

Comment:

Althingi's Judicial Affairs and Education Committee: the Disclosure of Information and Protection of Whistleblower Bill, case no. 453

Introduction

In response to a public call for comment we received via email, the Open Democracy Advice Centre has prepared a brief comment on Iceland's proposed Disclosure of Information and Protection of Whistleblower Bill, case no. 453.

We have prepared the draft after reviewing the Bill from <http://www.althingi.is/altext/141/s/0572.html>, but alongside two different English translations. While we have done our best to ensure an accurate translation, we have borne in mind possible issues arising from such translation in our commentary.

The Open Democracy Advice Centre

The Open Democracy Advice Centre (ODAC) was launched in October 2000 as a niche, not-for-profit partnership between the Institute for Democracy in South Africa (Idasa), the University of Cape Town (Department of Public Law), and the Black Sash Trust. It is the only specialist Centre of its kind in South Africa (and on the African Continent). Specialising chiefly in the advancement of the Promotion of Access to Information 2 of 2000 and the Protected Disclosures Act 26 of 2000, ODAC has been involved in high-level policy engagement and political activism on all issues advancing the right to know. We have produced a number of training and information publications, most notably for this comment "The Status of Whistleblowing in South Africa" (June 2010).

Comments on Articles

Article 2: Scope of the Act

In terms of the scope of the Act, we would suggest the scope to be dealt with more clearly by the provision of detailed definitions.

More particularly, our translations indicate that Article 2 states:

This act applies to disclosers that disclose, intend to disclose, make an attempt to disclose, may have disclosed or are suspected of having disclosed relevant information about wrongdoing, or in a good faith assume that the relevant information is about wrongdoing.

ODAC would submit that, particularly when considering the outer bounds of scope, this should be broadened. It is clear from the report attached to the Bill that the purpose of the Act is not just to protect whistleblowers, but also to discourage activities of wrongdoing *prior to them in fact occurring*. We would thus recommend re-framing the section as follows (note the point of emphasis):

This act applies to disclosers that disclose, intend to disclose, make an attempt to disclose, may have disclosed or are suspected of having disclosed relevant information about **or potential** wrongdoing, or in a good faith assume that the relevant information is about wrongdoing **or potential wrongdoing**.

Article 3: Oversight

ODAC would like to commend the oversight function being invested in the Prime Minister. It is vital in order to provide an enabling environment for whistleblowers that political will be driven from a suitably high office. The position of the Prime Minister can also ensure the inter-sectoral collaboration necessary to make broad-scale environmental changes a reality.

Article 4: Definitions

ODAC would submit that the definition of “discloser” should be extended to include information about a wrongdoing *that the discloser reasonably believes to be true*.

Due to the intersect of this definition with Article 5, ODAC believes this proposed change would prevent an over-extension of the Act’s scope to only meritorious cases receiving protection, thus improving the potential for the law to be properly implemented.

In regard to the proposed definition of “wrongdoing”, ODAC would suggest that a wrongdoing would include the potential concealment of a wrongdoing. While we acknowledge the inclusion of the phrase “*inter alia*”, ODAC submits that not providing clarity in this regard would provide difficulties in relation to interpretation. We base this on our own definition of “disclosure” in section 2 of the Protected Disclosures Act 2 of 2000. As such we propose the following drafting (note the point of emphasis):

Wrongdoing: Any conduct, act or omission, which is or could be, at least one of the following:

- i. unlawful or a breach against the law,
- ii. breach against professional ethics
- iii. fraudulent or corrupt
- iv. involves abuse of power or misuse of public funds
- v. involves a danger to health, life or the environment.
- vi. involves a negligence, carelessness or oversight.

vii. that any matter referred to in paragraphs (i) to (vi) has been, is being or is likely to be deliberately concealed.

ODAC would also like to suggest that an express definition be provided of the term “employees”, especially given the phrasing of Article 2. We would suggest this alteration, as an express limitation of our own Act has been that the definition of employee has been deemed to exclude persons such as independent contractors.¹ ODAC would propose, given the lower thresholds for protection for an “internal/inside disclosure”, that this form of disclosure should necessarily include disclosure to a legal advisor or trade union representative. ODAC would submit that these forms of disclosure, given legal privilege and trade union structures, would

¹ Martins, P. *The Status of Whistleblowing in South Africa* (2010, Open Democracy Advice Centre), p. 114.

conceptually be more attune to an internal disclosure than an external one (this is particularly given the interaction of this definition with Article 5).

Chapter II: Conditions for protection

Article 5: Disclosure

ODAC would submit an additional condition by including a provision for wrongdoing of an exceptionally serious nature – such activities may not be easy to establish as being in the public interest to disclose, but would certainly still be a disclosure worthy of protection. As such we propose the following drafting (note the point of emphasis):

...

- e. when the discloser has a reason to believe that an inside disclosure will turn out to be unsuccessful, or:
- f. when the discloser has a reason to believe that an inside disclosure is likely to turn out to be too risky for the discloser, or:
- g. when the discloser has a reason to believe that the wrongdoing is of an exceptionally serious nature.**

Article 6: Assistance with disclosure – rights and protection of discloser

ODAC would like to commend the extension of the protections in this regard as an effective mechanism for ensuring the promotion of a broad-based social acceptance of whistleblowing, by reducing potential risks for *all* potential role players.

Chapter III – rights and protection of discloser

ODAC would like to commend the extension of protections to contractual and other civil liabilities. These protections are broader than under the Protected Disclosures Act, which only provide for employment protections. However, the draft may consider extending protections to criminal liabilities – or consider a draft that creates a defense to related criminal prosecutions. We are considering in particular the forms of offence that may be created for the release of classified state documents.

ODAC supports in particular the manner in which clause 11 and 12 ensures anonymity.

General Notes

The Bill fails to encourage measures to allow for the proactive facilitation of whistleblowers by private entities. It should include obligations for creating whistleblowing policies, which would more easily facilitate internal disclosures as a first course of action. In the South African Protected Disclosures Act, this is not an express obligation – only discretionary, which has consistently been commented on as a weakness.² Mechanisms should be outlined in order to make it possible for people to blow the whistle.

Prepared by



Gabriella Razzano

Head of Legal Research

Open Democracy Advice Centre

² Ibid, p 115.