

## **WHISTLEBLOWER GREEN PAPER**

### **Handout For Public Consultations**

**The Objective:** The Government of Jamaica is in search of a **MODEL** for the country.

**A Definition:** Whistleblowing involves a person making a disclosure about an act of wrongdoing or procedural breach which occurs within an organisation.

#### **Expected Benefits:**

- It provides protection for the person who report specified wrongdoings;
- It sets out clear procedures for tackling whistleblowing;
- It allows organisations to take remedial action to ensure greater operational control

The enactment of whistleblower legislation is usually one of the measures employed to combat corruption. As such, it increases accountability and transparency.

Whistleblower legislation has two critical features:-

- It sets out **clear procedures** for tackling whistleblowing; and
- It **offers protection** for whistleblowers

**Background:** Jamaica is a signatory to the Organisation of American States (OSA) Inter-American Convention Against Corruption and the UN Convention Against Corruption. These conventions encourage member States to enact Whistleblower legislation.

The OAS Convention requires signatory nations to consider measures “to maintain and strengthen systems for protecting public servants and private citizens who, in good faith, report acts of corruption.”

### **SOME FEATURES**

The provisions in such a must carry three criteria:

- a) The disclosure must be made in good faith i.e. **not for personal gains or for malicious intent**
- b) Only certain types of information can qualify as **DISCLOSURE** so as to warrant protection for the person under the Act.
- c) The disclosure must be made to the specified person/bodies **AND** in the specified manner.

## WHO MAY REPORT WRONDOING?

The general criticism of Whistleblower legislation as it exists in a number of jurisdictions is that too much focus is placed on employees, thereby excluding a wide range of people within the society, among them:-

- Consumers
- Students
- Retirees
- The unemployed
- Prisoners
- Physically handicapped persons not in employment

In light of the modern practice of out-sourcing the likelihood of including independent contractors is also to be considered. This is relevant given the trend across the various legislative models to have both internal and external mechanisms for making disclosure.

## WHAT CAN BE DISCLOSED

Disclosure may seek to cover the areas concerning:

- \* A criminal offence committed, is being committed, or likely to be committed;
- \* Specific danger to life;
- \* The health or safety of persons;
- \* Public funds or public resources;
- \* The environment;
- \* Failure to comply with a legal obligation

## SOME LEGISLATIVE APPROACHES

Whistleblower legislation can be challenging, as illustrated in the extracts drawn from several jurisdictions.

**The United Kingdom:** 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. This Act also covers the Public, Private and Voluntary sectors.

**South Africa:** The South African Protected Disclosures Act, 2000, also provides for a “general protected disclosures” which can be made by any person, in certain circumstances.

Section 6 states its first objective 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.*”

**Canada:** Section 16 of the Canadian Public Servants Disclosure Protection Act, 2005, 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.

**Australia:** The Tasmanian Public Interest Disclosure Act, 2002, distinguishes between

- Corrupt Conduct
- Detrimental Action

Queensland’s Whistleblower Protection Act, 1994, provides that disclosures can be made by public officers, in the first instant and in specific cases, by any person.

## **THE AREAS FOR DISCUSSION AND RECOMMENDATION**

1. Which disclosures should qualify for protection?
  - The types of information to be disclosed;
  - The persons/bodies to whom disclosures can be made;
  - The types of information which would not qualify for protection.
  
2. The coverage of the proposed legislation
  - Should the persons entitled to make disclosures be limited to employees only, or extended to other persons?
  - Should the law apply to the Public Sector only? Or should the Private Sector be included?
  
3. The mechanisms for dealing with disclosures
  - To whom can disclosures can be made?
  - How are disclosures to be dealt with?
  
4. What protection/remedies are to be made available to whistleblowers?

5. Whether the practice of barring the disclosure of information as generally stipulated in employment contracts should be discontinued, in the interest of the proposed Whistleblower Legislation

Two additional areas must be considered:

- a) The provision of Legal Aid service for the whistleblower; and
- b) Witness Protection service