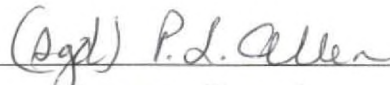


JAMAICA

No. 3 – 2011

I assent,

[L.S.]


Governor-General

08 MAR 2011

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.

[The date notified by the Minister
bringing the Act into operation]

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, 2011, 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.

PART I. *Preliminary*

- Interpretation.* 2. In this Act, unless the context otherwise requires—
- “appointed day” means the date of commencement of this Act;
 - “designated authority” means the individual or entity so designated under section 21;
 - “designated officer” means the person designated under section 13(3) as the person to whom disclosures 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 in the carrying out of any activity that involves the use of public funds;
- (g) 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) wilful concealment of any act described in paragraphs (a) to (h);

“investigation” means the carrying out of an enquiry 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) 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;

First
Schedule.

“prescribed person” means any person specified in the First 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 7;
- (b) a Minister in accordance with section 8;
- (c) a prescribed person in accordance with section 9;
- (d) a person other than a person mentioned in section 7, 8 or 9, in accordance with section 10;
- (e) an attorney-at-law in accordance with section 11;
and
- (f) a Minister or the Prime Minister in accordance with section 12;

“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.

5. A disclosure shall not qualify for protection under this Act unless it is made in good faith and in the public interest.

Good faith; public interest requirement.

6. —(1) Subject to subsections (2) and (3), procedures required to be established by any person under this Act for making a disclosure shall be in writing, and shall contain as a minimum requirement, as far as is practicable, the information specified in the Second Schedule.

Procedures for disclosures.

Second Schedule.

(2) Where a disclosure is made orally, the person receiving the disclosure shall within twenty-four hours after receiving the disclosure, cause the disclosure to be reduced into writing containing the same particulars as are specified in subsection (1).

(3) Nothing in this section precludes any person required to establish procedures under this Part, from operating procedures that are established other than pursuant to this Act, but which are not inconsistent with this Act.

PART II. *Disclosures Qualifying for Protection*

Protected Disclosures made Internally

Disclosure to
employer.

7.—(1) Subject to section 12, a disclosure made by an employee to an employer qualifies for protection if the disclosure is made—

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

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

Disclosure to
Minister

8. Subject to section 12, a disclosure made by an employee to a Minister qualifies for protection if his employer is—

- (a) a person appointed under any law by the Minister; or
- (b) a public body any of whose members is appointed by the Minister.

Protected Disclosures to Prescribed Person

Disclosure to
prescribed
person.

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

- (a) makes the disclosure to a prescribed person; and

- (b) reasonably believes that the conduct disclosed falls within the areas of responsibility of the prescribed person.

(2) The Minister may, by order subject to affirmative resolution, amend the First Schedule—

First
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.

Protected Disclosures made to the Designated Authority

10.—(1) Subject to section 12, a disclosure may be made by an employee to the designated authority if it is reasonable in all the circumstances of the case, to make the disclosure and any of the following circumstances applies, namely:

Disclosure to
designated
authority.

- (a) at the time of the disclosure, the employee reasonably believed that he would be subject to an occupational detriment if he made the disclosure to his employer in accordance with section 7;
- (b) there is no prescribed person in relation to the relevant improper conduct;
- (c) 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.

(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 the matters specified in

paragraphs (a), (b), (c), (d) and (e), and paragraphs (f) and (g), where applicable—

- (a) the seriousness of the improper conduct disclosed;
- (b) whether the improper conduct is continuing or is likely to occur in the future;
- (c) whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;
- (d) whether the employee has been subjected to or threatened with injury to himself, his immediate family or his property;
- (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 to Attorney-at-Law

Disclosure to
attorney-at-
law.

11. 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.

Certain Procedures for Disclosure

12.—(1) Where an employee seeks to make a disclosure in relation to a 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).

13.—(1) Each employer and prescribed person shall establish and operate procedures for receiving, investigating and otherwise dealing with disclosures.

Procedures for making disclosures internally

(2) Subject to section 10, an employee who seeks to make a disclosure shall utilize the procedure in section 7, 8 or 9 in the first instance.

(3) The procedures 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, take steps to 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 the status of the investigation of the disclosure.

(6) Each employer shall cause information on the procedures for making a disclosure to be circulated among employees of the employer on a regular basis, in order that the employees may be made aware of the procedures.

14.—(1) Where an employee makes an internal disclosure in accordance with section 13 and steps to deal with the disclosure have not been taken by the employer or the designated officer within thirty days, the employee may make an external disclosure in accordance with section 9 or 10.

Procedure for making disclosures externally.

(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.

15.—(1) This section applies notwithstanding any duty of secrecy or confidentiality or other prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract or practice.

(2) 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.

16.—(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.

17. 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.

18.—(1) Every person to whom—

(a) an employee makes a disclosure in accordance with section 7, 8 or 9; or

(b) a disclosure is referred in accordance with section 19(4), shall

receive the disclosure and take appropriate steps in accordance with this section to investigate or cause the disclosure to be investigated.

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

- (a) receive and record the matter being disclosed;
- (b) take steps, where the person considers that an investigation should be proceeded with and that the circumstances specified in section (19)(2) do not apply, to cause the conduct disclosed to be investigated in accordance with subsection (3).

(3) Having considered that an investigation should be proceeded with, the person shall—

- (a) commence investigations forthwith and issue periodic updates on the investigation to the employee making the disclosure, at intervals of thirty days;
- (b) ensure that investigations are carried out fairly;
- (c) review the results of investigations into disclosures and report the findings to the employee who made the disclosure and to anybody 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);
- (d) make recommendations regarding the measures to be taken to correct the improper conduct;
- (e) 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;
- (f) ensure that the rights of the employee making the disclosure, any witness and any person alleged to be at fault are protected; and
- (g) receive, record, review, investigate and otherwise deal with complaints made in respect of reprisals as a result of a disclosure made under this Act.

Right to
refuse; duty
to refer.

19.—(1) An employer or other person to whom a disclosure is made in accordance with this Act, acting in good faith, may, in any of the circumstances set out in subsection (2)—

- (a) refuse to deal with the disclosure, or commence an investigation into any improper conduct alleged in the disclosure; or
- (b) cease an investigation.

(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;
- (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.

(4) Where—

- (a) the disclosure has been made to a prescribed person or Minister; and
- (b) under the provisions of this Act the prescribed person or Minister is not entitled to investigate the matter disclosed then the prescribed person or Minister to whom the disclosure was made shall forthwith refer the disclosure to such other prescribed person or Minister who, in the opinion of the first mentioned prescribed person or Minister, is so entitled.

Provisions
for non-
disclosure
void

20. 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. Oversight Functions

21.—(1) The Minister shall, by order, designate an individual or entity as the designated authority for the purposes of this Act. Oversight by authority.

(2) The designated authority shall be responsible for monitoring compliance with this Act and the provisions of the Third Schedule shall apply in relation thereto. Third Schedule.

(3) In furtherance of its functions under subsection (2) the designated authority shall—

- (a) publish such procedural guidelines regarding the making, receiving and investigation of disclosures under this Act, as it considers appropriate;
- (b) provide such assistance as may be practicable to—
 - (i) any person who seeks to make a disclosure under this Act;
 - (ii) any person who is a designated officer, employer or other person subject to the requirements of this Act;
- (c) on an ongoing basis, plan, implement and monitor public awareness programmes aimed at informing and educating employees, employers and the general public in Jamaica about the making, in a responsible manner, of protected disclosures and about the procedures for receiving and investigating such disclosures;
- (d) review from time to time the procedures required under this Act to be established by any person;
- (e) review the implementation and operation of such procedures;
- (f) make recommendations to any person arising from any review under paragraph (c) or (d);
- (g) where it considers it appropriate to do so—
 - (i) initiate 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

25.—(1) The Minister may make regulations, subject to affirmative resolution, for the better carrying out of the purposes of this Act and without limiting the generality of the foregoing, may—

- (a) prescribe procedures to be applied in the making, receiving and investigation of disclosures;
- (b) prescribe forms to be used under this Act;
- (c) prescribe fees or other charges that may be imposed for services provided;
- (d) make provision in relation to the operations of the designated authority.

(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 both such fine and imprisonment.

Minister may amend monetary penalties.

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

Review of Act by parliamentary committee

27.—(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

28. This Act binds the Crown.

Amendment of Labour Relations and Industrial Disputes Act

29. Section 2 of the Labour Relations and Industrial Disputes Act is amended—

Amendment
of Labour
Relations and
Industrial
Disputes Act.

(a) in the definition of “industrial dispute” by inserting next after paragraph (b) the following as paragraph (c)—

“(c) without limiting the effect of paragraph (a) or (b), the subjecting of any worker to an occupational detriment on the basis that the worker seeks to make or has made a protected disclosure”;

(b) by inserting next after the definition of “lock-out” the following definitions—

“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) 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;

“protected disclosure” has the meaning assigned to it under the Protected Disclosures Act.

FIRST SCHEDULE

(Sections 2 and 9(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. Electoral Commission of Jamaica
10. Fair Trading Commission
11. Financial Services Commission
12. Independent Commission of Investigations
13. Integrity Commission
14. Inland Revenue Department
15. National Environment and Planning Agency
16. Office of Utilities Regulation
17. Political Ombudsman
18. Public Defender

SECOND SCHEDULE

(Section 6)

Information to be Supplied in Disclosure

1. The full name, address and occupation of the person making the disclosure.
2. The nature of the improper conduct in respect of which the disclosure is made.
3. The name of the person alleged to have committed, to be committing or to be about to commit the improper conduct.
4. The time and place where the alleged improper conduct is taking place, took place or is likely to take place.
5. The full name, address and description of a person (if any) who witnessed the commission of the improper conduct.
6. Whether the person making the disclosure has made a disclosure of the same or of some other improper conduct on a previous occasion and if so, about whom and to whom the disclosure was made.
7. If the person is an employee making a disclosure about that person's employer or a fellow employee, whether the person making the disclosure remains in the same employment.

THIRD SCHEDULE

(Section 21)

Procedure upon Investigation by Designated Authority

Procedure in
respect of
investiga-
tions.

1.—(1) The designated authority may adopt whatever procedure the authority considers appropriate to the circumstances of a particular case and, subject to the provisions of this Act, may obtain information from such person and in such manner and make such enquiries as the authority thinks fit.

(2) Nothing in this Act shall be construed as requiring the designated authority to hold any hearing.

(3) Regulations made under this Act may prescribe the practice and procedure to be adopted at any hearing.

(4) Where, for the purposes of an investigation, a designated authority requires a person to attend before the authority, that person shall be entitled to be paid, according to the scale set out in the First Schedule to the *Witnesses' Expenses Act*, expenses incurred by him by reason of such attendance and by way of compensation for the trouble and loss of time suffered by him.

Evidence

2.—(1) Subject to the provisions of sub-paragraph (5), the designated authority may at any time require any person who, in the opinion of the designated authority, is able to give any assistance in relation to an investigation in respect

of any disclosure made pursuant to this Act, to furnish such information and produce any document or thing in connection with such investigation as may be in the possession or under the control of that person.

(2) Subject as aforesaid, the designated authority may summon before the authority and examine on oath—

- (a) any person who has made representations to the authority; or
- (b) any other person who, in the opinion of the designated authority, is able to furnish information relating to the investigation,

and such examination shall be deemed to be a judicial proceeding within the meaning of section 4 of the *Perjury Act*.

(3) For the purposes of an investigation under this Act, the designated authority shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.

(4) Any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing imposed on any person by or under the *Official Secrets Act, 1911 to 1939* of the United Kingdom (or any Act of the Parliament of Jamaica replacing the same in its application to Jamaica) or, subject to the provisions of this Act, by any other law (including a rule of law) shall not apply in relation to the disclosure of information or the production of any document or thing by that person to a designated authority for the purpose of an investigation; and accordingly, no person shall be liable to prosecution by reason only of his compliance with a requirement of the designated authority under this paragraph.

(5) No person shall, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.

3.—(1) After conducting an investigation under this Act, the designated authority shall, in writing, inform the employer concerned, and where the employer is a public body, the Minister having responsibility therefor, of the result of that investigation and make such recommendations as the authority considers necessary in respect of the matter which was investigated.

Procedure
after
investigation

(2) If any report of the designated authority reflects adversely upon any person the designated authority shall, so far as practicable, inform that person of the substance of the report.

Disciplinary action against officers. 4. If the designated authority finds, during the course of the investigation or on the conclusion thereof that there is evidence of a breach of duty or misconduct or criminal offence on the part of an officer or member of a public body, the authority shall refer the matter to the person or persons competent to take such disciplinary or other proceeding as may be appropriate against that officer or member.

Passed in the Senate this 10th day of December, 2010 with thirty-six (36) amendments.

OSWALD G. HARDING, OJ, CD, QC
President.

Passed in the House of Representatives this 1st day of February, 2011 with twelve (12) amendments.

DELROY H. CHUCK,
Speaker.

On the 11th day of February, 2011 the Senate agreed to the amendments made by the House of Representatives.

OSWALD G. HARDING, OJ, CD, QC
President.

This printed impression has been carefully compared by me with the authenticated impression of the foregoing Act, and has been found by me to be a true and correct printed copy of the said Act.

Clerk to the Houses of Parliament.