

A BILL
ENTITLED

AN ACT to Encourage and Facilitate the Making by employees of specified disclosures of improper conduct in the public interest; to regulate the receiving, investigating or otherwise dealing with disclosures of improper conduct; to protect employees who make specified disclosures from being subjected to occupational detriment; and for related matters.

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BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, and by the authority of the same, as follows:—

1. This Act may be cited as the Protected Disclosures Act, 2010, and shall come into operation on a day to be appointed by the Minister by notice published in the *Gazette*.

Short title
and com-
mencement.

Interpretation. 2. In this Act, unless the context otherwise requires—

”appointed day” means the date of commencement of this Act;

”designated officer” means the person designated under section 11(3) as the person to whom disclosure may be made;

”disclosure” means disclosure of information made by an employee, regarding any conduct of an employer of that employee or another employee of the employer, where the employee has a reasonable belief that the information disclosed shows or tends to show that improper conduct has occurred, is occurring or is likely to occur, and “disclose” shall be construed similarly;

”employee” means—

(a) any person who—

(i) works or has worked for another person;
and

(ii) receives, received, or is entitled to receive, any remuneration for work done;

(b) any person who in any manner assists or has assisted in the carrying on or conduct of the business of an employer, without any entitlement to receive remuneration or reward; or

(c) any person who is, or was, engaged or contracted under a contract for services to do work for another person, or any agent of the person;

”employer” means any person who—

(a) employs or has employed another person to carry out work or provide services and who remunerates, or expressly or tacitly undertakes to remunerate, that other person for the work carried out or services provided; or

(b) permits or has permitted another person to assist in any manner in the carrying on or conduct of the

business of that person, without any obligation to provide remuneration or reward to that other person;

“improper conduct” means any—

- (a) criminal offence;
- (b) failure to carry out a legal obligation;
- (c) conduct that is likely to result in a miscarriage of justice;
- (d) conduct that is likely to threaten the health or safety of a person;
- (e) conduct that is likely to threaten or damage the environment;
- (f) conduct that shows gross mismanagement, impropriety or misconduct;
- (g) any act of reprisal against or victimization of an employee;
- (h) conduct that tends to show unfair discrimination on the basis of gender, race, place of origin, social class, colour, religion or political opinion; or
- (i) the wilful concealment of any act described in paragraphs (a) to (h);

“investigation” means the carrying out of an inquiry under this Act in respect of a disclosure;

“occupational detriment” means any act or omission that results in an employee, in relation to his employment, being—

- (a) subject to disciplinary action;
- (b) dismissed, suspended, or demoted;
- (c) harassed, intimidated or victimized;
- (d) transferred against his will;

- (e) refused transfer or promotion;
- (f) subject to a term or condition of employment or retirement from employment, that is altered to his disadvantage;
- (g) refused a reference or being provided with an adverse reference;
- (h) denied appointment to any employment, profession or office;
- (i) threatened with any of the actions specified in paragraphs (a) to (h); or
- (j) otherwise adversely affected in respect of his employment, profession or office, including employment opportunities and job security;

Schedule.

“prescribed person” means any person specified in the Schedule for receiving, investigating or otherwise dealing with disclosures under this Act;

“protected disclosure” means a disclosure made by an employee to—

- (a) an employer in accordance with section 5,
- (b) a Minister in accordance with section 6;
- (c) a prescribed person in accordance with section 7;
- (d) a person other than a person mentioned in section 5, 6, or 7, in accordance with section 8;
- (e) a person other than a person mentioned in section 5, 6, 7 or 8, in accordance with section 9;
- (f) an attorney-at-law in accordance with section 10; and
- (g) a Minister or the Prime Minister in accordance with section 11;

“public body” means—

- (a) a Ministry, department, Executive Agency or other agency of Government;
- (b) a statutory body or authority or any Government company, that is to say, a company registered under the Companies Act, being a company in which the Government or an agency of the Government, by the holding of shares, is in a position to direct the policy of that company.

3. The objects of this Act are to—

Objects of Act.

- (a) facilitate and encourage the making, in a responsible manner, of disclosures of improper conduct, in the public interest;
- (b) regulate the receiving, investigating or otherwise dealing with disclosures of improper conduct; and
- (c) protect employees who make specified disclosures from being subjected to occupational detriment.

4.—(1) This Act applies to any disclosure made after the appointed day, notwithstanding that the conduct to which the disclosure relates may have occurred before the appointed day.

Scope of Act.

(2) A disclosure of information is not a protected disclosure if the employee making the disclosure commits an offence by making it.

(3) For greater certainty, it is declared that nothing in this Act authorizes the disclosure of information that is protected by legal professional privilege.

PART II. *Disclosures Qualifying for Protection*
Protected Disclosures made Internally

5.—(1) Subject to section 11, a disclosure made by an employee to an employer qualifies for protection if the disclosure is—

Disclosure to employer.

- (a) made in good faith; and

(b) made—

- (i) substantially in accordance with a procedure referred to in subsection (2) for the making of disclosures, where such a procedure is in operation; or
- (ii) to the employer, where no procedure for the making of disclosures is in operation.

(2) Where an employee makes a disclosure in good faith, in accordance with the procedure prescribed or authorized by his employer, to a person (other than his employer), the employee is deemed to be making the disclosure to his employer.

Disclosure to
Minister.

6. Subject to section 11, a disclosure made by an employee to a Minister qualifies for protection if—

- (a) the disclosure is made, in good faith; and
- (b) his employer is—
 - (i) a person appointed under any law by the Minister; or
 - (ii) a public body any of whose members is appointed by the Minister.

Protected Disclosures Made Externally

Disclosure to
prescribed
person.

7.—(1) Subject to section 11, a disclosure made by an employee qualifies for protection where the employee—

- (a) makes the disclosure in good faith to the prescribed person; and
- (b) reasonably believes that the improper conduct falls within the areas of responsibility of the prescribed person.

Schedule.

(2) The Minister may, by order, amend the Schedule—

- (a) in relation to the persons therein prescribed; or
- (b) by prescribing or modifying the categories of prescribed persons to whom disclosures shall be directed,

and the order may specify the subject matter in relation to which a person is so prescribed.

8.—(1) Subject to section 11, a disclosure made by an employee to a person other than in accordance with section 5, 6 or 7 qualifies for protection if—

Other
external
disclosures

- (a) the employee—
 - (i) makes the disclosure in good faith; and
 - (ii) except where the reward or gain is in accordance with any law, does not make the disclosure for personal reward or gain;
- (b) at the time of the disclosure the employee reasonably believed that he would be subject to an occupational detriment if he made a disclosure to his employer in accordance with section 5;
- (c) there is no prescribed person in relation to the relevant improper conduct, and the employee making the disclosure has reason to believe that it is likely that evidence relating to the improper conduct will be concealed or destroyed if he makes the disclosure to his employer;
- (d) the employee making the disclosure had made a disclosure on a prior occasion to his employer or to a prescribed person in respect of which no action was taken within thirty days; and
- (e) it is reasonable, in all the circumstances of the case, to make the disclosure.

(2) In determining for the purposes of subsection (1), whether it is reasonable, in all the circumstances of the case, for the employee to make the disclosure, regard shall be had to—

- (a) the identity of the person to whom the disclosure is made;
- (b) the seriousness of the improper conduct disclosed;
- (c) whether the improper conduct is continuing or is likely to occur in the future;
- (d) whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;

- (e) in the case of any disclosure under subsection (1) (d), any action which the employer or the prescribed person has taken, or might reasonably be expected to have taken, as a result of the previous disclosure;
- (f) in the case of a subsequent disclosure to an employer, whether in making the disclosure to the employer, the employee complied with any procedure which has been prescribed in relation to or authorized by the employer; and
- (g) the public interest.

(3) For the purposes of subsection (2)(f), a subsequent disclosure may be regarded as a disclosure of substantially the same information referred to in subsection (1) (d) where the subsequent disclosure extends to information concerning an action taken or not taken by any person as a result of the previous disclosure.

Disclosure of
exceptionally
serious
misconduct.

9.—(1) Subject to section 11, a disclosure made by an employee to a person, other than in accordance with section 5, 6, 7 or 8, qualifies for protection if—

- (a) the employee—
 - (i) makes the disclosure in good faith;
 - (ii) except where the reward or gain is in accordance with any law, does not make the disclosure for personal reward or gain;
- (b) the improper conduct is of an exceptionally serious nature; and
- (c) it is reasonable in all the circumstances of the case, for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(c) whether it is reasonable, in all the circumstances of the case, for the employee to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

Disclosure to Attorney-at-Law

10. A disclosure made by an employee to an attorney-at-law with the object of obtaining, or during the process of obtaining, legal advice is a protected disclosure. Disclosure to attorney-at-law.

Certain Procedures for Disclosure

11.—(1) Where an employee seeks to make a disclosure that involves a subject matter that would prejudice the national security, defence or international relations of Jamaica, the disclosure shall be made to either the Minister with portfolio responsibility for that subject matter or the Prime Minister or to both. Special procedure for matters relating to national security, etc.

(2) The Prime Minister and each Minister referred to in subsection (1) shall establish and cause to be operated procedures for receiving, investigating or otherwise dealing with disclosures made under subsection (1).

12.—(1) Every employer shall establish and operate an internal procedure for receiving, investigating and otherwise dealing with disclosures. Procedures for making disclosures internally.

(2) Subject to section 9, an employee who seeks to make a disclosure shall utilize the internal procedure in the first instance.

(3) The internal procedure shall identify at least one person (in this Act referred to as a designated officer) to whom disclosures may be made.

(4) Designated officers shall be conferred with the requisite authority to receive, investigate or otherwise deal with any disclosure made.

(5) Where an employee makes a disclosure under this section, every designated officer shall keep the employee updated on any progress in the investigation of the disclosure.

(6) Information on the internal procedure for making a disclosure shall be circulated among employees on a regular basis in order that employees may be made aware of the procedure.

13.—(1) Where an employee makes an internal disclosure in accordance with section 12 and steps to deal with the improper conduct alleged have not been taken by the employer or the designated officer Procedure for making disclosures externally.

within thirty days, the employee may make an external disclosure in accordance with section 7 or 8.

(2) In this section, “employer” includes any person appointed under any enactment by a Minister or a public body, any of whose members are appointed by a Minister.

Immunity

Immunity from civil and criminal proceedings.

14. A person who makes a protected disclosure, or receives, investigates or otherwise deals with a protected disclosure, shall not be liable in any civil or criminal proceeding or to any disciplinary proceeding by reason of having made, received, investigated or otherwise dealt with that disclosure in accordance with this Act.

PART III. Provisions Against Occupational Detriment

Prohibition against occupational detriment.

15.—(1) An employee shall not be subjected to any occupational detriment on the basis that the employee seeks to make, has made, or intends to make, a protected disclosure.

(2) An employee who is dismissed as a consequence of seeking to make, making or intending to make a protected disclosure shall be treated as being unjustifiably dismissed.

Presumption of occupational detriment resulting from disclosure.

16. Where an employee suffers occupational detriment at or about the same time that he makes a protected disclosure, the occupational detriment shall be presumed to be a consequence of the protected disclosure, unless the employer shows that the act that constitutes the occupational detriment is otherwise justified.

PART IV. Receiving, Investigating and Otherwise Dealing With Disclosures Internally

Duty to receive and carry out investigations into disclosures.

17.—(1) Every employer or other person to whom an employee is entitled to make a disclosure in accordance with this Act shall receive the disclosure made by the employee and take appropriate steps to investigate or ensure that the disclosure is investigated.

(2) Subject to the provisions of this Act, any person who receives a disclosure pursuant to subsection (1) shall—

- (a) receive, record and take steps to investigate the improper conduct disclosed, including appointing or referring the matter

to another person to carry out investigations into the disclosure on his behalf, where necessary;

- (b) commence investigations forthwith and issue periodic updates on the investigation to the employee making the disclosure, at intervals of thirty days;
- (c) ensure that investigations are carried out fairly;
- (d) review the results of investigations into disclosures and report the findings to the employee who made the disclosure and to any body appearing to the person receiving the disclosure to be appropriate (having regard to the relevant improper conduct and the area of responsibility of that body);
- (e) make recommendations regarding the measures to be taken to correct the improper conduct;
- (f) take steps to remedy the improper conduct, provide redress where appropriate, take disciplinary action where appropriate, and reduce the opportunity for recurrence of the conduct;
- (g) ensure that the rights of the employee making the disclosure, any witness and any person alleged to be at fault are protected; and
- (h) receive, record, review, investigate and otherwise deal with complaints made in respect of reprisals as a result of a disclosure made under this Act.

18.—(1) An employer or other person to whom a disclosure is made in accordance with this Act may refuse to deal with the disclosure, or commence an investigation into any improper conduct alleged in the disclosure or cease an investigation, in the circumstances set out in subsection (2).

Right to
refuse.

(2) The circumstances are—

- (a) the subject-matter of the disclosure or the related investigation has been adequately dealt with, or could more appropriately be dealt with by another person;

- (b) the subject-matter of the disclosure is frivolous or not sufficiently important to warrant an investigation; and
- (c) the circumstances surrounding the subject matter of the disclosure have changed (whether by reason of a change in the circumstances of the employee or the employer, insufficiency of evidence or otherwise) so that it renders the investigation unnecessary.

(3) Where an employer decides to refuse to carry out an investigation the employer shall provide reasons in writing to the employee within fifteen days of the decision.

Provisions
for non-
disclosure
void.

19. Any provision of an agreement shall be void and of no effect if the provision precludes an employee from making a protected disclosure or purports to require an employee to—

- (a) agree to not make a disclosure under this Act during or after his period of employment;
- (b) refrain from instituting any proceedings pursuant to this Act; or
- (c) withdraw or abandon any disclosure made under this Act, or proceedings instituted pursuant to this Act.

PART V. Miscellaneous

Remedies for
occupational
detriment.

20. An employee who, having made a protected disclosure, believes that he has been subjected to, is being subjected to or is likely to be subjected to occupational detriment may apply to the Supreme Court on a claim against the employer for any appropriate relief or pursue any other process allowed or prescribed by law, including one or more of the following—

- (a) if the claim is for unjustifiable dismissal, to be re-instated to any position he may have held prior to being subjected to the occupational detriment;
- (b) an injunction;
- (c) a declaration;
- (d) specific performance;

- (e) damages;
- (f) such other relief as may be just.

21.—(1) A person commits an offence if he—

Offences and penalties.

- (a) discourages, prevents, restrains or restricts any employee from making a protected disclosure;
- (b) intimidates any employee who has made or intends to make a protected disclosure;
- (c) induces any person by threats, promises or otherwise to contravene this Act; or
- (d) aids, abets, procures or conspires with any other person to contravene this Act.

(2) A person who commits an offence under subsection (1) is liable upon—

- (a) summary conviction in a Resident Magistrate's Court to a fine not exceeding two million dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment; or
- (b) conviction on indictment in a Circuit Court to a fine or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

22.—(1) Every person receiving, investigating or otherwise dealing with a disclosure under this Act shall regard and deal with as secret and confidential—

Obligation for secrecy and confidentiality.

- (a) the identity of the employee making the disclosure and any disclosure made; and
- (b) any statement given, or document, information or thing provided, to the person in the carrying out of an investigation,

except that any statement given, or document, information or thing provided, given in furtherance of an investigation or any legal or disciplinary proceedings shall not be regarded as being inconsistent with the obligation for secrecy and confidentiality.

(2) A person who contravenes subsection (1) commits an offence and is liable upon summary conviction in a Resident Magistrate's Court to a fine not exceeding two million dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

Regulations.

23.—(1) The Minister may make regulations, subject to affirmative resolution, for the better carrying out of the purposes of this Act.

(2) Notwithstanding section 29 of the Interpretation Act, regulations made under subsection (1) may provide for the imposition of penalties on summary conviction in a Resident Magistrate's Court of a fine not exceeding five hundred thousand dollars or imprisonment for a term not exceeding six months, or of both such fine and imprisonment.

Minister may amend monetary penalties.

24. The Minister may, by order subject to affirmative resolution, amend the monetary penalties specified in this Act.

Review of Act by parliamentary committee.

25.—(1) This Act shall be reviewed, from time to time, by a committee of both Houses of Parliament appointed for that purpose.

(2) The first such review shall be conducted not later than three years after the appointed day.

Act binds the Crown.

26. This Act binds the Crown.

SCHEDULE

(Sections 2 and 7(2))

Prescribed Persons to Whom Disclosures May be Made

1. Auditor-General
2. Bank of Jamaica
3. Bureau of Standards
4. Children's Advocate
5. Commission for the Prevention of Corruption
6. Commissioner of Police
7. Contractor-General
8. Director of Public Prosecutions
9. Fair Trading Commission
10. Financial Services Commission
11. Independent Commission of Investigations
12. Inland Revenue Department
13. National Environment and Planning Agency
14. Office of Utilities Regulation
15. Political Ombudsman
16. Public Defender

MEMORANDUM OF OBJECTS AND REASONS

The Government has decided to introduce legislation in Jamaica to facilitate the disclosure of information regarding corrupt practices and other forms of wrongdoing in the workplace and to afford protection to persons making such disclosures. This “whistleblower legislation” is part of an overall initiative by Government to eradicate corruption, promote accountability and transparency, and reduce opportunities for improper conduct in the workplace.

The Bill contemplates as a disclosure any revelation by an employee of information regarding any conduct of the employer or of a fellow employee, which that employee reasonably believes constitutes improper conduct. “Improper conduct” is defined as, among other things—

- (a) a criminal offence;
- (b) conduct likely to result in a miscarriage of justice;
- (c) conduct that is likely to threaten the health or safety of any person;
- (d) conduct that is likely to threaten the environment;
- (e) gross mismanagement;
- (f) any act of reprisal on the part of the employer or another employee; and
- (g) unfair discrimination on the basis of gender, colour, religion or political opinion.

The Bill sets out internal (namely, within the workplace) reporting procedures and external (namely, outside the workplace) avenues for employees to make protected disclosures, namely disclosures made to—

- (a) an employer;
- (b) the Minister with portfolio responsibility for the employing body;
- (c) a prescribed person; and
- (d) broader category of persons in circumstances where—
 - (i) established reporting procedures have not been available or helpful; or
 - (ii) the improper conduct is of an exceptionally serious nature.

One or more of these avenues may be open to the employee seeking to make a protected disclosure depending on the specific circumstances of his case. The prescribed persons to whom disclosures may be made include the Director of Public Prosecutions, the Public Defender and the Contractor-General.

In order that the proposed legislation may achieve its purpose, the Bill prescribes certain duties to be carried out by the employer, including the duty to receive and carry out an investigation into any disclosures made and to maintain secrecy and confidentiality of any information received, including the identity of any witnesses and any person alleged to be at fault. At all steps in the process of making a disclosure, the employer has a duty to keep the disclosing employee informed as to the status of the investigations.

As a further protection to employees, the Bill provides for immunity from civil or criminal proceedings for persons making protected disclosures in accordance with the Act.

The Bill makes it an offence for any person to intimidate an employee who makes or intends to make a disclosure. A person who contravenes the Act commits an offence and is liable to be convicted either in a Resident Magistrate's Court or in the Supreme Court.

The Bill also provides that any agreement that would require an employee to agree not to make a disclosure under this Bill or to refrain from instituting proceedings under this Bill is void and of no effect.

DOROTHY C. LIGHTBOURNE, C.D., Q.C.
Minister of Justice

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AN ACT to Encourage and Facilitate the Making by employees of specified disclosures of improper conduct in the public interest; to regulate the receiving, investigating or otherwise dealing with disclosures of improper conduct; to protect employees who make specified disclosures from being subjected to occupational detriment; and for related matters.

As introduced by the Honourable Minister of Justice.

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