



梁繼昌議員 **Hon Kenneth Leung**

The Honourable KWOK Wai-keung
Chairman, Panel on Manpower
Legislative Council
1 Legislative Council Road
Central
Hong Kong

26 February 2016

Dear Mr. Kwok,

Public Interest Disclosure Bill 2016

I intend to introduce a private member's bill, namely the "Public Interest Disclosure Bill 2016" into the Legislative Council. The bill will provide protection to individuals who make certain disclosures of information in the public interest.

I am writing to consult the Panel on Manpower on this legislative proposal and the draft bill. I would be grateful if the Panel could arrange a timeslot to discuss this proposal.

The following documents are enclosed for your perusal:

- (a) The draft bill (in English only); and
- (b) Background information on the Bill.

Yours sincerely,

Kenneth Leung
Legislative Councillor

Encls.

Public Interest Disclosure Bill 2016

A Bill to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to be exempted from civil liability in making a qualifying disclosure; to amend the Employment Ordinance; to provide for related matters

Enacted by the Legislative Council.

1. Short Title And Commencement

- (1) This Ordinance may be cited as the Public Interest Disclosure Ordinance.
- (2) This Ordinance comes into operation on a day to be appointed by the [Secretary for Justice] by notice published in the Gazette.

2. Interpretation

- (1) In this Ordinance, unless the context otherwise requires –

"employee" (僱員) means an employee, to whom, by virtue of Section 4 of the Employment Ordinance (Cap. 57) applies;

"employer" (僱主) means any person who has entered into a contract of employment to employ any other person as an employee and the duly authorized agent, manager or factor of such first mentioned person;

"protected disclosure" means a qualifying disclosure which is made by an employee in accordance with sections 3 to 8;

3. Meaning of "qualifying disclosure" and interpretation thereof

- (1) In this Ordinance, "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the employee making the disclosure, tends to show one or more of the following-
 - (a) that a criminal offence has been committed, is being committed or is likely to be committed;
 - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
 - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

- (d) that the health or safety of any individual has been, is being or is likely to be endangered;
 - (e) that the environment has been, is being or is likely to be damaged; or
 - (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.
- (2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the Hong Kong or elsewhere, and whether the law applying to it is that of Hong Kong or of any other country or territory.
- (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
- (4) A disclosure of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
- (5) "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

4. **Disclosure to employer or other person**

- (1) A qualifying disclosure is made in accordance with this section if the employee makes the disclosure in good faith-
- (a) to his employer, or
 - (b) where the employee reasonably believes that the relevant failure relates solely or mainly to-
 - (i) the conduct of a person other than his employer, or
 - (ii) any other matter for which a person other than his employer has legal responsibility,
- to that other person.
- (2) An employee who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Ordinance as making the qualifying disclosure to his employer.

5. **Disclosure to legal adviser**

A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice.

6. **Disclosure to principal officials of the Government**

A qualifying disclosure is made in accordance with this section if the employee is a civil servant or a government employee and disclosure is made in good faith to a principal official of the Government.

7. **Disclosure to prescribed person**

(1) A qualifying disclosure is made in accordance with this section if the employee-

(a) makes the disclosure in good faith to a person prescribed by an order made by the Chief Executive in Council for the purposes of this section, and

(b) reasonably believes-

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

8. **Disclosure in other cases**

(1) A qualifying disclosure is made in accordance with this section if-

(a) the employee makes the disclosure in good faith;

(b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true;

(c) he does not make the disclosure for purposes of personal gain;

(d) any of the conditions in subsection (2) is met; and

- (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
- (2) The conditions referred to in subsection (1)(d) are-
- (a) that, at the time he makes the disclosure the employee reasonably believes that he will be subject to detriment by his employer if he makes a disclosure to his employer or in accordance with section 7;
 - (b) that, in a case where no person is prescribed for the purposes of section 7 in relation to the relevant failure, the employee reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer; or
 - (c) that the employee has previously made a disclosure of substantially the same information-
 - (i) to his employer; or
 - (ii) in accordance with section 7.
- (3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the employee to make the disclosure, regard shall be had, in particular; to-
- (a) the identity of the person to whom the disclosure is made;
 - (b) the seriousness of the relevant failure;
 - (c) whether the relevant failure is continuing or is likely to occur in the future;
 - (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person;
 - (e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 6 was made has taken or might reasonably be expected to have taken as a result of the previous disclosure; and
 - (f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the employee complied with any procedure whose use by him was authorised by the employer.

- (4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

9. Disclosure of exceptionally serious failure

- (1) A qualifying disclosure is made in accordance with this section if-
 - (a) the employee makes the disclosure in good faith;
 - (b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true;
 - (c) he does not make the disclosure for purposes of personal gain;
 - (d) the relevant failure is of an exceptionally serious nature, and
 - (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
- (2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the employee to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

10. Contractual duties of confidentiality

- (1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the employee from making a protected disclosure.
- (2) This section applies to any agreement between a employee and his employer including an agreement to refrain from instituting or continuing any proceedings under this Ordinance or any proceedings for breach of contract.

11. Immunity

A person shall not incur any civil liability, whether arising in contract, tort, defamation, equity or otherwise, in respect of the qualifying disclosure he has made.

12. **Other interpretative provisions**

- (1) In determining for the purposes of section 7 and section 8 whether a person makes a disclosure for purposes of personal gain, there shall be disregarded any reward payable by or under any enactment.
- (2) This ordinance shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention.

13. **Employment Ordinance amended**

The Employment Ordinance (Cap. 57) is amended as set out in sections 14 to 18:

14. **Section 32A amended (employee's entitlement to employment protection)**

- (1) Section 32A(1)(c)(i) after "72B(1)" –

Add

"or 72BA"

- (2) Section 32A(4)(a)(i) after "72B(1)"; -

Add

"or 72BA,"

- (3) Section 32A(5)(b) after "72B(1)" –

Add

", or 72BA".

15. **Section 32M amended (remedies for employment protection)**

Section 32M(2)(a), after "72B" –

Add

"or 72BA,"

16. **Section 32P amended (award of compensation)**

Section 32P(1)(b), after "72B(1)" –

Add

"or 72BA"

17. **Section 63A amended (offences relation relating to sections 31, 72A and 72BA and penalty)**

(1) Title –

Repeal title

Substitute

"Section 63A Offences relating to sections 31, 72A, 72B and 72BA and Penalty"

(2) Section 63A(5), after "(d)"

Add

"or 72BA"

18. **Section 72C added -**

After section 72B –

Add

Section 72BA

Employment not to be terminated, etc. by reason of fact that employee has made a qualifying disclosure.

(1) No employer shall terminate, or threaten to terminate, the employment of, or in any way discriminate against, any of his employees by reason of the fact that the employee has made a qualifying disclosure as defined in section 3 of the Public Interest Disclosure Ordinance (Cap. X), or agreed to make a qualifying disclosure.

(2) Where an employer is convicted of an offence under section 63A(5) in respect of an action prohibited by this section, the court or magistrate before which the conviction is obtained, may, in addition to nay fine that may be imposed, order the employer to pay as compensation to the employee who won the victim of the offence, such amount as the court or magistrate considers appropriate having regard to the circumstances of the case.

梁繼昌立法會議員辦事處

《2016 年公共利益披露條例草案》

背景資料

背景

1. 本文件旨在就梁繼昌議員將提出的《2016 年公共利益披露條例草案》（條例草案）提供背景資料。

理據

2. 告密者是指一名人士為公眾利益而披露資料。根據外國經驗，告密行為對公共和私營機構檢測和防止違規行為十分重要。
3. 儘管告密行為對維護管治的質量和防止嚴重違規行為有重要作用，現時香港並沒有專門的法例為告密者或報告違規行為的人提供保障。在缺乏充分和有效的保護下，會令人因擔憂負上法律責任和遭事後報復而不欲就違規行為作出舉報。
4. 現時香港的法例對舉報違規行為的保護相當零碎和分散：

《僱傭條例》（第 57 章）規定，僱主若因其僱員曾在有關執行《僱傭條例》、因工遭遇意外或違反工作安全法例而進行的法律程序中提供證據或向進行查訊的公職人員提供資料而作出解僱，有關解僱則屬違法。

根據現時一系列保障免受歧視的法例，包括《種族歧視條例》（第 602 章），《性別歧視條例》（第 480 章），《家庭崗位歧視條例》（第 527 章），以及《殘疾歧視條例》（第 487 章），任何人若根據相關條例行事或協助調查，他可受相關條例保護，免遭歧視受害。

《有組織及嚴重罪行條例》（第 455 章）、《販毒（追討得益）條例》（第 405 章），以及《聯合國（反恐怖主義）條例》（第 575 章）為個人披露資料的行為提供保護。如有人披露涉嫌洗黑錢或其他罪行的資料，他不會被視為違反合約或任何成文法則、操守規則或其他

條文對披露資料所施加的任何規限。

5. 現時法例對告密者的保護僅限於一定的範圍和行為，不能為作出舉報不當行為或作證的人提供足夠的保護，因此有必要引入法例向為公眾利益而披露資料的人提供充分和有效的保護。

立法建議－《2016年公共利益披露條例草案》

法案目的

6. 條例草案保護因公眾利益而披露資料的僱員。

受保護的人

7. 條例草案採用《僱傭條例》（第57章）第4條對僱員的定義，使條例草案適用於所有根據僱傭合約受聘的僱員及該等僱員的僱主，以及該等僱主與僱員之間的僱傭合約。

受保護的披露

8. 條例草案的保護僅適用於「受保護的披露」，即有關的披露資料行為是（1）「合資格的披露」，以及（2）是由僱員披露資料。

合資格的披露

9. 「合資格的披露」是指僱員合理地相信他是因公眾利益作出的任何資料披露，而有關披露涉及以下一項或多於一項的情況：
 - (a) 一宗已經發生、正在或相當可能發生的刑事罪行；
 - (b) 有人的行為沒有、正在沒有或相當可能沒有符合他須履行的法律義務；
 - (c) 已經發生、正在發生或相當可能發生的司法不公；
 - (d) 任何個人的健康或安全已經受到、正在受到或相當可能受到危害；
 - (e) 已經發生、正在發生或相當可能發生的環境破壞；

- (f) 有資料顯示第9段(a)至(e)項中提及的任何一項事件已經、正在或相當可能被刻意隱瞞。
10. 就第9段(a)至(f)項中提及的失誤並無關於該失誤是否已經、正在或即將在香港或其他地方發生，及該法律是否適用於香港或任何其他國家或地區。

真誠地作出披露及其他條件

11. 條例草案提供的保護只適用於僱員是基於真誠地作披露，及有關的披露不是為了個人利益上的得益而作出。
12. 如披露資料的行為涉及以下情況，將不被視為合資格的披露：
- (a) 僱員作出披露資料的行為會干犯刑事罪行；
 - (b) 披露資料的人所披露的資料是他人在索取法律諮詢時所披露的資料。

披露的方式

內部披露

13. 若僱員真誠地向僱主或僱主授權的人士披露資料，則屬合資格的披露。

監管下的披露

向政府官員或指定人士作出披露

14. 如僱員是公務員或政府的僱員，即該僱員真誠地向政府的主要官員作出的披露屬於合資格的披露。

向指定人士作出披露

15. 如僱員真誠地向一名由行政長官會同行政會議為本條例草案的目的而指令的一名指定人士作出披露，該披露屬於合資格的披露。

向法律顧問作出披露

16. 如僱員是在獲取法律諮詢的過程中向律師披露資料，該披露屬於合資格的披露。

更廣泛的披露

17. 如果僱員向一個非本條例草案指定的人士披露資料，該披露若符合以下情況，可被視為合資格的披露：
 - (a) 該僱員合理地相信他或她若向其僱主作出披露，他或她的僱主會對該僱員作出不利的對待；
 - (b) 就僱員所披露的相關失誤，並無規定一名指定人士接收其披露，以及該僱員合理地相信如果他向其僱主作出披露，有關的證據將被隱藏或毀滅；
 - (c) 該僱員曾經向其僱主或指定人士披露大致相同的資料；
 - (d) 有關失誤的性質是異常地嚴重。

條例草案的保障

18. 僱員就其所作出的合資格的披露，無須承擔任何民事法律責任，不論是在合約法、侵權法、誹謗法、衡平法或是在其他法律下產生的民事法律責任。
19. 就《僱傭條例》作出相應修訂以禁止僱主因為僱員作出受保護的披露而提出解僱或威脅解僱，或以任何方式作出歧視。
20. 法院可指令根據本條例草案而被定罪的僱主向受害的僱員作出賠償或補救措施。

合約的保密義務

21. 若任何協議內的條文聲稱將僱員排除於受保護的披露之外，該條文則屬無效。
22. 本條例草案適用於僱員和僱主之間的任何協議，包括協議不提出或不繼續進行本條例草案下的任何法律程序或任何與違反合約有關

的法律程序。

條例草案的影響

23. 此項立法建議符合《基本法》的規定，包括與基本法所保障的權利有關的條文。本條例草案不涉及(i)公共支出;(ii)政治架構,(iii)政府運作，或(iv)政府政策的任何問題。

梁繼昌立法會議員辦事處

2016年2月

Office of the Hon Kenneth Leung

Background Brief on the Public Interest Disclosure Bill 2016

INTRODUCTION

1. This paper sets out the background of the Hon Kenneth Leung's proposal to introduce the "Public Interest Disclosure Bill 2016" ("**PIDB**").

JUSTIFICATIONS

2. A whistleblower is a person who makes a disclosure of information in the public interest. From experience of overseas jurisdictions, the act of whistleblowing is important for detection and prevention of wrongdoings in both public and private sectors.
3. Although whistleblowing is important in safeguarding the quality of governance and preventing serious wrongdoing, there is no specific legislation providing protection for the whistleblower or the person reporting wrongdoings in Hong Kong. In the absence of adequate and effective protection, the act of whistleblowing has been deterred in fear of legal liability and retaliation.
4. The protection afforded to persons reporting wrongdoing in Hong Kong is piecemeal and fragmented:

The Employment Ordinance (Cap 57) stipulates that it is unlawful to dismiss an employee by reason of the fact that the employee has given evidence or information in any proceedings or inquiry in connection with the enforcement of the Employment Ordinance, work accidents or breach of work safety legislation.

The ordinances in relation to discrimination, including the Race Discrimination Ordinance (Cap 602), Sex Discrimination Ordinance (Cap 480), Family Status Discrimination Ordinance (Cap 527), and Disability Discrimination Ordinance (Cap 487), protect individuals from victimisation, if an individual acts against acts of discrimination in accordance with the relevant ordinances or assists in such investigations.

The Organized and Serious Crimes Ordinance (Cap 455), the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), and the United Nations (Anti-Terrorism) Ordinance (Cap 575) provide protection to individuals under which the disclosure of suspected money laundering or other crimes is not to be treated as a breach of restrictions imposed by contract, enactment, rule of conduct or other restrictions.

5. The statutory protection for the person reporting wrongdoings is confined to certain scopes and acts, which cannot provide sufficient protection for the person reporting wrongdoing or giving evidence for such purpose. Therefore, there is a necessity to introduce legislation to provide sufficient and effective protection for the person who makes a disclosure of information in the public interest.

LEGISLATIVE PROPOSAL- “Public Interest Disclosure Bill 2016”

Purpose of the Bill

6. The PIDB protects employees who make certain disclosures of information in the public interest.

Protected persons

7. The PIDB adopts the definition of employee set out under the section 4 of the Employment Ordinance (Cap 57) , the Bill applies accordingly to employees engaged under a contract of employment, to an employer of such employee and to a contract of employment between such employer and employee.

Protected disclosures

8. The protection in PIDB applies only to a “protected disclosure” which is (1) a “qualifying disclosure” that discloses certain kinds of information, and (2) made by an employee.

Qualifying disclosures

9. “Qualifying disclosure” means any disclosure of information which, in the reasonable belief of the employee making the disclosure in the public interest, of which tends to show one or more of the following that:

- (a) A criminal offence has been committed, is being committed or is likely to be committed;
 - (b) A person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
 - (c) A miscarriage of justice has occurred, is occurring or is likely to occur;
 - (d) The health or safety of any individual has been, is being or is likely to be endangered;
 - (e) The environment has been, is being or is likely to be damaged; or
 - (f) Information tending to show any matter falling within any one of the paragraph 9 (a) - (e) has been, is being or is likely to be deliberately concealed.
10. It is immaterial whether the relevant failure mentioned in paragraph 9 (a) - (f) occurred, occurs or would occur in Hong Kong or elsewhere, and whether the law applying to it is that of Hong Kong or of any other country or territory

Good faith and other conditions

11. The protection in PIDB applies only to an employee who makes the disclosure in good faith and not for personal gain.
12. A disclosure of information which falls within the following circumstances is not considered as a qualifying disclosure:
- (a) The employee making the disclosure commits an offence by making it;
 - (b) The information disclosed by a person to whom the information had been disclosed in the course of obtaining legal advice.

The channels of disclosure

Internal disclosure

13. A qualifying disclosure is made if the employee makes the disclosure in good faith to his employer or a person authorised by his employer.

Regulatory disclosure

Disclosure to government officials or prescribed person

14. A qualifying disclosure is made if the employee is a civil servant or a government employee and disclosure is made in good faith to a principal official of the Government.

Disclosure to prescribed person

15. A qualifying disclosure is made if the employee makes the disclosure in good faith to a person prescribed by an order made by the Chief Executive in Council for the purposes of the PIDB.

Disclosure to legal adviser

16. A qualifying disclosure is made if the employee makes the disclosure to a lawyer in the course of obtaining legal advice.

Wider disclosure

17. A qualifying disclosure is made if the employee makes the disclosure to a person not prescribed in the bill, provided that the disclosure meets the following circumstances:

- (a) The employee reasonably believes that he or she will be subjected to a detriment by his employer if he or she makes a disclosure to his employer;
- (b) No person is prescribed for the disclosure in relation to the relevant failure, and the employee reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer;
- (c) The employee has previously made a disclosure of

substantially the same information to his employer or the prescribed person;

- (d) The relevant failure is of an exceptionally serious nature.

Protection

18. An employee shall not incur any civil liability, whether arising in contract, tort, defamation, equity or otherwise, in respect of the qualifying disclosure he has made.
19. Consequential amendments are made to the Employment Ordinance to prohibit an employer to terminate, or threaten to terminate, the employment of, or in any way discriminate against, any of his employees by reason of the fact that the employee has made a protected disclosure.
20. The court may order the employer who has been convicted of an offence as a result of the enactment of the PIDB to pay compensation to or otherwise provide other remedies to the victimized employee.

Contractual duties of confidentiality

21. Any provision in an agreement is void in so far as it purports to preclude the employee from making a protected disclosure.
22. The protections in PIDB apply in any agreement between an employee and his employer, including an agreement to refrain from instituting or continuing any proceedings under the PIDB or any proceedings for breach of contract.

IMPLICATIONS OF THE PROPOSAL

23. The proposal is in conformity with the Basic Law, including the provisions concerning the rights enshrined by Basic Law. The bill does not relate to any matters of (i) public expenditure, (ii) political structure, (iii) the operation of the Government, or (iv) Government policies.

Office of the Hon Kenneth Leung

February 2016