Jamaica's *Protected Disclosures Bill, 2010*

A PRELIMINARY ANALYSIS

WITH

RECOMMENDATIONS FOR IMPROVEMENT

Submitted by

Venkatesh Nayak and Ms. Vrinda Choraria

Commonwealth Human Rights Initiative (CHRI)
B-117, First Floor, Sarvodaya Enclave,
New Delhi – 110 017
Tel: 011- 43180200 / 2686 4678
Fax: 011-2686 4688
Email: info@humanrightsinitiative.org
majadhun@vsnl.com
vrinda@humanrightsintiiative.org
venkatesh@humanrightsinitiative.org

July 2010

Jamaica's *Protected Disclosures Bill, 2010*

A Preliminary Analysis With Recommendations for Improvement

Introduction

Jamaica is debating the *Protected Disclosures Bill, 2010* (the Bill) that aims to protect employees who blow the whistle on wrongdoing that has occurred or is likely to occur within the public bodies that have employed them. Commonwealth Human Rights Initiative welcomes this initiative as the Bill is aimed at improving accountability mechanisms within Government. A preliminary analysis of the Bill is given below with recommendations for improving certain provisions in order to make the law more effective in dealing with protected disclosures.[1]

Analysis of the Bill and Recommendations for Improvement

Interpretation

1. **Section 2** of the Bill defines what actions or omissions will be considered as "improper conduct". While the current list of such activities is comprehensive it does not include disclosure of the commission of human rights violations as a category entitled for protection. It is necessary to expand the scope of the protected disclosures to include reporting on acts of custodial or other kinds of violence that may be committed by law enforcement agencies and security forces. ***Section 2 may be amended to include "human rights violation" as another category of improper conduct.***

2. The language of **Section 2** in the Bill must be improved considerably. Under the definition of the term "disclosure" the Bill explains that it includes disclosure that tends to show that "improper conduct" "has occurred", "is occurring" or "is likely to occur". Under the definition of the term "improper conduct" specific actions are mentioned. However they are not mentioned in a uniform pattern. For example, 'criminal offence' [sub-section (a)] is merely mentioned as such implying that the disclosure could be about a criminal offence that "has occurred", "is occurring" or "is likely to occur" when read with the definition of "disclosure". However sub-section (c) mentions only "conduct that is likely to result in a miscarriage of justice". A strict reading of this clause implies that conduct that 'has actually resulted' or 'is resulting' in the miscarriage of justice will not be considered as "improper conduct". While the definitions of "disclosure" and "improper conduct" must be read together always, there may be cases where employers may argue that the intention of Parliament was to exclude these two categories of conduct and define only such conduct that is 'likely' to result in the miscarriage of justice as "improper conduct". The argument of special law versus

[1] We are grateful to Dr. Carolyn Gomes of Jamaicans for Justice for sharing the text of the Bill with us.

general law (*generalia specialibus non derogant)* may be used to defeat the purpose of sub-section (a). ***In order to avoid this confusion it is recommended that the reference to the temporal dimensions be removed from the definition of the term "disclosure". Instead the temporal dimensions may be included in the definition of ""improper conduct". Eg. Sub-section (a) under the definition of "improper conduct" may be replaced with the following: "that a criminal offence has been committed, is being committed or is likely to be committed". Similarly sub-section (c) may be replaced with the following: "conduct that has resulted, is resulting or is likely to result in a miscarriage of justice." All sub-sections under the term "improper conduct", where appropriate, may be amended in this manner.***[2]

3. In clause (d) of **Section 2,** of the Bill "improper conduct" is said to include "conduct that is likely to threaten the health and safety of a person". While this is a welcome provision its scope must not be restricted to an individual only. Protected disclosures must be allowed when it is about conduct that threatens the health and safety of large segments of people or the entire community. ***Clause (d) may be amended to include a reference to 'the community' as well.***

4. **Section 2** of the Bill defines a **"public body"** to indicate which agencies are covered. The current definition restricts the coverage of the law to the executive sphere of government and public sector companies. The legislature and the judiciary are not covered by this Bill. This is not in tune with international best practice. In the UK the entire public sector with the exception of the armed forces and the intelligence services are covered by the *Public Interest Disclosure Act, 1998*. Their law extends to the private and the voluntary sector also. Improper conduct of the kind described in this Bill may occur in a range of agencies performing public functions or using public funds. Such bodies may also be brought under the ambit of this Bill. ***The Bill may be amended to include the 'judiciary' and 'Parliament' and also any body performing public functions or utilising public funds within the definition of 'public body'***.

Objects of the Act

5. **Section 3** describes the objects of the Bill. Its objective is to shield employees who make protected disclosures from being subjected to occupational detriment. This alone is not enough as the whistleblower may be subjected to other kinds of harassment. A good whistleblower law must create systems and mechanisms by which the safety of the person and the property of the whistleblower are protected and law enforcement agencies have a protective role to play here. The Bill also does not provide for a scheme of compensating the whistleblower for damages caused other than permitting him/her to move the Supreme Court for damages. ***Section 3 may be amended to include the following objectives: "providing protection to the safety of the person and the***

[2] Section 43B under Part IVA of the *Public Interest Disclosure Act, 1998* of the United Kingdom can serve as a guide in this exercise: http://www.opsi.gov.uk/acts/acts1998/ukpga_19980023_en_1#l1g1 Accessed on 26 July, 2010.

property of the person making the protected disclosure" and "compensating the person making protected disclosure for damages suffered". (Also see para #14 below.)

Scope of the Act

6. **Section 4(2)** of the Bill states that a disclosure is not protected under the Bill if the person commits an offence by disclosing this information. This can be problematic if the offence is cross-referenced to the *Official Secrets Act*. Although the *Official Secrets Act of 1911* is an anti-espionage law it may also criminalise unauthorised possession of classified information. It is not uncommon for employers to hide documentary evidence of wrongdoing by stamping the document 'secret' or 'confidential' with access being restricted to a few officials only. If an official who does not have authorisation happens to obtain classified documents that contain information about 'improper conduct' and makes a disclosure under this Bill such disclosure must receive the benefit of protection in the larger public interest. ***Unless the information about 'improper conduct' has been obtained through spying or some other similar means established beyond reasonable doubt, the disclosure of such information under this Bill must still be protected in the larger public interest. Section 4(2) may be amended to this effect.***

Disclosure to the Minister

7. **Section 6** of the Bill, lays down the conditions under which a disclosure made to a Minister is a protected disclosure. According to this Section, the person making the disclosure should be employed by a person appointed under any law by the Minister or he or she should be employed by a public body whose members are appointed by the Minister. The scope of this section can be expanded to include all offices that fall within the jurisdiction of the Minister. The advantage of expanding the scope of this section is that employees of any office under this Minister who do not feel confident of blowing the whistle internally as they fear their employer may be permitted to do so within the governmental set up without having to adopt other permitted methods. ***Section 6 may be amended to include a new sub-section (iii) under which any person can make a disclosure to the minister if he or she is employed in any public body falling within the jurisdiction of the Minister.***

Other External Sources

8. **Section 8** of the Bill, lays down the conditions that need to be met for a disclosure to get lawful protection if made externally. However the phraseology of **Section 8** is vague. It does not make it clear as to whether the whistleblower is required to satisfy any one or all of the conditions mentioned under clauses (a) to (e) of **sub-section (1)**. According to the UK's *Public Interest Disclosure Act, 1998* it is enough if the whistleblower meets any one of the different conditions laid down for making external disclosures. ***Section 8 (1)***

may be amended to indicate that it is adequate if the person making the protected disclosure satisfies any one of the conditions mentioned in clauses (a) to (c).

9. **Section 8(2)** of the Bill lists out the circumstances that must be considered for treating a disclosure made to an external source as protected disclosure. Clause (d) says that the determination of reasonableness of the disclosure made must be guided by an important factor – whether the disclosure was made in breach of a duty of confidentiality of the employer towards any other person. The current wording of this clause implies that if a duty of confidentiality of the employer to a third party is breached then it may not be treated as protected disclosure. International best practice requires that the effect of the breach may be assessed in terms of the damage caused to the third party and how much of it may be described as being 'unjustified'. This is an important criterion to make an assessment of the reasonableness of the disclosure. ***Section 8(2) may be amended to provide guidance for assessing the impact of the breach of the employer's duty of confidence towards a third party caused as a result of the disclosure made by the whistleblower.***

10. **Section 9** of the Bill protects the external disclosure of information about 'improper conduct' that is of an exceptionally serious nature. However there is no guidance about what kinds of actions would belong to this category. ***Although it may not be possible to identify all such circumstances, it is useful to provide some illustrations of 'improper conduct' that may be disclosed under Section 9.***

Special Procedure for Matters Relating to National Security

11. Under **Section 11** of the Bill 'improper conduct' relating to national security matters can be reported only to the Prime Minister or the Minister in charge of the relevant portfolio for it to be treated as protected disclosure. This compulsion is difficult to understand and justify, especially in the light of Section 9 which allows disclosure to be made to external persons if the improper conduct is of an exceptionally serious nature. 'National security' is a rubric much abused in several jurisdictions by the powers that be. Decisions on national security matters are made at these high levels. Compelling the whistleblower to confide in the same authorities about their 'improper conduct' is akin to putting him/her before a firing squad without even a summary trial. As the Bill does not provide any mechanism for ensuring the safety of the person, family and the property of the whistleblower it is important to provide other options. One such option is to permit disclosure to prescribed persons under Section 7. They may be able to ensure a measure of safety for the whistleblower. Another option would be permit disclosure to external persons if the improper conduct is of an exceptionally serious nature and it is not uncommon for national security matters to have such dimensions. ***Section 11 may be amended to recognise disclosures about 'improper conduct' in matters relating to national security made to prescribed persons under Section 7 and***

or external persons under exceptional circumstance under Section 9 as protected disclosures.

Procedures for Making Disclosures Internally

12. Section 12(2) of the Bill compels an employee to use the internal mechanism of whistle-blowing set up by his/her employer in the first instance unless the 'improper conduct' is of an exceptionally serious nature. This compulsion is not in tune with international best practice standards. Where an employee does not feel confident about using the internal procedure for fear of suffering occupational detriment or any kind of victimization by his/her employer he/she must have the option of electing to make the disclosure to a prescribed person or to any external person. If this provision is allowed to remain, Section 8(1)(b) becomes redundant as he/she will not be able to make a disclosure outside the public body even if he/she believes on reasonable grounds that he/she may suffer occupational detriment at the hands of the employer.[3] ***Section 12(2) may be deleted in order to allow an employee to make a disclosure to any person of his/her choice under Sections 6, 7 and 8.***

Compensation and Interim Relief

13. With the exception of **Section 20(e)** in the Bill, where a whistleblower may move the Supreme Court for damages suffered on account of any occupational detriment or the likelihood of such a detriment being caused there is no mention of the kind of damages will that a whistleblower may legitimately claim. Similarly there is no scope for providing any interim relief to the whistleblower. Under the *Public Interest Disclosure Act, 1998* of the UK, a whistleblower is entitled to interim relief if he/she has been sacked on account of blowing the whistle. He/she may be re-employed if it appears that he/she may win the case or the employment is deemed to continue so that he/she receives a salary. This is related to the absence of an appeals mechanism under the Bill which is discussed immediately below. ***A new provision must be included in the Bill laying down the principles for compensating the whistleblower if it is proven that the information he/she provided was not adequately protected thereby leading to some detriment. Further another new provision must be included in the Bill to provide interim relief to wronged whistleblowers until a final decision is reached in his/her case.***

Right to Refuse and the Absence of a Complaints Mechanism

14. Under the UK's *Public Interest Disclosure Act, 1998*, a whistleblower who has been subjected to occupational detriment may make a complaint against his/her employer before the Employment Tribunal. No such complaints mechanism has been provided in

[3] Section 8(1)(b) permits a whistleblower to make a disclosure to any person other than his/her employer or the Minister or a prescribed person if the employee believes that he/she might be subjected to occupational detriment if he/she made the disclosure to his/her employer.

the Bill. Instead the whistleblower is required to approach the Supreme Court for redress of any grievance regards the handling of the protected disclosure made by him/her. Approaching the apex Court of the land must always be the last resort. Not all Jamaicans may be able to afford the expenses involved in such time-consuming litigation. Therefore it is better to create a complaints mechanism where an existing tribunal may adjudicate over such matters quickly without burdening the pocket of the whistleblower. **Section 18** of the Bill empowers the employer to refuse to investigate a complaint of 'improper conduct. However there is no mechanism whereby a whistleblower can contest this decision. The absence of a complaints body weakens the Bill considerably. ***The Bill may be amended to provide for a procedure of filing and disposing complaints before an appropriate tribunal in Jamaica where a whistleblower feels that he/she has been subject to occupational detriment or that his/her complaint regarding 'improper conduct' has not been properly investigated into by his/her employer.***

15. **Section 18(2)(b)** of the Bill empowers the employer to refuse to investigate a matter disclosed by the whistleblower if he/she considers it to be frivolous. The term 'frivolous' if left unillustrated remains vague and is susceptible to abuse by the employer. ***Section 18 may be amended to include illustrations as to what criteria may be used to determine if a matter reported by the whistleblower is frivolous or not.***

16. **Section 18(2)(c)** of the Bill empowers the employer to refuse to deal with a disclosure if the circumstances surrounding the subject matter of the disclosure have changed. In the absence of illustrations as to what may be treated as changed circumstances warranting a refusal to deal with the whistleblower's disclosure this provision may be misused. The Bill does not clearly state whether retired employees of public bodies are also entitled to make protected disclosures and whether the retirement of the person making the protected disclosure will be treated as a change in the circumstances of the case. Employees may choose to blow the whistle on 'improper conduct' within their public body soon after retirement in order to escape occupational detriment at the hands of their employer. The Bill must provide for the protection of such whistleblowers also. The *Whistleblower Protection Act, 1989*, of the USA extends protection to former employees who blow the whistle on improper conduct.[4] ***The Bill may be amended to permit whistle-blowing by former employees of public bodies.***

In Conclusion

Jamaica has the unique opportunity of crafting a good whistleblower law in order to improve accountability within the public administration. Such a law must be based on international best practices and go the whole length of the way required to protect whistleblowers. If a weak law is adopted it will not encourage whistleblowers to report on improper conduct. It is important to get a strong law and lay down a foolproof mechanism to protect whistleblowers.

[4] Section 1213, *Whistleblower Protection Act of 1989*: http://thomas.loc.gov/cgi-bin/query/F?c101:1:./temp/~c101MASavA:e0: Accessed on 26 July, 2010