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**THE PROTECTED PUBLIC
INTEREST DISCLOSURE BILL,
2001 (DRAFT)**

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The Institute of Economic Affairs (IEA), Ghana, was founded in October 1989 as an independent, non-governmental institution dedicated to the establishment and strengthening of a market economy and a democratic, free and open society. It considers improvements in the legal, social and political institutions as necessary conditions for sustained economic growth and human development.

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**THE PROTECTED (PUBLIC INTEREST)
DISCLOSURE BILL 2001 (DRAFT)**



An Institute of Economic Affairs Publication

THE PROTECTED (PUBLIC INTEREST) DISCLOSURE BILL, 2001 (DRAFT)

MEMORANDUM

The purpose of this Bill is to provide for the manner in which individuals may in the public interest disclose information that relates to unlawful, corrupt or other illegal conduct or practices of others in the society and to ensure that the persons who make the disclosures are not subjected to victimisation.

It is recognised that criminal, corrupt and other illegal conduct in the organs of State, the private sector, and other institutions in society undermine efficiency, accountability and transparency in governance and good corporate practices. Information leading to their detection and necessary action is therefore a matter of great importance.

Corruption and other unlawful conduct in both the public and private sectors and in the society as a whole cannot be effectively combated unless there is reliable disclosure about their incidence. Such disclosure must necessarily come from persons who know the inside workings of the department, institution or organization involved; and these are invariably the employees.

An employee may be dismissed for a number of reasons. One reason may be that the employee has become aware of some illegal or irregular conduct of the employer and is considered a danger or at the least a nuisance who must be got rid of. By the provisions of this Bill, an employee can disclose specific wrong doings of his or her employer and any victimisation that he or she suffers as a result is actionable.

Although the thrust of the Bill is to regulate the subject as between employers and employees, it is realised that occasions arise where disclosure of information in dealings between persons who do not have employment or contractual relationship require protection in order that corruption can be unveiled.

An additional explanation which requires to be made in this memorandum is that the provisions of the Bill do not affect in any manner the role of informants. Security agencies can therefore continue to solicit and receive information from informants whose identity may not be disclosed.

Countries such as the United Kingdom, some states in the United States of America and South Africa, to mention a few, have legislation on this subject. In this country, where improprieties in both the public and private sectors as well as the society in general, are undeniably rife, the need for such legislation is imperative.

The Bill is divided into three Parts. Part I is on information the disclosure of which is protected; Part II is on the procedures for disclosure and related action whilst Part III deals with protection of persons who make protected disclosures and also provides for miscellaneous matters.

Clause 1 (1) sets out matters in respect of which the disclosure of information

is protected. These include disclosures, reasonably believed, by the person making the disclosures that they tend to show that a crime has been committed, is about to be committed or is likely to be committed. Others are that a person has not complied with a law or is in the process of breaking a law or likely to break a law which imposes an obligation on him or her or that the environment has been degraded, is being degraded or is likely to be degraded.

For the disclosure to be protected under the Bill, the disclosure must, among others, have been made in good faith; the disclosure must not be made for personal gain and the disclosure must be made to any one or more of a number of persons specified in clause 3 of the Bill.

The persons to whom protected disclosure can be made include the employer of the person making the disclosure; thus giving the employer an opportunity to stop or remedy the impropriety, a police officer at a police station, the Attorney-General, the Auditor-General, the Security Agencies, a member of Parliament the Serious fraud Office, the Commission on Human Rights and Administrative Justice and a chief or head or elder of the family of the person making the disclosure.

The list of persons to whom disclosure of information may be made has been tailored in order to ensure free, easy and uninhibited access by all individuals at whatever level (clause 3 (1)).

Clause 4 (1) provides that a disclosure may be made in writing or orally. This should enable persons who are illiterate or who find writing difficult to have their disclosures recorded for them in writing.

Clause 4 (2) sets out the particulars which should be contained in a disclosure. It is important that the identity of the person making the disclosure, the facts upon which the disclosure is based and the person affected by the disclosure should be specific. This should discourage vague allegations made anonymously.

Clause 5 deals with reducing disclosures made by illiterates and blind persons into writing and the need for the person who takes down the information to certify the record. Under clause 6 where a disclosure is made to any of the specified persons provided under clause 3, a record should be made of the time and place where the disclosure is made and an acknowledgement in writing of receipt of the disclosure should be given to the person making the disclosure. The writing in which the disclosure is made should be kept confidential and in safe custody. This clause also makes special provision for disclosure made to an illiterate chief or head of family to be brought to the notice of any of the other persons who have better facilities for recording the disclosure and are entitled to receive disclosures.

Under clause 7, written copies of disclosures made to any person entitled by the Bill to receive disclosures, other than the Attorney-General, should be submitted to the Attorney-General within five days of receipt of the disclosure. The time frame is considered adequate for passing on such information.

Investigation of disclosure is dealt with under clause 8. Although the clause

provides for the investigation of received disclosures by the recipient, it is realised that some of the specified persons would not have the capability to conduct such investigation and the clause therefore provides for the transfer of the disclosure to the Attorney-General or such body as the Attorney-General may direct, for investigation. In any event, since copies of all disclosures are by clause 7 to be submitted to the Attorney-General, the Attorney-General may in all cases cause investigations to be conducted.

The need to attend to the investigation with expedition is necessary, and clause 8 (3) therefore sets a time frame of sixty days for the completion of investigations.

Clause 9 provides for the making of an application to the court where in the course of investigation there is the likelihood that relevant evidence or documents may be destroyed or concealed or that a person willing to make a disclosure may be subjected to undue pressure or intimidation. There is always the possibility that those who see themselves as adversely affected by disclosure of information may try to obstruct or frustrate the investigation by concealment or destruction of relevant documents. This section makes it possible to seek the aid of the court to prevent this.

Reports of investigation conducted under this Bill are to be submitted to the Attorney-General immediately upon its completion and where the report is not submitted within the sixty day period specified under clause 8 (3), the reasons for the delay should be reported to the Attorney-General (clause 10 (1) & (2)). The final report on any investigation submitted to the Attorney-General should state among others the recommendations of the investigator (clause 10 (3)).

Upon receipt of a report of an investigation, the Attorney-General may accept the recommendations contained in the report and act on it, ask for further investigation by the same body or some other body or reject the report and recommendations for stated reasons which must be communicated to the investigator. These provisions seek to ensure that there are clear guidelines on how to treat such reports.

One of the major attributes of this legislation is securing the non-victimisation of persons, particularly employees, who make disclosures of wrong doing by their employers. Under clause 12, an employer is not to subject an employee to victimisation merely because of a disclosure. Victimisation as set out under clause 12 (2) includes, dismissal, suspension, redundancy, denial of promotion, transfer against one's will, harassment and threats of any of these as a result of making a protected disclosure.

A person who honestly and reasonably believes that he or she has been subjected to victimisation under the Bill may in the first instance make a complaint to the Commission on Human Rights and Administrative Justice. The Commission after hearing all parties concerned and any other persons the Commission considers

necessary, may make an order including reinstatement, reversal of any transfer or transfer to another establishment where applicable (Clause 14). The Commission is also given power under this clause to make an order for compensation where it considers it just in the circumstances of the particular case.

Furthermore, in order to secure the enforcement of an order given by the Commission under this bill, provision is made in clause 14 (5) that orders of the Commission for re-instatement, transfer and payment of compensation, among others, shall have the same effect as a judgement or order of the High Court and shall be similarly enforced. Clause 14 (6) makes it clear that the powers conferred on the Commission under this Bill is in addition to the powers of the Commission under the Commission on Human Rights and Administrative Justice Act, 1993 (Act 456).

Aside of the right to complain to the Commission, a person who is victimised may institute an action in a court for damages for breach of contract or other reliefs except that no action should be commenced in a court unless the processes with the Commission on Human Rights and Administrative Justice under clause 15 have been exhausted. Under clause 16, the commission has power to order legal assistance to be give a complainant who claims to have been or is being victimised for having made a disclosure of impropriety and is in need of such legal assistance.

Clause 17 enables persons who make disclosures to be reimbursed for expenses incurred by them in relation to investigations, whilst clause 18 deals with police protection for the person who makes protected disclosure and the person's family.

By clause 19 a person who makes a protected disclosure covered by this Bill and in accordance with the Bill is not liable for civil or criminal action unless the disclosure was made with malicious intent.

Employment contracts which seek to prevent the application of the provisions of the Bill are void (Clause 20)

Clauses 21, 22 and 23 deal with power vested in the Attorney-General to make regulations, modification of existing enactments and interpretation respectively.

Date:

A BILL ENTITLED THE PROTECTED (PUBLIC INTEREST) DISCLOSURE ACT 2001

AN ACT to provide for the manner in which individuals may in the public interest disclose information that relates to unlawful or other illegal conduct or practices of others; to provide for the protection against victimisation of persons who make such disclosures and matters related to these.

BE IT ENACTED by Parliament as follows:

PART I – INFORMATION THE DISCLOSURE OF WHICH IS PROTECTED

Protected disclosure

1. (1) A person may make a disclosure of information where that person reasonably believes that the information tends to show any or all of the following:
 - (a) that a crime has been committed, is about to be committed or is likely to be committed;
 - (b) that a person has not complied with a law or is in the process of breaking a law or likely to break a law which imposes an obligation on that person;
 - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
 - (d) that in a public institution there has been, there is or there is likely to be waste or mismanagement of public resources;
 - (e) that the environment has been degraded, is being degraded or is likely to be degraded; or

- (f) that the health or safety of any individual or a community has been endangered or is likely to be endangered.
- (2) A conduct which falls within any of the matters specified in subsection (1) is in this Act referred to as an "impropriety".
- (3) Notwithstanding any other law to the contrary a disclosure of an impropriety is protected under this Act if
 - (a) the disclosure is made in good faith;
 - (b) the person who makes the disclosure reasonably believes that the information disclosed and any allegation of impropriety contained in it are substantially true;
 - (c) the disclosure is not made for personal gain; and
 - (d) the disclosure is made to one or more of the persons or institutions specified in section 3 of this Act.

Person who qualifies to make disclosure of impropriety

- 2. Disclosure of impropriety may be made
 - (a) by an employee of an employer;
 - (b) by an employee of another employee; or
 - (c) by any person of another person, the absence of a contractual relationship notwithstanding.

Person to whom disclosure of impropriety may be made

- 3. (1) Disclosure of impropriety may be made to any one or more of the following:

- (a) an employer of the person making the disclosure;
- (b) a police officer at any police station;
- (c) the Attorney-General;
- (d) the Auditor-General;
- (e) any staff of the Intelligence Agencies;
- (f) a member of Parliament;
- (g) the Serious Fraud Office;
- (h) the Commission on Human Rights and Administrative Justice;
- (i) the National Media Commission;
- (j) the Narcotic (Control) Board;
- (k) a chief; or
- (l) the head or an elder of the family of the person disclosing the impropriety.

(2) A person who makes a disclosure of impropriety may in determining to whom the disclosure should be made take into account the following:

- (a) any reasonable belief or fear on his or her part that he or she will be subjected to dismissal, suspension, harassment, discrimination or intimidation;
- (b) reasonable belief or fear that evidence relevant to the impropriety may be concealed or destroyed;

- (c) that the person to whom the disclosure is made will not frustrate the objective;
- (d) the impropriety is of such an exceptionally serious nature that expeditious action must be taken to deal with it;
- (e) the place where and the circumstances under which the person making the disclosure lives.

PART II – PROCEDURES FOR DISCLOSURE AND RELATED ACTION

Procedures for making a disclosure

- 4. (1) A protected disclosure may be made in writing or orally by the person making the disclosure.
- (2) The disclosure shall contain as far as practicable the following particulars:
 - (a) the full name, address and occupation of the person making the disclosure;
 - (b) the nature of the impropriety in respect of which the disclosure is made;
 - (c) the person alleged to have committed or about to commit the impropriety;
 - (d) the time and place where the alleged impropriety took place or is likely to take place;
 - (e) the full name, address and description of any person who witnessed the commission of the impropriety;
 - (f) whether the person making the disclosure has made a disclosure of the same or of some other impropriety on

any previous occasion and if so about whom and to whom the disclosure was made; and

- (g) if the person is an employee making a disclosure about his or her employer or a fellow employee, whether he or she remains in the same employment.

Reduction of disclosure into writing

- 5. (1) Where a person makes a disclosure orally, the person to whom the disclosure is made shall cause the disclosure to be reduced to writing containing the same particulars as are specified in subsection (2) of section 4.
- (2) Where the person making the disclosure is illiterate, the writing required to be made under subsection (1) shall be read over, interpreted and explained to him or her in a language he or she understands and he or she shall approve of it before making his or her mark to it and a certificate to this effect shall be attached to the writing.
- (3) In the case of a literate person who is blind a certificate as required in subsection (2) shall be made with the necessary modification.

Action by person who receives disclosure of impropriety

- 6 (1) When a disclosure of impropriety is made to any person specified in section 3, the person shall
 - (a) make a record of the time and place where the disclosure is made;
 - (b) give to the person who makes the disclosure an acknowledgment in writing of receipt of the disclosure; and
 - (c) keep the writing in which the disclosure is made

confidential and in safe custody pending investigation of the impropriety.

- (2) Where the disclosure is made to a chief or a head or elder of a family who is illiterate, the chief, head or elder may instead of recording the disclosure as required under subsection (1), assist the person to make the disclosure to the police or to some other authority specified in section 3.
- (3) Where a person to whom disclosure is made fails to keep confidential the disclosure contrary to subsection (1) (c), the person commits an offence and is liable on summary conviction to a fine not exceeding 500 penalty units or imprisonment for a term not exceeding 2 years or to both.

Submission of copy of written disclosure to the Attorney-General

7. Where a disclosure is made to any person specified under section 3, other than the Attorney-General, the person shall submit a copy of the written disclosure to the Attorney-General within five days of receipt of the disclosure.

Investigation

8. (1) Where a disclosure of impropriety is made to a person specified under section 3, the person shall investigate the matter except that where the person to whom the disclosure is made does not have the capability to undertake the investigation, the person shall refer the disclosure as recorded to the Attorney-General or such body as the Attorney-General may direct for investigation.
- (2) Notwithstanding subsection (1), the Attorney-General may upon receipt of a copy of a written disclosure under section 7, cause investigations to be conducted into the disclosure.
- (3) Investigation undertaken in respect of any protected disclosure

shall be carried out as expeditiously as possible and shall in any event be completed within sixty days of receipt of the disclosure or directives to undertake the investigation.

Application to court for assistance

9. Where in the course of an investigation under section 8, it appears to the investigator,

- (a) that evidence or documents relevant to the investigation are likely to be destroyed or concealed; or
- (b) that a person willing to provide information relevant to the investigation is being subjected to pressure or intimidation to withhold the information,

the investigator may apply to the court for an order to preserve the evidence or documents or to restrain the intimidation of the person willing to provide the information.

Submission of report of investigation to the Attorney-General

10. (1) A report on investigation conducted pursuant to section 8 shall be submitted to the Attorney-General immediately the investigation is completed, for the directives of the Attorney-General.

(2) Where the completion of the investigation is delayed beyond the sixty day period specified in subsection (3) of section 8, a report shall be submitted to the Attorney-General stating,

- (a) the reasons for the delay;
- (b) measures that are proposed to expedite the investigation; and
- (c) any further assistance required to complete the investigation.

- (3) A report of an investigation which is submitted to the Attorney-General shall contain particulars of
- (a) the manner in which the investigation was conducted;
 - (b) the names and particulars of persons who provided information in the course of the investigation;
 - (c) any facts obtained which either confirm or dispute the truth or accuracy of the information contained in the disclosure and the person who provided the facts;
 - (d) any obstacle encountered in the course of the investigation and the nature of the obstacle; and
 - (e) the recommendations of the investigator.

Action by the Attorney-General

11. The Attorney-General may upon receipt of a report under subsection (3) of section 10, take any of the following steps:
- (a) accept the recommendations contained in the report and act on it;
 - (b) ask for further investigations by the same person or institution that conducted the investigations or by some other person or institution; or
 - (c) reject the report and the recommendations for stated reasons which shall be communicated to the investigator.

PART III – PROTECTION FOR MAKING DISCLOSURE OF IMPROPRIETY
AND MISCELLANEOUS PROVISIONS

Protection against victimisation

12. (1) A person who makes a disclosure of impropriety under this Act shall not to be subjected to victimisation by his or her employer or by a fellow employee or by any other person because of having made the disclosure.
- (2) A person who makes a disclosure of impropriety shall be considered as having been subjected to victimisation if because of making the disclosure,
- (a) he or she, being an employee, is
- (i) dismissed;
 - (ii) suspended;
 - (iii) declared redundant;
 - (iv) denied promotion;
 - (v) transferred against his or her will;
 - (vi) harassed;
 - (vii) intimidated;
 - (viii) threatened with any of the matters set out in subparagraph (i) to (vii); or
 - (ix) subjected to any discriminatory or other adverse measure by his or her employer or a fellow employee; or

- (b) not being an employee, he or she is subjected to discrimination or intimidation by any person or establishment affected by the disclosure.
- (3) A person shall not be considered as having been subjected to victimisation under subsection (2) if the person against whom the complaint is directed has the right in law to take the action complained of and the action taken is shown to be unrelated to the disclosure made.

Report to Commission on Human Rights and Administrative Justice

- 13. (1) A person who honestly and reasonably believes that he or she has been subjected to victimisation or learns that he or she will be subjected to victimisation because of having made a protected disclosure may in the first instance make a complaint to the Commission on Human Rights and Administrative Justice.
- (2) A complaint made under subsection (1) shall contain the following particulars:
 - (a) the name, description and address of the complainant ;
 - (b) the name, description and address of the complainant's employer or of any other person who the complainant claims has subjected the complainant to victimisation or might subject him or her to victimisation; and
 - (c) the specific acts complained of as constituting victimisation.

Action by the Commission and enforcement of its orders

- 14. (1) The Commission shall, on receipt of a complaint made pursuant to section 13, as soon as practicable conduct an inquiry into the complaint at which the complainant and the person against whom

- the complaint is made shall be heard.
- (2) The Commission in the course of conducting an inquiry under subsection (1) may make such interim orders as it considers fit.
 - (3) After hearing the parties and such other persons as the Commission and the parties consider necessary, the Commission shall make such order as it considers just in the circumstances including an order for,
 - (a) reinstatement;
 - (b) reversal of any transfer; or
 - (c) transfer to another establishment where applicable of the complainant.
 - (4) The Commission may where it considers it just in the circumstances of the case make an order for payment of compensation.
 - (5) An order of the Commission under this section shall be of the same effect as a judgment or an order of the High Court and is enforceable in the same manner as a judgment or an order of the High Court.
 - (6) The powers conferred on the Commission under this Act is in addition to the powers exercisable by the Commission under the Commission on Human Rights and Administrative Justice Act, 1993 (Act 456).

Right of action for victimisation

15. A person who has been subjected to victimisation may bring an action in the court to claim damages for breach of contract or for such other relief or remedy to which he or she may be entitled except that no action shall be commenced in a court unless the complaint has first been submitted to

the Commission under section 13.

Legal assistance

16. Where the Commission in the course of any inquiry or hearing before it under section 14, is of the opinion that the complainant is in need of legal assistance, the Commission shall issue a certificate to the complainant to obtain legal aid from the Legal Aid Board or such other institution as the Commission may specify in the certificate.

Reimbursement of expenses

17. (1) A person who makes a disclosure that results in an investigation shall be paid, out of money provided by the office of the Attorney-General, expenses incurred by the person in relation to the investigation.
- (2) Any amount payable under subsection (1) shall be paid within a period of not more than thirty days from the date the money became due.

Police protection

18. (1) A person who makes a disclosure and who reasonably believes that,
- (a) his or her life or property; or
 - (b) the life, or property of any member of his or her family
- is endangered or likely to be endangered as a result of the disclosure may request police protection and the police shall provide such protection as it consider adequate.
- (2) Notwithstanding subsection (1) the Commission or the Attorney-General as appropriate may in relation to a disclosure made or about to be made under this Act, direct that the person who has made or is about to make the disclosure and the person's

family be given police protection.

- (3) "Family" for the purposes of this section means spouse, father, mother, child, grandchild, brother and sister,

Protection against civil and criminal action

19. A person who makes a protected disclosure in accordance with this Act is not liable to any civil or criminal proceedings in respect of the disclosure unless it is proved that he or she knew that the information contained in the disclosure is false and the disclosure was made with malicious intent.

Void employment contracts

20. (1) A provision in a contract of employment or other agreement between an employer and an employee is void if it
- (a) seeks to prevent the employee from making a disclosure protected under this Act;
 - (b) has the effect of discouraging an employee from making a protected disclosure;
 - (c) precludes the employee from making a complaint in respect of victimisation; or
 - (d) prevents an employee from bringing an action in court or before any institution to claim relief or remedy in respect of victimisation.
- (2) Subsection (1) also applies to any contract of employment or agreement in existence on the date of the coming into force of this Act.

Regulations

21. The Attorney-General may by legislative instrument make Regulations prescribing
- (a) further disclosure procedures;
 - (b) other persons to whom disclosures may be made; and
 - (c) measures generally for the effective implementation of the provisions of this Act.

Modification of existing laws

22. The existing enactments shall be construed with such modifications as are necessary to give effect to the provisions of this Act.

Interpretation

23. In this Act unless the context otherwise requires,

“chief” means a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queenmother in accordance with the relevant customary law and usage

“Commission” means the Commission on Human Rights and Administrative Justice;

“disclosure” means protected disclosure;

“protected disclosure” means providing information on any of the matters referred to in subsection (1) of section 1;

“employee” means a person who works for another person, company or organisation or for the Republic and who is paid or entitled to be paid for his or her services but does not include an independent contractor;

“employer” includes an individual, a body corporate or unincorporated or the Republic who or which engages the services of or provides work for any other person and pays for the services, and a person acting on behalf of or on the authority of the employer;

“impropriety” means any conduct or act which falls within the categories referred to in subsection (1) of section 1; and

“Republic” means the Republic of Ghana;

“victimisation” means acts which fall within any of the matters specified in subsection (2) of section 12.

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