

GREEN PAPER

**PROPOSED WHISTLEBLOWER
LEGISLATION**

IN SEARCH OF A MODEL FOR JAMAICA

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Introduction

1. The Government has identified the enactment of Whistleblower legislation as a matter of priority.
 - 1.1 The purpose of this Paper is to provide information, identify common features of whistleblower legislation, outline the various issues which arise for consideration and invite comment thereon. This exercise is intended to assist in the formulation of policy for the purpose of drafting implementing legislation.

- 1.2 Whistleblowing involves a person making a disclosure about an act of wrongdoing or procedural breach which occurs within an organization. The enactment of whistleblower legislation is usually one of the measures employed to combat corruption. Other legislative measures include the Access to Information Act, 2001 and Corruption (Prevention) Act, 2001, which currently exist in Jamaica.
- 1.3 It is felt that to the extent that the environment facilitates persons who are willing to take a moral stance and reveal wrongdoing, the more difficult it will be for others to engage in corrupt activities and be later shielded by the silence of fearful would be whistleblowers. An important advantage of whistleblower legislation therefore, is its tendency to require or foster development of internal mechanisms for handling disclosures of wrongdoing within organizations, as this helps to increase accountability and transparency.
- 1.4 Within the Jamaican culture, the attitude towards persons who are perceived as giving information or evidence about wrongdoing on the part of others is generally unfavourable. This is manifested in the lyrical content of some popular songs which refer to such persons as “informers” and seem to encourage harsh and condemnatory treatment to them. In this respect, informers are viewed as traitors.
- 1.5 Negative attitudes towards whistleblowers are not exclusive to Jamaica. In fact, in extreme cases, situations can become dangerous where a person opts to give information containing allegations of wrongdoing against another person. When this takes place in the context of the work environment, the potential losses can be significant, such as loss of job, the consequences of disciplinary proceedings, suspension, a blemished employment record etc. The extent to which wrongdoers will go to protect themselves from the consequences of their actions can be quite varied depending on the individual in question.
- 1.6 It is these circumstances which have largely led to the enactment of whistleblower legislation in several countries. The main objects of such laws are usually to facilitate whistleblowing by establishing clear procedures and to offer protections to whistleblowers.
- 1.7 International anti-corruption agreements have promoted the enactment of whistleblower legislation. Jamaica is a signatory to the UN Convention Against Corruption, as well as to the OAS Inter-American Convention Against Corruption. Both these agreements require that countries adopt whistleblower laws and by being a signatory, Jamaica has signified its commitment to the exercise. The OAS Convention requires that countries agree to consider measures to maintain and strengthen *systems for*

*protecting public servants and private citizens who, in good faith, report acts of corruption.*¹

- 1.8 A number of countries have enacted legislation including New Zealand, Canada, the USA, New Zealand, Australia, the UK and South Africa. Common features of such legislation will be outlined below.

Common Features of Whistleblower Legislation

A. Which Disclosures should qualify for protection?

- 1.9 From the legislation reviewed, the trend discerned is that a disclosure will qualify for protection if it satisfies three conditions: (i). The disclosure must be made in good faith, that is, based upon a reasonable belief in the truth of the disclosure that impropriety is about to take place or has taken place; (ii). Only certain types of information can form the subject matter of a disclosure for the purpose of qualifying for protection under the Acts; (iii). The disclosure must be made to specified persons or bodies and in the manner specified. This pattern is exemplified by the provisions from various jurisdictions.

United Kingdom

2. Under the **UK Employment Rights Act, 1996 (UK ERA)** a disclosure qualifies for protection if it relates to information which, in the reasonable belief of *the worker* making the disclosure, tends to show one or more of the following:

- (a). that a criminal offence has been committed, is being committed 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 to which he is subject,
 - (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, or
 - (f). that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.
- 2.1 The Act also provides that disclosures may qualify for protection if made to: an employer or other responsible person; a legal adviser; a Minister of the Crown; or a prescribed person. These provisions are treated in greater detail below in relation to mechanisms for dealing with disclosures (*Section D.*)

¹ OAS Inter-American Convention against Corruption, Article III, section 8

- 2.2 A disclosure, though not made to the specified persons, might nevertheless be afforded protection in certain clearly defined circumstances.
- 2.3 Section 43G of the **UK ERA** sets out circumstances under which such disclosures, including those made to the media, may be protected if they meet the following tests. The first deals with the evidence and motive of the whistleblower. He must make the disclosure in good faith and with reasonable belief that the allegation contained in the disclosure and the information disclosed are substantially true. Also, the disclosure must not be made for personal gain.
- 2.4 The second test sets out three preconditions, one of which must be met if the disclosure is to be capable of protection. These include: that at the time of the disclosure, the worker must reasonably believe that he will be subjected to a detriment by his employer if he makes the disclosure to his employer; or that in a case where no person is prescribed in relation to the relevant failure, the worker reasonably believes that evidence relating to the failure will be concealed or destroyed if he makes the disclosure to his employer; or that the worker has previously made a disclosure to his employer.
- 2.5 Finally, to be protected, the disclosure must satisfy the test of reasonableness in all circumstances. The reasonableness of the disclosure is determined by having regard to:
- (a). the identity of the person to whom the disclosure is made;
 - (b). the seriousness of the relevant failure;
 - (c). whether the relevant failure is continuing or likely to occur in the future;
 - (d). whether the disclosure is made in breach of confidentiality owed by the employer to any other person;
 - (e). any action taken as a result of a disclosure previously made;
 - (f). whether in making the disclosure to the employer, the worker made use of a procedure authorized by the employer.
- 2.6 It is noted that the **UK ERA** introduces an additional category whereby disclosures of *exceptionally serious* matters might also be protected under section 43H, though they fail to meet the tests outlined above. As usual, the worker must make the disclosure: in good faith; with reasonable belief that the allegation contained therein is true; not for the purpose of personal gain; and in all circumstances of the case, it must be reasonable for him to make the disclosure. In determining whether the disclosure is reasonable in this instant, the UK provision emphasizes that regard will be had to the identity of the person to whom the disclosure is made.

South Africa

- 2.7 In keeping with the general trend, section 1 of the South African **Protected Disclosures Act, 2000 (PDA)** sets out the types of information which will qualify for protection, if made by an employee in good faith. Like the UK Act, the South African PDA specifies the persons to whom disclosures ought to be made in order to be protected. The types of information and the list of persons are similar to those previously examined.
- 2.8 The Act also provides for a “general protected disclosure,” which might be made to any person, in certain circumstances. The list of circumstances applicable includes those previously outlined under the **UK ERA**.

Canada

- 2.9 The Canadian **Public Servants Disclosure Protection Act, 2005 (PSDPA)** and the **New Zealand Protected Disclosure Act, 2000 (PDA)** follow the same pattern, listing the nature of the information which will qualify as a protected disclosure and the persons to whom the disclosure can be made.
3. Section 2 of the Canadian **PSDPA** defines a protected disclosure as one which is made in good faith by a public servant: (a). in accordance with the Act; (b). in the course of a parliamentary proceeding; (c). in the course of a procedure established under any other Act of parliament; or (d). when lawfully required to do so.
- 3.1 Similar to other jurisdictions referred to, section 16 provides that in limited circumstances, a disclosure made to the public might nonetheless enjoy protection of the Act. These circumstances include: where there is insufficient time to make the disclosure in accordance with other sections and the public servant believes on reasonable grounds that the subject matter of the disclosure is an act or omission that: (a). constitutes a serious offence under an Act of Parliament or (b). constitutes an imminent risk of substantial and specific danger to the life, health and safety of persons or to the environment.
- 3.2 The list of wrongdoings relating to the public sector to which the Act applies is provided by section 8 and includes: (a). a contravention of any Act of Parliament or of the legislature or province, or of any Regulations; (b). misuse of public funds or a public asset; (c). a gross mismanagement in the public sector; (d). an act or omission that creates a substantial and specific danger to life, health or safety of persons, or to the environment; (e). a serious breach of a code of conduct established under the Act; (f). the taking of a reprisal against a public servant; and (g). knowingly directing or counseling a person to commit any of the wrongdoings set out.

New Zealand

- 3.3 A disclosure is protected under Section 6 of the **New Zealand PDA**, if made by an employee in the manner provided, where the following

requirements are met: (a). the information is about serious wrongdoing in or by that organization; and (b). the employee believes on reasonable grounds that the information is true or likely to be true; and (c). the employee wishes to disclose the information so that the serious wrongdoing can be investigated; and (d). the employee wishes the disclosure to be protected.

3.4 Serious wrongdoing is defined to include: (a).an unlawful, corrupt, or irregular use of public funds or public resources; or (b). an act, omission, or course of conduct that constitutes a serious risk to public health or public safety or the environment; or (c). an act, omission or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation and detection of offences and the right to a fair trial; (d). an act, omission or course of conduct that constitutes an offence; or (e). an act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or constitutes gross mismanagement.

Australia

3.5 The Australian legislation examined also deals with disclosures qualifying for protection in terms of the nature of the protection and the persons to whom disclosures can be made.

3.6 Under the **Tasmanian Public Interest Disclosure Act, 2002 (PIDA)**, improper conduct is defined to include: (a) corrupt conduct; or (b) a substantial mismanagement of public resources; or (c) conduct involving substantial risk to public health or safety; or (d) conduct involving substantial risk to the environment – that would, if proved, constitute – (e) a criminal offence; or (f) reasonable grounds for dismissing or dispensing with, or otherwise terminating the services of a public officer who was, or is, engaged in that conduct.

3.7 Corrupt conduct is defined to include: (a) conduct of a person (whether or not a public officer) that adversely affects, or could adversely affect, either directly or indirectly, the honest performance of a public officer's or public body's functions; or (b) conduct of a public officer that amounts to the performance of any of his or her functions as a public officer dishonestly or with inappropriate partiality; or (c) conduct of a public officer, a former public officer or a public body that amounts to a breach of public trust; or (d) conduct of a public officer, a former public officer or a public body that amounts to the misuse of information or material acquired in the course of the performance of their functions as such (whether for the benefit of that person or body or otherwise); or (e) a conspiracy or attempt to engage in conduct referred to in paragraph (a), (b), (c) or (d).

3.8 Detrimental action is defined to include: (a) action causing injury, loss or damage; (b) intimidation or harassment; (c) discrimination, disadvantage or

3.9 Consideration is being given to the types of disclosures which should qualify for protection. The Government would welcome your views and comments.

B. Which Disclosures should not qualify for Protection?

(i). Information relating to National Security Information

4. National Security information is generally subjected to special treatment within whistleblower schemes.

New Zealand

4.1 The **New Zealand PDA** establishes special rules and procedures for intelligence and security. Section 12 provides that the internal procedures of an intelligence and security agency must: provide that persons to whom a disclosure may be made, hold an appropriate security clearance and be authorized to have access to the information; state that the only appropriate authority to whom information may be disclosed is the Inspector-General of Intelligence and Security; and that guidance on making such disclosures can only be sought from the Inspector-General and not from an Ombudsman; and that no disclosure may be made to an Ombudsman, or to a Minister of the Crown other than the Minister responsible for the relevant intelligence and security agency or the Prime Minister.

Canada

4.2 Section 49 of the **PSDPA** sets out similar restrictions. When referring matters to the appropriate authority, the Public Sector integrity Commissioner (the Commissioner) is precluded from disclosing any information that the Government of Canada or the public sector is taking measures to protect including information that: (a). is a confidence of the Queen's privy Council for Canada in respect of which section 39(1) of the Evidence Act applies; (b). is subject to solicitor-client privilege; (c). is special operational information within the meaning of the Security of Information Act; (d). is subject to any restriction on disclosure under and other Act of Parliament; (e). could reasonably be expected to cause injury to international relations, national defence or national security, or to the detection, prevention or suppression of criminal, subversive or hostile activities; (f). could reasonably be expected to cause injury to the privacy interests of an individual; or (g). could reasonably be expected to cause injury to commercial interests.

4.3 Notwithstanding these restrictions, the Commissioner may reveal the information if it has already been disclosed following a request under the access to information Act or with consent of the authorized person in the organization primarily interested in the information. The Commissioner can also disclose the information if either of certain named circumstances apply. These include if in his opinion, the public interest in making the disclosure outweighs the potential harm from the disclosure.

United Kingdom

4.4 Similarly, section 193 of the **UK ERA**, by virtue of certain amendments, restricts the application of whistleblowing procedures to persons involved in national security and intelligence work.

4.5 Consideration is being given to subjecting national security information to special treatment, having regard to its sensitive nature. Your comments are invited.

(ii). **Where a person commits an offence by disclosure**

4.6 Where the person who makes a disclosure commits an offence by making it, legislation typically excludes it from protection. Such situations arise where the whistleblower makes the disclosure in contravention of legislative provisions which protect the secrecy of the information disclosed. As such, section 43B(3) of the UK ERA provides that a disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(iii). **Information subject to legal professional privilege**

4.7. Additionally, disclosures of information which is the subject of legal professional privilege is usually not protected under whistleblower legislation. This approach is taken in the **UK ERA**. Section 43B(4) provides that a disclosure of information in respect of which claim to legal professional privilege could be maintained in legal proceedings, is not a qualifying disclosure if made in the course of obtaining legal advice.

4.8 Consideration is being given to adopting a similar approach in dealing with the cases where a person commits an offence by making the disclosure and where the information disclosed is subject to legal professional privilege. Comments are invited.

C. To whom should the Act Apply?

(i). **Who can make disclosure?**

4.9 The coverage of the proposed legislation must be determined in two respects. The first relates to the persons who will be entitled to make disclosures and the second relates to the sector to which the law will apply.

5. Based on the statutes examined, the contemplated whistleblower is usually an employee or worker. This is the case in the **UK ERA**, the **South African PDA** and the **New Zealand PDA**.

5.1 This is an area which has attracted strong criticism from some commentators. De Maria² points out that while coverage is fairly extensive in all schemes, the “employment bias” excludes whole classes of people including: consumers, students, retirees, the unemployed, prisoners, and the physically and handicapped persons not in employment.

5.2 Notwithstanding this criticism, the coverage of legislation is usually limited to employees. In fact, the South African legislation further restricts the interpretation of employee.

South Africa

5.3 The Act defines “employee” to mean any person, *excluding an independent contractor*, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business, including any person acting on behalf of or on the authority of such employer.

5.4 The exclusion of independent contractors would be of some concern, particularly in light of the modern practice of out-sourcing many services to such contractors. This statutory exclusion would result in a potentially large group of persons falling outside the protection of the whistleblower scheme. Additionally, having regard to the criticism of the restrictive definition (earlier discussed – paragraph 5.1), it would be difficult to justify a further exclusion.

5.5 **Accordingly, consideration should be given to the appropriateness of excluding independent contractors from the definition of “employee” adopted in the proposed legislation. The Government welcomes your comments and views on this issue.**

5.6 The treatment of the coverage of similar legislation adopted by Queensland and Victoria may also be useful to note.

Queensland

Common Law – Common Mistakes – The Dismal Failure of Whistleblower Laws in Australia, New Zealand, South Africa, Ireland and the United Kingdom, Paper presented to the International Whistleblowers Conference, University of Indiana, 2002

- 5.7 In Queensland, Part III of the **Whistleblowers Protection Act, 1994** provides that disclosures can be made by public officers, in the first instant and in specific cases, by any person. It is noted that certain employees of the Stated are classified as public officers. Others, such as members of the Judiciary are excluded in order to preserve their independence. Far from operating beyond the reach of the law, such officers are subject to special procedures which must be used where their conduct is being called into question.
- 5.8 Otherwise, the range of disclosures that can be made by public officers includes those related to maladministration and negligence.
- 5.9 Unlike other disclosures which can only be made by public officers, sections 19 and 20 of the Act allow *public interest disclosures* to be made by anybody. The types of disclosures permitted here include those relating to: a substantial and specific danger to the health or safety of a person with a disability; a substantial and specific danger to the environment; or a reprisal taken against anybody for making a public interest disclosure.

Victoria

- 5.10 The **Victorian Whistleblowers Protection Act, 2001** takes an approach which is at the other end of the continuum, in that a disclosure can be made by “any natural person.” Such a disclosure can be made where the person reasonably believes that a *public officer or public body* has engaged in improper conduct or has taken detrimental action.
- 5.11 **Consideration should also be given to whether persons who are able to make protected disclosures ought to be restricted to employees or otherwise extended. The Government welcomes your comments and views.**

(ii). Public/Private Sector

6. The second aspect of coverage of whistleblower legislation to be determined, relates to whether it should apply to the public sector, private sector or both. This must be considered in terms of *the sector in which the person authorized to make the disclosure is located*, as well as *the location of the person whose wrongdoing can be disclosed*.

6.1 The approaches vary among jurisdictions. The **UK ERA** covers public, private and voluntary sectors. The New Zealand and South African Acts apply to both the public and private sectors. Section 6 of the **New Zealand PDA** provides that *an employee of an organization* may make disclosures about wrongdoing in or by an organization. Section 6 of the **South African PDA**, states its first object as being “*to protect an employee, whether in the private or*

the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure.”

- 6.2 The coverage of some Acts is restricted to wrongdoing in the public sector. As noted earlier, the **Victorian Whistleblowers Act** allows any person to make a disclosure of improper conduct *on the part of a public officer or public body*.
- 6.3 The **Canadian PSDPA** and **Tasmanian PIDA** allow disclosures to be made by public servants and *in relation to wrongdoing in the public sector*.
- 6.4 **Consideration ought to be given to whether the proposed legislation ought to apply to the public sector, the private sector, or both. Your comments and views are invited.**

D. Mechanisms for dealing with Disclosures

(i). To Whom can a Disclosure be made?

- 6.5 Defining clear disclosure procedures is important in providing safeguards, since the disclosure of information can be potentially damaging to the individuals and organizations concerned.
- 6.6 The trend across the various legislative models is to have both internal and external mechanisms for making disclosures. Typically, legislation requires persons to make disclosures using the internal mechanisms of their organization as the first option. Some statutes specifically require the establishment of internal procedures while others simply require that disclosures be made to employers.
- 6.7 The underlying principle seems to be that recourse may be had to external options either in the absence of internal procedures; or where a disclosure has been made internally, but the employer has failed to take action; or where the person to whom disclosures could be made internally, appears to be implicated in the wrongdoing which forms the subject matter of the disclosure, giving the employee reason to believe that the disclosure ought not be made his employer. This trend can be illustrated by reference to legislation from some jurisdictions.
- 6.8 Section 10 of the **Canadian PSDPA** mandates each Chief Executive to establish internal procedures to manage disclosures made under the Act, by public servants employed in the portion of the public sector for which the chief executive is responsible. Chief executives are further required to designate a senior officer to be responsible for receiving and dealing with disclosures of wrongdoings made by public servants employed in the relevant portion of the public sector. This is to be done in accordance with the duties and powers of

senior officers set out in a Code of Conduct required to be established by the Treasury Board.

6.9 Section 12 of the Act authorizes a public servant to disclose to his supervisor or to the senior officer designated by the Chief Executive, any information he believes could show that a wrongdoing has been committed or is about to be committed, or that he has been asked to commit a wrongdoing.

7. Section 39 also provides for the appointment of a Public Sector Integrity Commissioner. Section 13 permits a public servant to make a disclosure to the Commissioner if one of three circumstances exists. These include: if the public servant believes on reasonable grounds that it would be inappropriate to disclose the information to his or her supervisor, or to the appropriate senior officer, by reason of the subject matter of the wrongdoing or the person alleged to have committed it; or the public servant has already disclosed the information to his supervisor or to the appropriate senior officer and is of the opinion that the matter has not been appropriately dealt with; or that no senior officer has been appointed to receive disclosures in the portion of the public sector in which the public servant is employed.

7.1 The Act also provides that disclosures concerning wrongdoing on the part of the Public Sector Integrity Commissioner may be made to the Auditor General of Canada.

7.2 Section 34 provides that if the Commissioner is of the opinion that a matter under investigation would involve obtaining information that is outside the public sector, he must cease that part of the investigation and refer the matter to any authority he considers competent to deal with it.

7.3 This is largely consistent with the approach taken even where legislation applies to the private sector as well. It is submitted that this is the practical solution having regard to the limited authority which state bodies can exercise in addressing the general wrongdoing of private entities.

United Kingdom

7.4 Section 43C of the **UK ERA** provides that a worker may make a disclosure in good faith to his employer or other responsible person where he reasonably believes that the failure relates to the conduct of a person other than his employer or a matter for which a person other his employer has legal responsibility. Disclosures can also be made to the Minister, if the employer is appointed by enactment by a Minister. Therefore workers in Government appointed bodies are protected if they report their concerns in good faith to the sponsoring department rather than to their employer. Additionally, disclosures are protected when made to persons prescribed by the Secretary of State for Trade and Industry by Order in accordance with section 43F.

7.5 Consideration is being given to adopting the approach of identifying generally, the persons to whom disclosures can be made; as well as prescribing specific persons or bodies whose functions relate to matters which might arise as the subject-matter of disclosures. The Government welcomes your comments.

(ii). **How disclosures are to be dealt with**

7.6 As noted earlier, legislation usually designates persons to receive disclosures and to carry out investigations where necessary. Of the legislation examined, Canada has the most elaborate scheme in this respect. This is so in that the Act establishes the office of the Public Sector Integrity Commissioner, as a dedicated authority for the purpose of carrying out various functions under the Act, including the investigation of disclosures. The legislation of other jurisdictions such as Tasmania and Victoria, provide for disclosures to be made to an Ombudsman in certain circumstances. Some of the relevant provisions can be examined to illustrate how these matters have been treated.

Canada

7.7 In Canada, the need for independence and the importance of the post are reflected in the manner of appointment and the security of tenure for seven years. Appointment of the Commissioner is done by the Governor in Council, by commission under Great Seal, after approval of the appointment by resolution of the Senate and House of Commons.

7.8 Section 22 of the **PSDPA** sets out the duties of the Commissioner which include:

- (a). providing advice to public servants who are considering making a disclosure under the Act.
- (b). receiving, recording and reviewing disclosures of wrongdoings in order to establish whether there are sufficient grounds for further action.
- (c). conducting investigations on disclosures made to the Commissioner, including appointing persons to conduct investigations on his behalf.
- (d). ensuring that the right to procedural fairness and natural justice of all persons involved in investigations are respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoing.
- (e). protecting as far as possible in accordance with the law, the identity of persons involved in the disclosure process.
- (f). establishing procedures for processing disclosures and ensuring the confidentiality of information collected in relation to disclosures and investigations.

- (g). reviewing the results of disclosure investigations and reporting findings to persons who made disclosures and to the appropriate chief executives.
- (h). making recommendations to chief executives concerning measures to be taken to correct wrongdoings and reviewing reports on measures taken in response to those recommendations.

7.9 Section 26 of the Act provides that investigations are to be conducted informally and expeditiously. The Commissioner is required to notify chief executives and persons whose conduct is called into question, when commencing an investigation.

8. As regards investigations, section 27 provides that where a decision or recommendation might adversely affect an individual, the Commissioner may afford him the opportunity to answer the allegation.

8.1 The **Victorian Whistleblowers Act** provides that certain functions are to be carried out by the Ombudsman. Section 8 lists those functions as including the following:

- (a). determination of whether disclosures are public interest disclosures;
- (b). investigation of matters disclosed in public interest disclosures;
- (c). preparation and publication of guidelines for the procedures to be followed by public bodies in relation to disclosures and investigations.
- (d). monitoring investigations by public bodies and
- (e). monitoring investigations by the Chief Commissioner of Police; and
- (f). reviewing the procedures and the implementation of procedures of public bodies in relation to disclosures and investigations.

8.2 Consideration is being given to adopting a similar approach with respect to requiring that persons who make disclosures be informed as to the progress of investigations conducted. Your comments are invited.

8.3 Your comments and views are also invited as to the type of mechanism which would be appropriate for the dealing with disclosures under the proposed legislation.

E. Nature of Protections/ Remedies available to Whistleblowers

8.4 All whistleblower statutes seek to protect persons who have disclosed wrongdoing from victimization. Typically, the provisions speak of the right of the worker not to suffer any “detriment” or “retaliatory action” or “reprisal,” as a result of making the disclosure. The type of conduct defined as detriment

varies as does the extent of the remedies. Usually, protection takes the form of legal remedies for unfair dismissal, including compensation in appropriate cases.

United Kingdom

8.5 Section 47B of the **UK ERA** provides that “a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer, done on the ground that the worker has made a protected disclosure.” Quite usefully, the section also extends protection to categories of workers who are performing statutory functions. The section protects employees from actions falling short of dismissal and protects other workers who cannot be dismissed (because they are technically not employees), from victimization such as termination of their contract. The Act deems it an unfair dismissal if the principal reason for such dismissal, is that the worker made a protected disclosure. If the principal reason for which an employee is selected for redundancy is that he made a protected disclosure, such action will also be construed as an unfair dismissal.

8.5 Section 48 grants the employee the right to present a complaint to an employment tribunal, on the basis that he has been subjected to detriment in contravention of section 47B. The Act also permits the tribunal to make an award for compensation of the worker where it is satisfied that the worker has been victimized.

Canada

8.6 Section 19 of the **PSDPA** prohibits any person from taking any reprisal against a public servant. “Reprisal” is defined to include any of a number of measures taken against the public servant because he made a protected disclosure or has, in good faith, cooperated in an investigation carried out under the Act. These include: (a).disciplinary measure; (b).demotion; (c).termination of employment; (d).any measure that adversely affects the employment of working conditions of the public servant; and (e).a threat to take any of these measures.

8.7 Section 21 gives a public servant a right of complaint under the Inquiries Act where he alleges that a reprisal has been taken against him, by reason that he made a protected disclosure in the course of a parliamentary proceeding or inquiry under that Act. Section 22 lists as the first duty of the Public Sector Integrity Commissioner, the provision of guidance to employees even as they contemplate making a disclosure. Such a provision demonstrates that assistance to whistleblowers can be provided from the outset of the process.

New Zealand

8.8 The **PDA** sets out a number of protections for the employee where he has suffered retaliatory actions as a result of having made the disclosure. If the

retaliatory action includes dismissal, section 17 provides that the employee may have a personal grievance for the purposes of the Employment Contracts Act. Section 18 of the Act grants the employee immunity from civil, criminal and disciplinary proceedings, by reason of having made the disclosure.

8.9 Section 19 affords confidentiality to the employee, by requiring every person to whom a disclosure is made to use best endeavours not to disclose information that might identify the person who made the disclosure. This is so unless the person consents in writing or the person receiving the information believes the disclosure of the identifying information is essential to the investigation of the allegations made.

9. Under the South African Act, an employee who is subjected to detriment, may approach any court having jurisdiction to grant appropriate relief or pursue any other process prescribed by any law. The employee is also given the right to be transferred upon request.

9.1 It is noted that some commentators recommend that a range of remedies be made available to whistleblowers which goes beyond those provided for in legislation examined, for example counseling services.

9.2 Consideration is being given to providing a range of remedies to whistleblowers. Comments and views are invited.

F. Voiding certain Contractual Duties of Confidentiality

9.3 These provisions invalidate clauses in employment contracts which seek to restrain employees from making protected disclosures. Section 43J of the **UK ERA** provides that any provision in an agreement which purports to preclude a worker from making a protected disclosure is void. The provision is stated to apply to any agreement between worker and employer and includes an agreement to refrain from instituting or continuing proceedings under the Act.

9.4 Consideration is being given as to whether a provision should be included in the proposed legislation which invalidates contractual duties of confidentiality. Your comments are invited.

Additional Considerations

(i) Witness Protection

9.5 The issues related to whistleblower legislation are quite complex. The question of witness protection for example, though not an obvious

consideration, might arise in situations where a whistleblower becomes a witness in proceedings relating to the information disclosed. This is so, particularly having regard to the widespread hostility towards individuals perceived as informers. In addition, there is an unfortunately high level of distrust of Police in particular, and Officers of the State in general. This heightens the need for members of the public to be assured that adequate safeguards are being implemented to secure their protection.

(ii). Legal Aid

9.6 Similarly, consideration might have to be given to the provision of legal aid to a whistleblower who may require such assistance in pursuing remedies.

9.7 In recognition of the importance of witness protection and legal aid in whistleblower schemes, the OAS Whistleblower Bill³, prepared for adoption in Member States, specifically grants the protected witness a right to counsel.⁴

9.8 Certain adjustments may need to be made to the existing witness protection and legal aid schemes, in order to support the introduction of the proposed whistleblower legislation. This will no doubt also require some financial considerations.

Public Invitation to Participate

The public is invited to submit comments and proposals on the issues that have been highlighted in this Paper. Specifically, comments are invited with respect to the following:

1. The disclosures which should qualify for protection under the proposed legislation. (see: paragraphs 1.9 – 3.9) This will include:
 - (i). the types of information which can be disclosed;
 - (ii). the persons or bodies to whom disclosures can be made; and
 - (iii). the types of information which will not qualify for protection. (see: paragraphs 4 – 4.8)
2. The coverage of the proposed legislation. This will include:
 - (i). the categories of persons who should be entitled to make disclosures under the proposed legislation; that is, whether this category should be limited to employees or extended to include other persons. (see: paragraphs 4.9 – 5.11)
 - (ii). the sector/ sectors to which it will apply; that is, whether it will apply to the public sector alone; or to both the public and private sectors. (see: paragraphs 6 – 6.4)
3. The mechanisms which will be responsible for dealing with disclosures under the proposed legislation. This includes: (see: paragraph 6.5 – 8.2)
 - (i). to whom disclosures can be made; and
 - (ii). how disclosures are to be dealt with.
4. The protection/remedies to be made available to whistleblowers. (see: paragraphs 8.3 – 9.2)
5. Whether certain contractual duties of confidentiality should be void. (see: paragraph 9.3)

Appendix

All comments on this Paper must be forwarded by
.... **2008, to :**

Ministry of Justice
2 Oxford Road
Kingston 5

Or by email to:
moj@gov.jm

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