* (2012) 2531.

[144] Safety, Health and Welfare at Work Act 2005, s 28(c), as inserted by WRA 2015, s 52(1) and sch 7, pt 1, item 21.

non-executive members; volunteers and unpaid trainees; and natural persons who acquire information on a relevant wrongdoing during a recruitment process or other pre-contractual process.[145] The premise behind this cap was that it would allow for compensation to be awarded, subject to an appropriate limit, where quantifying compensation based on remuneration would not be possible.[146] The proposal to cap compensation in such circumstances was criticised by Kenny who argued that 'This is wholly inadequate. It sends a message to would-be disclosers of serious wrongdoing that the risk they incur is not fully understood. It signals that their wellbeing and that of their families is not taken seriously'.[147] The 2022 Act ultimately increased this cap to €15,000 and limited its application only to individuals who acquire information on a relevant wrongdoing during a recruitment process.[148]

The 2022 Act should have provided for uncapped compensation just as the UK legislation does. There is evidence of persons who have made disclosures of wrongdoing being unable to secure employment in the same area again. For example, a study conducted in an eighteen-month period between 2016 and 2018, found that 84% (77) respondents had been blacklisted in their industry after having blown the whistle.[149] As a result, such persons need to be compensated appropriately and a limitation on the amount of compensation that can be awarded will mean that this is not achieved.

4. CONCLUSION

The case law analysis under the 2014 Act demonstrates that there are anomalies in the legislation as regards its provision of protection. The purpose of the 2014 Act is to provide protection to all workers, as defined, who make protected disclosures but what the case law analysis established is that employees, as opposed to workers other than an employee, are much better protected. It further identified additional specific weaknesses in the operation of the legislation, which diminishes the effectiveness of the statutory

[145] The General Scheme of the Protected Disclosures (Amendment) Bill 2021, Head 21(3).

[146] Ibid, Head 21, Explanatory Note.

[147] Kate Kenny, 'Pre-Legislative Scrutiny of the General Scheme of the Protected Disclosures (Amendment) Bill 2021' (NUI Galway 29 June 2021) 8.

[148] PD(A)A 2022, s 25(a), amending, PDA 2014, sch 2(1)(c).

[149] Kate Kenny, Marianna Fotaki and Alexis Bushnell, 'Post-disclosure Survival Strategies: Transforming Whistleblower Experiences' (2019) 12.

protection afforded to all workers. The obligation to transpose the Directive meant that Ireland was in a good position to strengthen its statutory protection of whistleblowers, however, there were also nuances in the operation of the 2014 Act that are highlighted when comparing it to the operation of PIDA in the UK. Therefore, the Irish legislature was required to have looked beyond the minimum standards in the Directive and towards the UK for further guidance.

The case law analysis demonstrated that the WRC is the most availed of forum for the enforcement of rights under the 2014 Act. There are significant advantages for employees in bringing a claim before the WRC, compared to a claim by a worker, including employees, before the civil courts. This creates unfairness as regards access to justice for those who make protected disclosures and who suffer harm just as employees do. Despite this, the 2022 Act does not address the inequity and only extends the right to bring a claim before the WRC for penalisation to trainees, volunteers, and those who acquire information on a relevant wrongdoing during the recruitment process.[150] As outlined, in the UK, all workers can bring a whistleblowing claim before the ET. The WRC in Ireland has the power to hear claims of discrimination by employees under the Employment Equality Acts 1998–2015 ('EEA')[151] and also by 'persons' outside of the employment relationship under the Equal Status Acts 2000–18 ('ESA').[152] The definition of 'employee' under the EEA[153] is broader than the traditional approach to this definition and extends beyond those who work under a contract of service to cover those who work under a contract for personal services and who would be deemed a 'worker' for the purposes of the 2014 Act. Therefore, there is precedent underpinning the proposal to permit all workers to bring claims before the WRC for harm suffered by them for having made a protected disclosure. By doing so, this would ensure that the advantages outlined above in respect of costs, fees, and processing times would be afforded to all workers, and not just to employees claiming unfair dismissal or penalisation before the WRC.

Further evidence of inequity under the 2014 Act arose in respect of research into the type of claims brought under the legislation. The research identified that the majority of cases were penalisation claims by employees but did not yield any detriment claims by workers before the civil courts.

[150] PD(A)A 2022, s 21, inserting PDA 2014, s 12(7B).
[151] Employment Equality Acts 1998–2015, s 77.
[152] Equal Status Acts 2000–18, s 21.
[153] Ibid s 2.

Under the 2014 Act, employees were protected from a much wider and non-exhaustive range of acts or omissions that constituted 'penalisation', than workers who were protected from a limited form of 'detriment'. Under PIDA, there was no statutory definition of 'detriment', and this applied to all workers, irrespective of their employment status. The extension of the definition of retaliation under the Directive to both the definitions of 'penalisation' and 'detriment' is a welcome amendment and follows the UK approach not to limit the types of harm that could be sustained by a worker in retaliation for making a protected disclosure. This should ensure parity of protection from harm for all workers who make protected disclosures.

In contrast to the welcome amendment to the definition of 'detriment' under the 2022 Act, a controversial amendment is the extension of interim relief to penalisation claims only. This means that workers other than employees have less protection than employees and they will not be able to avail of such a crucial form of protection. Both the UK and Ireland are failing in this regard.

The case law analysis highlighted the low success rates under the 2014 Act. It is promising to observe that lessons have been learnt in respect of the necessity to shift the burden of proof in retaliation cases, as is the position in the UK, although it is the requirement under the Directive that is resulting in this amendment. All workers will benefit from the reversal of the burden of proof in penalisation and detriment claims. However, the approach in Ireland to treating the first date of the alleged penalisation as the date for when the clock starts in respect of the time for filing penalisation claims is troublesome and as argued above, it would make more sense to adopt the UK approach of, where an act extends over a period, starting the clock on the last day of that period and where there may be a series of similar acts or failures, the time period begins on the date of the last act or failure.

In addition, the UK approach to both excluding personal/interpersonal grievances by way of a public interest test and omitting a cap on compensation should have been adopted by the Irish legislature. The amendment in the 2022 Act to include a definition of personal/interpersonal grievances does not resolve the issue where there may still be an intermingling of relevant wrongdoings and personal/interpersonal grievances and will most likely present further interpretation issues for the courts, as the Supreme Court was faced with in *Baranya*. The retention of the cap on compensation in penalisation and unfair dismissal claims, as well as the introduction of a further cap of €15,000 for those in the recruitment process in penalisation

claims, means that there is not 'full compensation' for whistleblowers who suffer retaliation. This is an unnecessary limitation and should have been amended to reflect international best practice principles, as the UK legislation does.

Unfortunately, the opportunity to amend the legislation, when transposing the Directive, to ameliorate these inequities was not used. On publication of the 2022 Bill, Minister McGrath stated 'The implementation of the EU Directive and the amendments I am proposing in this Bill will further strengthen the protections for whistleblowers and maintain Ireland's position as a leader in this area'.[154] It is questionable whether this aim has been achieved, and of course it is too early to make a full assessment in this regard. However, although there have been calls in the UK to reform/repeal PIDA, as it stands, there are examples of good practice from its operation that should have been taken into consideration by the Irish legislature when amending the 2014 Act. The case law analysis set out above confirms the weaknesses in the 2014 Act and demonstrates that more could have been done in the amendment process to address these and to ensure there is parity of protection afforded to all workers who make protected disclosures. Future research of case law under the 2022 Act will have to be undertaken to identify its strengths and weaknesses and to inform the review on the operation of the legislation within five years of when it is passed.[155]

[154] Department of Public Expenditure and Reform, 'Minister McGrath published Protected Disclosures (Amendment) Bill' (*DPER* 9 February 2022) <www.gov.ie/en/press-release/affa6-minister-mcgrath-publishes-protected-disclosures-amendment-bill/> accessed 15 February 2022.

[155] PD(A)A 2022, s 26, inserting PDA 2014, s 2A.