PARLIAMENT

REPUBLIC OF TRINIDAD AND TOBAGO

FIRST SESSION OF THE ELEVENTH PARLIAMENT (2015/2016)

SECOND INTERIM REPORT
OF
THE JOINT SELECT COMMITTEE
APPOINTED TO CONSIDER AND REPORT ON THE WHISTLEBLOWER PROTECTION BILL, 2015

Ordered to be printed

TOGETHER WITH THE MINUTES OF PROCEEDINGS

PARL:

HOR PAPER NO: / 2016

MANDATE

1. Pursuant to resolutions of the House of Representatives on Friday November 13, 2015 and of the Senate on Friday November 17, 2015, a Joint Select Committee was established:

   to consider and report on a Bill entitled the "Whistleblower Protection Bill, 2015"; and…to report within eight weeks, that is to say, on or before January 22, 2016.

MEMBERSHIP OF THE COMMITTEE

2. The following persons were appointed to serve on the Committee:

   Mr. Faris Al-Rawi, MP
   Mr. W. Michael Coppin
   Mr. Foster Cummings
   Mr. Wade Mark
   Mrs. Sophia Chote, SC
   Mr. Stuart Young, MP
   Major Gen. (Ret.) Edmund Dillon, MP
   Mr. Prakash Ramadhar, MP

SECRETARIAT AND TECHNICAL SUPPORT

3. During the session Ms. Chantal La Roche, Legal Officer II Parliament, served as Secretary of the Committee and Tanya Alexis, Legal Officer as Assistant Secretary.

EXTERNAL ASSISTANCE

4. The following persons provided assistance to the Committee:

   Mr. Ian Macintyre, SC – Chief Parliamentary Counsel
   Christine Morgan-Cox – Legal Counsel II

INTERIM REPORT

5. An Interim Report of your Committee was adopted in the House of Representatives on Friday January 22, 2016 and in the Senate on Monday January 25, 2016. Your Committee requested and was granted a two (2) month extension to complete its mandate. This extension will expire on March 22, 2016.

MEETINGS

6. Since the presentation of the Interim Report, the Committee held three (3) meetings on the following dates:
   - February 19, 2016
   - February 23, 2016
   - March 15, 2016

7. The Minutes of the meetings are attached at Appendix I.

WORK TO DATE

8. At its fourth Meeting held on February 19, 2016 your Committee agreed to engage the services of an External Expert to assist the Committee in its deliberations on the Bill. Your Committee agreed to contact the following persons with a view to ascertaining their availability and qualifications:

   i The Hon. J. Paul Harrison – Retired President of the Jamaican Court of Appeal and Chairman of the Corruption Prevention Commission;

   ii The Hon. B. St. Michael Hylton OJ QC – Recommended by Dr. Barnett;

   iii Mr. Kent Pantry QC – former DPP; and

   iv Mr. Greg Christie – Attorney-at-Law and the former Contractor General of Jamaica.

9. Your Committee also agreed to grant a further extension of the deadline for written submissions on the Bill to February 29, 2016 to allow Stakeholders who had not submitted their comments on the Bill to do so. As a result, additional submissions were received from:
    i. The Trinidad and Tobago Police Service (Office of Commissioner of Police)
    ii. Disclosure Today (Non-Profit Organisation)
    iii. The Integrity Commission
    iv. Media Association of Trinidad and Tobago; and
    v. Bankers Association of Trinidad and Tobago.

10. At its fifth meeting held on February 23, 2016 your Committee with the assistance of Mr. Ian Macintyre, S.C., Chief Parliamentary Counsel continued its clause by clause analysis of the Bill and commenced its review of the submissions received from Stakeholders and members of the Public.

11. At its sixth meeting held on March 15, 2016 your Committee agreed to avail itself of the services of Dr. Derrick McKoy, Dean of the Faculty of Law at the Mona Campus of the University of the West Indies and former Contractor General. Dr. McKoy has agreed to provide services as a legal consultant to the Committee during its deliberations on the Bill at no fee.

REPORT

12. The Committee wishes to report that the review of the written submissions of Stakeholders and the members of the public on the Bill is still in progress. However, additional time is required for the completion of this exercise, and for the Committee to consult with Dr. McKoy. As such, the Committee is unable to submit its recommendations by the deadline of March 22, 2016.

RECOMMENDATIONS

13. Your Committee humbly requests a further period of seven (7) weeks to complete its work and to submit a final report to Parliament by April 29, 2016.

14. During the period of extension, the Committee proposes to continue its work in collaboration with Dr. Derrick McKoy, Dean of the Faculty of Law at the Mona Campus of the University of the West Indies and former Contractor General, the Chief Parliamentary Counsel's Department of the Ministry of the Attorney General, to meet with stakeholders and to continue to assess submissions received.

Respectfully Submitted,

Signed

Faris Al-Rawi, MP

Chairman

March 18, 2016

APPENDIX I

PARLIAMENT
Republic of Trinidad and Tobago

Levels G - 7, Tower D
The Port-of-Spain International Waterfront Centre
1A Wrightson Road, Port-of-Spain

JOINT SELECT COMMITTEE ON THE WHISTLEBLOWER PROTECTION BILL, 2015

MINUTES OF THE FOURTH MEETING HELD IN THE ARNOLD THOMASOS ROOM (WEST), LEVEL 6, OFFICE OF THE PARLIAMENT, TOWER D, IWFC, #1A WRIGHTSON ROAD, PORT OF SPAIN ON FEBRUARY 19TH 2016 AT 10:00 AM

Committee Members

PRESENT

Mr. Faris Al-Rawi, MP	- Chairman
Mr. Stuart Young, MP	- Member
Major Gen. (Ret.) Edmund Dillon, MP	- Member
Mr. W. Michael Coppin	- Member
Mr. Foster Cummings	- Member
Mr. Wade Mark-Member	

ABSENT/EXCUSED

Mr. Prakash Ramadhar, MP	– Member
Mrs. Sophia Chote, SC	- Member

Secretariat

Ms. Chantal La Roche	- Secretary
Ms. Tanya Alexis	- Asst. Secretary

Other Attendees

Mr. Ian Macintyre, SC	- Chief Parliamentary Counsel
Ms. Christine Morgan-Cox	- Legal Counsel II

COMMENCEMENT

1.1 The meeting was called to order by the Chairman at 10:20 a.m.

CONFIRMATION OF MINUTES

2.1 The Committee considered the Minutes of the Third Meeting held on January 12, 2016.

2.2 The Minutes of the Third Meeting were amended by omitting the words "revisit this issue as there may be need" from paragraph 4.4 on page 4

2.3 The motion for the confirmation of the Minutes was moved by Mr. Mark and seconded by Mr. Young and the Minutes were confirmed by the Committee.

MATTERS ARISING FROM THE MINUTES

Discussion of the Terms of External Expert to Assist the Committee

3.1 The Committee reviewed the list of experts nominated by Mrs. Chote and agreed that all persons on the list should be contacted with a view to ascertaining their availability and proposed fees.

3.2 The persons nominated by Mrs. Chote were:

- The Hon. J. Paul Harrison –Retired President of the Jamaican Court of Appeal and Chairman of the Corruption Prevention Commission;
- The Hon. Dr. Lloyd Barnett QC;
- The Hon. B. St. Michael Hylton OJ QC –Recommended by Dr. Barnett;
- Mr. Kent Pantry QC – former DPP; and
- Mr. Greg Christie – Attorney-at-Law and the former Contractor General of Jamaica

3.3 The Committee agreed, subject to availability and cost, to invite an Expert Consultant to attend the Committee's sixth meeting scheduled for Wednesday March 2, 2016.

Continuation of the Clause By Clause Analysis of the Whistleblower Protection Bill, 2015 by the Chief Parliamentary Counsel

4.1 The Committee discussed the opinion presented by the Chief Parliamentary Counsel, Mr. Ian Macintyre S.C. which opined *inter alia* that a special majority would be required for the legislation to be passed. Arising out of the opinion the Committee discussed the following:

a) whether the need for the three fifths majority was tempered by the proportionality in the Bill; and
b) whether need for further consideration of this issue should be ventilated or pursued.

The opinion is attached as Appendix I to these Minutes.

4.2 The Committee agreed to also seek guidance on these concerns from the Expert Consultant.

4.3 The Committee agreed to suspend deliberations on the matrix of corresponding penalties provided by the Chief Parliamentary Counsel to allow Members time to review the document.

Review of Submissions Received on the Whistleblower Protection Bill, 2015

5.1 The Committee agreed to grant an extension of the deadline for written submissions to February 29, 2016 to allow Stakeholders who have not submitted comments on the Bill to do so.

5.2 The Committee continued the process of reviewing submissions on the Bill. The discussions and decisions of the Committee during this review are attached as Appendix II to these Minutes.

5.3 Arising out of the submissions on the Bill, the Committee instructed the Chief Parliamentary Counsel to confirm whether the use of the term "unfair discrimination" may create uncertainty and to ensure harmony with the Equal Opportunity Act.

Other Business

6.1 The Committee agreed to convene public hearings with the following members of the public and stakeholders:

- Association of Trinidad & Tobago Insurance Companies (ATTIC)
- Central Bank Of Trinidad And Tobago
- National Trade Union Centre Of Trinidad And Tobago (NATUC)
- Afra Raymond

6.2 The Committee agreed that it will schedule a date and time to conduct the live public hearings at its next meeting.

6.3 The Committee agreed that its next meeting will be held on Tuesday 23rd February, 2016 at 10:00 a.m.

ADJOURNMENT

7.1 The Chairman thanked Members and adjourned the meeting.

7.2 The adjournment was taken at 12:40 p.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

February 16, 2016

APPENDIX I

OPINION
RE. THE WHISTLEBLOWER PROTECTION BILL, 2015

Introduction

On 12th January, 2016, the Joint Select Committee of Parliament on the Whistleblower Protection Bill, 2015 (hereinafter referred to as "the Bill") requested that the Chief Parliamentary Counsel submit a written opinion with respect to the constitutionality and retrospective application of the Bill.

Section 4(a) to (c) of the Constitution of the Republic of Trinidad and Tobago (hereinafter referred to as "the Constitution") recognizes and declares, *inter alia*, the following fundamental human rights and freedoms:

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) the right of the individual to respect for his private and family life.

Section 5(1) of the Constitution provides that, except as is otherwise expressly provided in Chapter 1 and section 54 of the Constitution, "no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared." Section 5(2) of the Constitution provides, *inter alia*, as follows:

"(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not –

...

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligation;

...

(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms."

Section 13 of the Constitution falls within Chapter 1 of the Constitution and provides as follows:

"13. (1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

(2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House."

The main issue, therefore, is whether any provision of the Bill infringes the fundamental human rights and freedoms enshrined in sections 4 and 5 of the Constitution and, therefore, requires the support of a special majority of three-fifths of all the members of each House of Parliament in order to have legal effect.

The following provisions of the Bill raise questions as to their constitutionality:

(a) the long title, the definition of "improper conduct" in clause 2 and clauses 6(1) and (2), 9(2), 10(2), 12(3), 13(2) and 15(1), which when read together, permit the disclosure, collection, processing and sharing of personal or confidential information of a person without his knowledge or consent;

(b) clause 4 which permits a disclosure to be made in respect of improper conduct which occurred before the coming into force of the proposed Act;

(c) clauses 6(6), 16 and 25 which make contractual provisions voidable, unenforceable and void, respectively; and

(d) clauses 16 and 17(1) which limit the right of persons to initiate civil or disciplinary proceedings.

Issue No. 1 – Disclosure, Collection, Processing and Sharing of Personal or Confidential Information

The long title, the definition of "improper conduct" in clause 2 and clauses 6(1) and (2), 9(2), 10(2), 12(3), 13(2) and 15(1), which when read together, permit the disclosure, collection, processing and sharing of the personal or confidential information of a person without his knowledge or consent.

According to the long title, the purpose of the proposed legislation is, *inter alia*, "to combat corruption and other wrongdoings by encouraging and facilitating disclosures of improper conduct in the public and private sector." The range of wrongdoings contemplated by the Bill is set out in the definition of "improper conduct" in clause 2. It goes beyond the commission of criminal offences and breaches of the law to include, for example –

"(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;

…

(h) conduct that tends to show unfair discrimination on a basis of gender, race, place of origin, social class, colour, religion or political opinion; or

(i) willful concealment of any act described in paragraph (a) to (h)."

Clause 6(1) enables an employee to make a disclosure of improper conduct based on his reasonable belief that improper conduct is likely to occur. This provision also demonstrates that the disclosed information,

while based on reasonable belief, need not relate to the commission of a criminal offence or a breach of the law and may be speculative to a certain extent.

Further, the disclosed information may include the personal or confidential information of an employer or an employee as there is no provision which prohibits the disclosure of such information. On the contrary, clause 17(1) states that "[notwithstanding] any other law, … a whistleblower who makes a protected disclosure is not liable to any criminal, civil or disciplinary proceedings for having made such a disclosure." Thus, the Bill allows the disclosure of personal or confidential information of a person without his knowledge or consent to be made with impunity, even if the disclosure is in contravention of a written law or in breach of a contractual obligation.

Additionally, clause 6(2)(c) provides that a disclosure may be made "in respect of information acquired by the employee while he was employed in the organisation." Past employees who are usually under a contractual obligation to keep secret or confidential certain information acquired while employed with an organisation, may therefore disclose such information with impunity under the Bill. Moreover, the Bill permits an employee whose employment with an organisation is coming to an end, to collect and retain the personal or confidential information of his employer or another employee in an unlawful manner with a view to disclosing it after he has left the organisation.

Clause 9(2) provides for the receipt and processing of anonymous disclosures. Clause 10(2) confers on whistleblowing reporting officers the responsibility of "receiving and processing internal disclosures of information about improper conduct" and of determining whether to refer such disclosures to a designated authority for further investigation.

Under clause 12(3), a whistleblowing reporting officer may refer an internal, protected disclosure to the Whistleblowing Reports Unit of a designated authority for further investigation if the disclosure "leads to the detection of improper conduct which constitutes a criminal offence or the breach of a law." This provision supports the above view that disclosures of improper conduct need not relate to the commission of a criminal offence or the breach of the law.

Clause 13(2) provides that "[a] Whistleblowing Reports Unit shall be responsible for receiving and processing external disclosures pertaining to matters which fall within the areas of responsibility of its designated authority." Clause 15(1) allows Whistleblowing Reports Units to refer protected disclosures to another Whistleblowing Reports Unit, if it considers that the disclosure can be better processed by that other Whistleblowing Reports Unit.

The abovementioned provisions raise the issue as to whether they infringe the right of the individual to respect for his private and family life guaranteed under section 4(c) of the Constitution.

Fundamental human rights and freedoms are to be construed as broadly as possible. In the Trinidad and Tobago case of **Allan Henry and others v. Commissioner of Prisons**,[1] the Court stated at page 18 of its judgment that "it is well established that the Constitution should be afforded a generous, liberal and purposive construction and, conversely, a court should not derogate from rights conferred by the Constitution by an unduly restrictive construction." Further, these rights and freedoms apply equally to companies as they apply to individuals.[2]

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[1] HCA: 2548 of 2003, CV2007-04450, CV2008-01123.

[2] Smith v. L.J. Williams, 32 W.I.R. 395

The European Convention on Human Rights (ECHR)[3] sheds some light on what is meant by the words "respect for his private and family life." Article 8(1) of the ECHR provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." Article 8(2) of the ECHR elaborates by providing that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others." Thus, the collection of information by State officials about an individual without his consent has been held to infringe the right of the individual to respect for his private life. Examples of such an infringement include –

(a) the recording of fingerprinting, photography and other personal information by the police[4] even if the police register is secret[5];

(b) the collection of medical data and the maintenance of medical records[6]; and

(c) the disclosure by tax authorities of details of personal expenditure (and thus intimate details of private life)[7].

In light of the above, it is submitted that the Bill abrogates or authorises the abrogation of the right of the individual to respect for his private and family life in as much as the Bill allows for –

(a) the otherwise unlawful acquisition of the personal or confidential information of an individual or organisation, as well as the acquisition of the personal or confidential information of an individual or organisation without his or its consent;

(b) the disclosure of such information to whistleblowing reporting officers and Whistleblowing Reports Units;

(c) the collection, processing and sharing of such information; and

(d) the immunity of a person who unlawfully acquires personal or confidential information and discloses it by means of a protected disclosure, from criminal or civil liability or disciplinary action.

The Bill, therefore, needs to be passed with a special majority in accordance with section 13(2) of the Constitution. It is arguable, however, that even if the Bill is passed with such a special majority, it may still be unconstitutional under section 13(1) of the Constitution on the grounds that it is not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual. As explained above, the Bill permits personal and confidential information to be obtained in contravention of the criminal law and protects persons who obtain and disclose such information from criminal liability. This means, for example, that the Bill protects a person who unlawfully obtains personal information by

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[3] Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950, http://www.echr.coe.int/Documents/Convention_ENG.pdf; retrieved 13/1/2016.
[4] *Murray v. the United Kingdom*, judgment of 28 Oct. 1994, Series A no. 300-A.
[5] *Leander v. Sweden*, judgment of 26 March 1987, Series A no. 116.
[6] Appl. No. 14661/81, 9 July 1991, 71 DR 141.
[7] Appl. No. 9804/82, 7 Dec. 1982, 31 DR 231.

hacking an individual's computer system or email account and discloses such information cannot be prosecuted. It is questionable whether such disrespect for the private and family life of the individual which tolerates the commission of criminal offences is proportionate to the desirability, in the public interest, of combating corruption and other wrongdoings and is therefore reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual. It is submitted that in this regard, the Bill fails the proportionality test and is not reasonably justifiable in a democratic society.

Issue No. 2 – Retrospectivity

Clause 4 provides as follows:

> *"4. This Act applies to any disclosure made after the coming into force of this Act, irrespective of whether or not the improper conduct to which the disclosure relates occurred before or after the coming into force of this Act."*

The provision is therefore retrospective in that it permits a disclosure to be made in respect of improper conduct which occurred before the coming into force of the proposed Act. The issue raised by this provision is whether it is objectionably retrospective and therefore infringes the right of the individual to the protection of the law enshrined in section 4(b) of the Constitution.

According to Francis Bennion, "The essential nature of a legal system is that current law should govern current activities. … If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. … The basic principle against retrospectivity 'is no more than simple fairness, which ought to be the basis of every rule'."[8] It follows, therefore, that if the retrospectivity of an enactment is contrary to the essential nature of law, then the enactment may be said to infringe the right of the individual to the protection of the law.

All retrospective enactments are not objectionable. According to Bennion, "[i]t is important to grasp the true nature of objectionable retrospectivity, which is that the past legal effect of an act or omission is retroactively altered by a later change in the law. However, the mere fact that a change is operative with regard to past events does not mean that it is objectionably retrospective. Changes relating to the past are objectionable only if they alter the legal nature of an act or omission in itself. A change in the law is not objectionable merely because it takes note that a past event has happened, and bases new legal consequences upon it."[9]

Clause 4 does not purport to change the nature of the conduct which occurred before the coming into force of the proposed Act. It does seek to turn conduct which was lawful or proper before the commencement of the Act, into unlawful or improper upon the commencement of the Act. It merely refers to improper conduct which may have occurred before the commencement of the Act and permits a whistleblower to disclose information in relation such improper conduct. The legal consequences for such conduct would continue to be the same consequences that applied at the time of the conduct.

Consequently, clause 4 is not objectionably retrospective and does not infringe the right of the individual to the protection of the law.

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[8] Francis Bennion, *Statutory Interpretation*, 4th Edition, Butterworths: London (2002), pp. 265-266

[9] Bennion, *Statutory Interpretation*, p. 266.

Issue No. 3 – Voiding and Unenforceability of Contractual Rights

Clauses 6(6), 16 and 25 make contractual provisions voidable, unenforceable and void, respectively, and therefore raise questions as to whether they infringe the right to property and not to be deprived thereof except by due process of law.

Clauses 6(6), 16 and 25 of the Bill state as follows:

> *"6(6) Any provision in any contract of employment shall be **voidable** in so far as it purports to preclude the making of a disclosure.*
>
> *16. Subject to the exceptions provided for in this Act, despite any prohibition of, or restriction on, the disclosure of information under any written law, rule of law, **contract**, oath or practice, a whistleblower **may not be subjected to detrimental action** on account of his having made a protected disclosure.*
>
> *25. Any provision in a contract of service or other agreement between an employer and an employee is **void** in so far as it—*
>
> > *(a) purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act; or*
> >
> > *(b) purports to preclude the employee or has the effect of discouraging the employee from making a protected disclosure.".*

Clause 6(6) makes a provision in a contract of employment voidable in so far as it purports to preclude the making of a disclosure. Thus, where an employee makes a disclosure in breach of his contract of employment, a court may determine, in light of the circumstances of the case, that contractual provision is void and so prevent the employer from enforcing his contractual right.

Clause 16 provides, *inter alia*, that despite any contractual provision, a whistleblower may not be subjected to detrimental action on account of his having made a protected disclosure. The definition of "detrimental action" in clause 3 includes (a) subjecting a whistleblower to disciplinary action; (b) dismissing, suspending or demoting him; (c) refusing him a transfer or promotion; (d) altering a term or condition of his employment or retirement to his disadvantage; and (e) providing him with an adverse reference.

Clause 25 renders void any contractual provision which purports to exclude a provision of the Bill or to preclude or discourage an employee from making a protected disclosure.

In the case of **I.R.C. v. Lilleyman**[10], it was held that "money" is property within the context of the right to property and not to be deprived thereof except by due process of law. The reasoning in this case was that protection from deprivation was the aim of the constitutional right. Thus, anything of which a person can be said to be deprived may fall within a broad and purposive definition of "property" for the purposes of section 4(a) of the Constitution, including a lease, tenancy, mortgage, contract, bill of sale, pledge,

[10] I.R.C. v. Lilleyman (1964) 7 W.I.R. 496.

contract, grant of permission or licence. Hence, legislation which deprives a person of contractual rights without due process of law by rendering contractual provisions void or unenforceable, abrogates the right of the individual to property and the enjoyment thereof and the right not be deprived of such property and enjoyment without due process of law. Consequently, clauses 16 and 25 are unconstitutional and require the support of a special majority under section 13(2) of the Constitution.

Clause 6(6), however, only makes certain contractual provisions voidable. It will be for the courts to decide whether in the circumstances of the case the contractual provision should be enforced or be declared void. Clause 6(6) therefore provides for the due process of law as administered by the courts and does not infringe section 4(a) of the Constitution.

Issue No. 4 – Removal of the Rights of Persons to Initiate Proceedings in Court

The final issue for consideration is whether clauses 16 and 17(1), as discussed, infringe the right to protection of the law by removing the rights of persons to initiate proceedings in court. Essentially the issue is whether limiting the access of persons aggrieved by the actions of a whistleblower to judicial proceedings or administrative remedies is a breach of section 5(2)(e) and (h) of the Constitution.

Section 5(2)(e) and (h) of the Constitution states as follows:

> *"(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not—*
>
> *(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;*
>
> *…*
>
> *(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.".*

The Constitution therefore provides that every person has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

It is submitted that both clauses 16 and 17(1) abridge section 5(2)(e) and (h) of the Constitution. "Detrimental action" is defined in clause 3 to include subjecting a person to disciplinary action. Clause 16 therefore prevents an employer from initiating disciplinary action against an employee who, in making a protected disclosure, breaches a duty of confidentiality owed by him to his employer under his contract of employment. Similarly, clause 17 deprives the employer of access to criminal, civil and disciplinary remedies for such a breach of confidentiality. Clauses 16 and 17(1) are therefore unconstitutional and require the support of a special majority under section 13(2) of the Constitution.

As indicated above, however, even if clause 17(1) is passed with a special majority, it may fail the test of being reasonably justifiable in a democratic society because it tolerates the commission of criminal offences for the purposes of making a protected disclosure.

Conclusion

The Whistleblower Protection Bill, 2015 infringes fundamental rights and freedoms guaranteed under section 4(a), (b) and (c) and section 5(2)(e) and (h) of the Constitution as follows:

(a) the long title, the definition of "improper conduct" in clause 2 and clauses 6(1) and (2), 9(2), 10(2), 12(3), 13(2) and 15(1), when considered together, abrogate the right of the individual to respect for his private and family life enshrined in section 4(c) of the Constitution;

(b) the retrospectivity of the Bill under clause 4 is not objectionable because it does not alter the nature or character of improper conduct which occurred before the commencement of the proposed Act, nor does it alter the legal consequences for such improper conduct. Clause 4 does not infringe the right of the individual to the protection of the law under section 4(b) of the Constitution;

(c) clauses 16 and 25 make contractual provisions unenforceable and void, respectively, and therefore infringe the right of the individual to enjoyment of property and not to be deprived thereof except by due process of law as guaranteed under section 4(a) of the Constitution. Clause 6(6), however, renders contractual provisions voidable, thereby providing for due process through the courts. Clause 6(6) does not, therefore, infringe the right to enjoyment of property and not to be deprived thereof except by due process of law;

(d) clauses 16 and 17(1) infringe the right of the individual to the protection of the law enshrined in section 4(b) of the Constitution by removing the rights of persons to initiate judicial proceedings and administrative action to determine their rights. These clauses also abrogate section 5(2)(e) and (h) of the Constitution.

To the extent that clause 17(1) tolerates the commission of criminal offences for the purposes of acquiring and disclosing personal or confidential information, the Bill is not be reasonably justifiable in a democratic country and may be struck down by the courts under section 13(1) of the Constitution even if it is passed with a special majority.

And I so advise,

Ian Macintyre SC
Chief Parliamentary Counsel

APPENDIX II

COMMENTS ON CLAUSE 3 (INTERPRETATION) OF THE WHISTLEBLOWER PROTECTION BILL, 2015

STAKEHOLDER/ ENTITY	SUBMISSIONS/COMMENTS	Committee's Comments
ASSOCIATION OF TRINIDAD & TOBAGO INSURANCE COMPANIES (ATTIC)	• Definition of "improper conduct" includes (d) conduct that is likely to threaten the health or safety of a person. Isn't this covered under the OSHA 2004? Should the Occupational Health and Safety Agency be included as a designated Authority under the schedule? • Definition of disclosure includes reference to improper conduct that is likely to occur. • Definition of protected disclosure references clauses 11(4) and 14(6) which do not exist. • Definition of improper conduct- (f) should include reference to public and private funds.	• The Committee agreed to include OSHA as a designated Authority and leave the larger question of the decentralization of the authorities for another occasion. • The Committee agreed to let the position in the Bill remain. • This was already amended to read: "A protected disclosure means a disclosure referred to in section 7(1)" • The Committee agreed that the definition should be restricted to Public Money and that Public funds should be defined as a reference to Public Money in Act No. 1 of 2015
CENTRAL BANK OF TRINIDAD AND TOBAGO	• The definition of "protected disclosure" is unclear in the Bill and does not go far enough when compared to the equivalent definition of "qualified disclosure" in section 43 of the UK's Public Interest Disclosure Act. • In the definition of "designated authority" the word "in" is missing after "listed". • The definition of "detrimental action" should be expanded to include not only the actual sanction that the whistleblower is likely to experience but also the threat of the sanction. In that regard, consideration should be given to replacing the word "means" with the word "includes". This recommendation is consistent with the Whistleblower Protection Principles. • In part (g) of the definition of 'detrimental action' consider including "or refused a	• The Committee agreed that there was merit in including similar provisions in the Bill to that of **43B(3) and 43B(4) of the Public Interest Disclosure Act, 1998.** • Already amended • The Committee agreed that 'means" should remain. Sub-sections (j) and (k) were wide enough to capture this concern and that the definition is in line with the Transparency International's International Principles for Whistleblower Legislation. • This concern is captured by sub-section (j) of the Bill.

	reference" after "provided with an adverse reference". • Definitions of 'employee' and 'employer' should be consistent with definitions in HR/IR related legislation. • The definition of "improper conduct" should be expanded to specifically include "corruption" and "abuse of authority". • In the definition of "organization' the word "of' should be replaced by "or'. • The definition of "protected disclosure" makes reference to clauses 11(4) and 14(6) which do not appear in the Bill but fails to make reference to clause 7 in which a definition has been outlined. • Consider including a definition for 'whistleblowing' e.g. UK Public Interest Disclosure Act. • In the definition of "whistleblowing reports unit' the word "officer" should be deleted.	• That the definition in the Bill is wide enough and is in accordance with Transparency International's International Principles for Whistleblower Legislation. • The Committee agreed that this should remain. • This has already been amended. • This has already been amended. • The Committee agreed that this was not necessary as the word whistleblowing is not used in the Bill. • This has already been amended
NATIONAL TRADE UNION CENTRE OF TRINIDAD AND TOBAGO	• In the definition of "improper conduct" consideration should be given to clarifying item e: - "conduct that is likely to threaten or damage to the environment". It should be clearly stated whether this refers to conduct or action that will threaten and or damage the environment that is prohibited by law. As while some conduct such as burning tyres or certain types of emission are not prohibited, studies have proved that they may cause damage to the environment in the long run, but to engage in such activity may not necessarily be in contravention of the law. Therefore we submit that in our opinion more specificity and less subjectivity may be useful.	• The Committee agreed that this is already captured by the Act.

THE OMBUDSMAN - LYNETTE STEPHENSON,S.C.	• "Disclosure"- Quaere the insertion of the phrase "is likely to occur". How is this to be determined? • "Employee"- which category would be applicable for the person employed in the Public Service. Additionally, item (b) is unclear as to who these individuals are. • "Improper conduct" – item (b) – clarify what will be considered a "legal obligation". Item (h) Instead of using "a" use the word "the". Item (i)- the spelling of the word "willful" should instead be "wilful" following the English and not the American usage.	• The Committee agreed that concern is covered by the construction of the legislation as a whole. • The Committee agreed that this is unnecessary, because Clause 5 of the Bill binds the State. As such, the Public Service is included. • Legal obligation – this definition would be done by judicial determination. In sub-section (h) The Committee agreed to change "a" to "the". Spelling of wilful was already amended.
MIRIAM SAMARU – PRINCIPAL, HUGH WOODING LAW SCHOOL	• What is meant by the word "gross" as used in the definition of improper conduct in clause 3 of the Bill? See paragraph (f) under the definition of "improper conduct". This needs to be defined so that it is not left up to a whistleblower to determine what it means in making a decision whether or not to make a disclosure.	• The Committee agreed to retain the word 'gross' as it indicated a higher level of mismanagement.
SEAN DALIPSINGH – MEMBER OF THE PUBLIC	• "Designated authority" means the office or body listed in the schedule. The schedule contains 16 authorities almost undermining the Bill itself, the wording needs to be restructured along with the authorities. "Designated Authority" means the office or body listed in the schedule but not limiting the term to the specified authority. Or a more comprehensive list of authorities can be given.	• The Committee agreed that it would consider adding other Designated Authorities to the list. However, the bigger question of whether this decentralised method or centralised method of whistleblower reporting would be dealt with on another occasion.
AFRA RAYMOND – MEMBER OF THE PUBLIC	• Regarding (f) under "improper conduct" – An issue here is the use of the phrase 'public funds', which differs from the key phrase 'public money' used in the Public Procurement and Disposal of Public Property Act 2015. The phrase in this law should be 'public money', so as to avoid confusion.	• Committee agreed that to avoid confusion that Public Funds should be changed to Public Money.

	• Detrimental Action – is now prohibited and the definition includes dismissal, disciplinary action, demotion, transfers, and refusal of transfers, detrimental alteration of employment terms, denial of appointments and a wide scope of injury, loss or damage. It seems that there is a significant gap here, since lawsuits are not mentioned in the definitions clause, yet Clause 17 (1) states – "…a whistleblower who makes a protected disclosure is not liable to any criminal, civil or disciplinary proceedings for having made such a disclosure."	• The Committee agreed that this concern was captured by the Bill.
TRINIDAD AND TOBAGO TRANSPARENCY INSTITUTE	**Improper Conduct** • "Conduct that shows gross mismanagement, impropriety or misconduct in the carrying out of any activity that involves the use of public funds". This definition is wide enough to include some of the largest state enterprises whose failure to produce audited accounts places them squarely in this class of "improper conduct". • "Public funds" differs from the key phrase "public money" in the Public Procurement and Disposal of Public Property Act. Using "public money" here instead provides for consistency and may avoid confusion. • "Unfair discrimination" may open up 'a zone of uncertainty and even suggest that certain acts of discrimination are in fact fair'. • Why there is no protection for persons disclosing discrimination generally and why is there a specific exemption of protection for disclosure on the basis of sexual orientation? Maybe the law should provide for discrimination generally and "leave the gates open" for additional circumstances on a case by case basis. **Employee**	• The Committee disagreed with this submission and agreed to let the status quo remain in relation to the submission. • The Committee already noted and agreed to make the changes. • The Committee agreed to cross-reference this concern with the Equal Opportunities Act. • The Committee agreed to cross-reference this concern with the Equal Opportunities Act. • The Committee agreed that the breadth of the definition of employee in the Bill will cover Board Members.

	• Are Board Directors specifically protected? It is not clear that they fall within the definition of employee.	
ALICIA JOSEPH - MEMBER OF THE PUBLIC	**External Disclosure** • While the term external disclosure is defined. The term external action (in relation to Part II 12.1 – 2) seems ambiguous is it any action taken by the respective Whistle-blowing Reports Unit or anybody external to the organization? **Improper Conduct** • "That is likely to threaten the health or safety of a person". This seems to be an issue that would fall under the OSH Authority. If this is the case should that body not form one of the designated authorities outlined in the Schedule (Clause 3). Similarly, "conduct that tends to show unfair discrimination..." should the Equal Opportunity Commission not be added to the Schedule as a designated authority.	• The Committee agreed that "external action" as used in 12 is meant to be referenced to something which is patently obvious to a reasonable person in the the circumstance of the whistleblower that something has been done. • The Committee Agreed with this submission.
JASON MAULE - MEMBER OF THE PUBLIC	**Improper Conduct** • Discrimination as it relates to sexual orientation has been excluded.	• The Committee agreed that the definition in the Bill was within the context of the Equal Opportunity Commission and did not need to be broadened.

Levels G - 7, Tower D
The Port-of-Spain International Waterfront Centre
1A Wrightson Road, Port-of-Spain

JOINT SELECT COMMITTEE ON THE WHISTLEBLOWER PROTECTION BILL, 2015

MINUTES OF THE FIFTH MEETING HELD IN THE ARNOLD THOMASOS ROOM (WEST), LEVEL 6, OFFICE OF THE PARLIAMENT, TOWER D, IWFC, #1A WRIGHTSON ROAD, PORT OF SPAIN ON FEBRUARY 23RD 2016 AT 10:00 AM

Committee Members

PRESENT

Mr. Faris Al-Rawi, MP	- Chairman
Mr. W. Michael Coppin	- Member
Mr. Foster Cummings	-Member
Mr. Wade Mark	-Member
Mr. Prakash Ramadhar, MP	-Member
Mrs. Sophia Chote, SC- Member	

ABSENT/EXCUSED

Mr. Stuart Young, MP	- Member
Major Gen. (Ret.) Edmund Dillon, MP	- Member

Secretariat

Ms. Chantal La Roche	- Secretary
Ms. Tanya Alexis	- Asst. Secretary

Other Attendees

Mr. Ian Macintyre, SC	- Chief Parliamentary Counsel
Ms. Christine Morgan-Cox	- Legal Counsel II

COMMENCEMENT

1.1 The meeting was called to order by the Chairman at 10:38 a.m.

CONFIRMATION OF MINUTES

2.1 The Committee considered the Minutes of the 4th Meeting held on February 19, 2016.

2.2 The Minutes of the Fourth Meeting were amended by removing paragraph 4.1 and replacing it with:

The Committee discussed the opinion presented by the Chief Parliamentary Counsel, Mr. Ian Macintyre S.C. which opined *inter alia* that a special majority would be required for the legislation to be passed. Arising out of the opinion the Committee discussed the following:

c) whether the need for the three fifths majority was tempered by the proportionality in the Bill; and
d) whether need for further consideration of this issue should be ventilated or pursued.

The opinion is attached as Appendix I to these Minutes.

2.3 The motion for the confirmation of the Minutes was moved by Mr. Cummings and seconded by Mr. Coppin and the Minutes were confirmed by the Committee.

MATTERS ARISING FROM THE MINUTES

Discussion of the Terms of External Expert to Assist the Committee

3.1 The Committee noted that the Secretariat contacted the Jamaican Bar Association to obtain curriculum *vitaes* and ascertain the availability of the Expert Consultants.

Review of Submissions Received on the Whistleblower Protection Bill 2015

4.1 The Committee continued the process of reviewing submissions on the Bill. The discussions and decisions of the Committee during this review are attached as Appendix I to these Minutes.

4.2 Arising out of the submissions on Clauses 6 and 4 of the Bill, the Committee instructed the Chief Parliamentary Counsel to:

a) Prepare an opinion on whether reasonable ground or reasonable belief should be used in Clause 6 (1) of the Bill;
b) Examine what filters can be used to disqualify the immunity afforded to whistleblowers on the basis of mental health and compare the existing filters in other laws in Trinidad and Tobago.
c) Consider framework whistleblower legislation from other jurisdictions and examine whether the timelines are included in the legislation or in the regulations and guidelines.
d) Re-draft Clause 6 (4) to consider the inclusion of a twenty four (24) hour period in relation to the phrase "as soon reasonably practicable" and "cause to be reduced into writing", as opposed to "reduced into writing".

Other Business

5.1 The Committee noted that the report from the Law Reform Commissions on the key policy issues in the area of whistleblower protection from both a regional and international perspective was complete. The Chairman undertook to forward report to the Secretariat for circulation to Members.

5.2 The Committee also instructed the Chief Parliamentary Counsel to consider the Law Review Commission report and summarise policy considerations in relation to the Bill for discussion by Members.

5.3 The Committee agreed that it would postpone scheduling meetings with the members of the public and stakeholders until after the Committee had finished its considerations of the submissions received.

5.4 The Committee agreed that its next meeting will be held on Wednesday 2nd March, 2016 at 10:00 a.m.

ADJOURNMENT

6.1The Chairman thanked Members and adjourned the meeting.

6.2The adjournment was taken at 12:05 p.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

February 23, 2016

APPENDIX I

COMMENTS ON CLAUSE 4 (INTERPRETATION) OF THE WHISTLEBLOWER PROTECTION BILL, 2015

STAKEHOLDER/ENTITY	SUBMISSIONS/ COMMENTS	COMMITTEE'S COMMENTS
ASSOCIATION OF TRINIDAD & TOBAGO INSURANCE COMPANIES (ATTIC)	• Clause 4 states that the Act applies to any disclosure made when same comes into force, "irrespective of whether or not the improper conduct to which the disclosure relates occurred before or after the coming into force of this Act". It is recommended that a time frame should be included for disclosures which relate to improper conduct which occurred before the Act comes into force to avoid reporting conduct which can no longer be actioned due to the expiration of the limitation period.	• The Committee noted the following points: i The opinion provided by the CPC's Office provided that the Bill did not breach the rule of retrospectivity. ii That there should be a prescriptive period for disclosures as valuable resources and time could be spent pursing frivolous matters. iii The Bill did not rob an accused person/ Entity of the prescriptive periods available under the criminal/civil law. The Committee agreed that the Expert Consultants with the same retrospective provision in their Act to provide some guidance and statistics on how this. The Committee agreed to make the recommendation to the Government as this was a policy decision that the Government will have to make.

CENTRAL BANK OF TRINIDAD AND TOBAGO	• In clause 4, line 2 the words "the conduct" should be deleted as these appear misplaced.	• This has already been amended.
THE OMBUDSMAN - LYNETTE STEPHENSON,S.C.	• Should there not be a cut-off point as to how far back such action would be investigated? This would entail the use of limited resources to obtain evidence which would lead to punishment.	• Committee has already addressed this.
TT SECURITIES AND EXCHANGE COMMISSION	• This gives the legislation retroactive effect. This clause purports to operate in the manner of retrospective legislation as it attaches a new detriment to events/considerations which have already passed. There exists in law, a presumption that statutes are not intended to have retrospective application unless it deals with elements of legal procedure. Retrospective laws may be considered inconsistent with the rule of law which the Constitution of T&T is deemed to uphold.	• Committee has already addressed this.
JASON MAULE - MEMBER OF THE PUBLIC	• Is there a cut off period? How far back can a report of improper conduct be made?	• Committee has already addressed this.

COMMENTS ON CLAUSE 6 OF THE WHISTLEBLOWER PROTECTION BILL, 2015

STAKEHOLDER/ENTITY	SUBMISSIONS/ COMMENTS	COMMITTEE'S COMMENTS
ENVIRONMENTAL MANAGEMENT AUTHORITY	• This Clause repeats the contents of clause 4.	• Already addressed.
RODNEY SEEPERSAD – MEMBER OF THE PUBLIC	• The term "improper conduct" is definitive. Consider information reasonably suspecting improper conduct.	• Agreed to let the provisions in the Bill remain.

	• Clause 6(1) should read "may have occurred" instead of "has occurred." • Clause 6 (6) should read void, instead of "voidable."	• Agreed to let the provisions in the Bill remain. • The intention was voidable.
RACHEL MAIKHOO –MEMBER OF THE PUBLIC	• How is Clause 6 balanced with the issues of confidentiality? E.g. Trade secrets.	• This does not apply to trade secrets.
ALICIA JOSEPH -MEMBER OF THE PUBLIC	• Clause 6 (4) There is no fixed period outlined for placing a verbal report in writing. This seems ambiguous. This is a recurring trend throughout the document and seems to clash with another part of the legislation. Furthermore, perhaps complaints can be placed in both a soft and hard copy and not simply left to a hard copy. In addition there seems to be no outlined process for making a disclosure (either internal or external), even if this process is used as a guide with certain mandatory steps outlined.	• The Committee agreed that "soft copy versions could be manipulated" The Committee considered the inclusion of a time period and agreed that the CPC's Office would redraft the clause to include 24 hours and the words and as soon a reasonably practicable. The Committee also agreed that CPC's Office would also consider framework whistleblower legislation from other jurisdictions and examine whether the timelines are included in the legislation or in the regulations and guidelines.
ASSOCIATION OF TRINIDAD & TOBAGO INSURANCE COMPANIES (ATTIC)	• Clause 6 (1) references improper conduct that is likely to occur. • Clause 6 provides that a whistleblower can make a disclosure either in writing or orally. It further states that where an oral disclosure is made, the Whistleblowing Reporting Officer is required to reduce the report to writing. It is suggested that in order to maintain the integrity of the disclosure, the whistleblower should be required to make the report in writing. Where the Whistleblowing Reporting Officer reduces the disclosure to writing this is "third party" reporting and can be deemed hearsay. • If Clause 6 is not changed as suggested above, it is recommended	• Agreed to let the provisions in the Bill remain. • The Committee instructed the CPC to Re-draft Clause 6 (4) to consider the inclusion of a twenty four (24) hour period in relation to the phrase "as soon reasonably practicable" and "cause to be reduced into writing", as opposed to "reduced into writing". • The Committee already considering the inclusion of time frame in the legislation.

	that an appropriate time frame should be identified for reducing the report to writing.	

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The Port-of-Spain International Waterfront Centre
1A Wrightson Road, Port-of-Spain

JOINT SELECT COMMITTEE ON THE WHISTLEBLOWER PROTECTION BILL, 2015

MINUTES OF THE SIXTH MEETING HELD IN THE ARNOLD THOMASOS ROOM (WEST), LEVEL 6, OFFICE OF THE PARLIAMENT, TOWER D, IWFC, #1A WRIGHTSON ROAD, PORT OF SPAIN ON MARCH 15, 2016 AT 10:00 AM

Committee Members

PRESENT

Mr. Faris Al-Rawi, MP - Chairman
Mr. W. Michael Coppin - Member
Mr. Foster Cummings - Member
Mr. Wade Mark-Member
Major Gen. (Ret.) Edmund Dillon, MP - Member

ABSENT/EXCUSED

Mr. Stuart Young, MP - Member
Mr. Prakash Ramadhar, MP – Member
Mrs. Sophia Chote, SC- Member

Secretariat

Ms. Chantal La Roche - Secretary
Ms. Tanya Alexis - Asst. Secretary

Other Attendees

Mr. Ian Macintyre, SC - Chief Parliamentary Counsel
Ms. Christine Morgan-Cox - Legal Counsel II

COMMENCEMENT

1.1 The meeting was called to order by the Chairman at 10:15 a.m.

CONFIRMATION OF MINUTES

2.2 The Committee considered the Minutes of the 5th Meeting held on February 23, 2016.

2.2 There being no amendments the motion for the confirmation of the Minutes was moved by Mr. Coppin and seconded Mr. Cummings by and the Minutes were confirmed by the Committee.

MATTERS ARISING FROM THE MINUTES

Discussion of the Terms of External Expert to Assist the Committee

3.1 The Committee noted that the Secretariat contacted the following Expert Consultants:

i. The Hon. B. St. Michael Hylton OJ QC;
ii. Mr. Kent Pantry QC;
iii. Mr. Greg Christie; and
iv. Dr. Derrick McKoy former Contractor General and Dean of the Faculty of Law at the Mona Campus of the University of the West Indies.

3.2 The Chairman advised the Committee that Mr. Christie recommended, Dr. McKoy who served as Jamaica's 3rd Contractor General and is currently the Dean of the Faculty of Law at the Mona Campus of the University of the West Indies. Dr. McKoy also authored the following papers:

i. ***"Whistle Blowing and the Law",***; and
ii. ***"Blowing in the Wind: Whistleblower Legislation and the Anti-Corruption Project in the Commonwealth Caribbean***"

3.3 The Chairman informed the Committee that the Secretariat was unable to obtain contact information in relation to Hon. J. Paul Harrison, Retired President of the Jamaican Court of Appeal and Chairman of the Corruption Prevention Commission.

3.4 The Committee reviewed the Curriculum *Vitaes* of the Expert Consultants and agreed to avail itself of the services of Dr. McKoy. The Committee also agreed to provide Dr. McKoy with a brief containing:

i the Whistleblower Protection Bill, 2015;
ii The written submissions received by the Committee;
iii An Opinion by the Chief Parliamentary Counsel on the constitutionality and retrospective application of the Bill;
iv A matrix of corresponding penalties in other legislation; and
v The Policy Paper entitled "The Introduction of Whistleblower Legislation in Trinidad and Tobago" prepared by the Law Reform Commission.

3.5 The Committee agreed to invite Dr. McKoy to appear at its next meeting via video conferencing.

Circulation of the Policy Paper circulated by the Law Reform Commission

4.1 The Committee noted that the policy paper prepared by the Law Reform Commission entitled "The Introduction of Whistleblower Legislation to Trinidad and Tobago" was received from the Attorney General and circulated to Members.

Review of Submissions Received on the Whistleblower Protection Bill 2015

5.1 The Committee continued the process of reviewing submissions on the Bill. The discussions and decisions of the Committee during this review are attached as Appendix I to these Minutes.

5.2 The Committee agreed to consider submissions on clause 6 of the Bill Volume II and to subsequently consider from Clause 7 in both volumes I and II onwards.

5.3 The Committee agreed that it would suspend considerations on Clauses 1- 5, Volume II until after the Committee has completed both volumes of the submissions.

5.4 The Committee instructed the Secretariat to reduce all the submissions into one document for ease of reference.

DISCUSSIONS ON THE WAY FORWARD

6.1 Discussion ensued on the effect of the imminent reporting deadline on the work of the Committee.

6.2 As a consequence, the Committee agreed that a report would be tabled to bring to the attention of the Parliament:

(i)the decisions of the Committee thus far;

(ii)its inability to complete its work in the mandated period; and (iii) its request for an extension to April 29, 2016.

6.3 The Committee concurred that this report would be approved by round-robin.

ADJOURNMENT

7.1 The Chairman thanked Members and adjourned the meeting.

7.2 The adjournment was taken at 12:05 p.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

March 15, 2016

APPENDIX I

COMMENTS ON CLAUSE 6 OF THE WHISTLEBLOWER PROTECTION BILL, 2015

STAKEHOLDER/ENTITY	SUBMISSIONS/COMMENTS	COMMITTEE'S COMMENTS
TRINIDAD AND TOBAGO POLICE SERVICE (OFFICE OF THE COMMISSIONER OF POLICE)	• Clause 6 Disclosure should not be limited to employees of an organization by also any person outside of an organization This clause should be amended to include after that the whistleblower had a reasonable belief that the information of the improper conduct was true at the time it was reported.	• The committee agreed to retain the provision as worded in the Bill as this suggestion would be lower than the standard stipulated in the Bill.
	• The word "organisation" should be defined since there are persons registered as sole traders and business who employ persons.	• The Committee agreed that the broad definitions of employer and employee would capture "organisations".
	• Provisions should be made with respect to disclosures that deal with matters of national security, official military secrets and classified information. Special procedures and safeguards for reporting should be developed and included in the supporting Regulations of the Act.	• The Committee noted this point and noted also that Parliament was in the process of drafting an Official secrets Act. As such, the Committee decided that further discussions should be held to determine whether it should be borne out in regulations or the Primary legislation.
	• Whistleblowing Officer: How is this person appointed? What qualifications are required? What protection would be afforded to that person? NB: He is appointed by his employer, operating in-house. We are of the view that this person should be independent of and unconnected to the employer.	• The Committee agreed that the Bill provided mechanisms for external reporting and that qualifications and method of appointment would be treated with in the regulations.
	• Clause 6 (2) (b) As it related to the improper conduct occurring prior to the coming of the act, it should not be indefinite, but a specific time frame of six years should be enshrined.	• The Committee agreed that it would invite the Expert Consultant to provide some guidance on this point.

	• Clause 6 (3) Disclosures must only be in writing and signed by the whistleblower. Clause 6 (4) Open to manipulation, if an oral disclosure is made it should be reduced in writing in the presence of the whistleblower and signed by him/her • Clause 6 (6) This clause makes a contractual provision voidable that seeks to preclude a disclosure; however, there are specific pieces of legislations that preclude making disclosures to persons who are not authorized to receive same under the Act. Specifically the Interception of Communication Act Chapter 15:08 and the Strategic Services Agency Chapter 15:06, which contain confidentiality clauses.	• The Committee instructed the Chief Parliamentary Counsel to consider whistleblowing legislation in other jurisdictions and consider whether there is a need for certification of oral disclosures. • The whistle-blowing Bill will supersede the Secrecy provisions in those Acts, provided it is a proper disclosure, the whistleblower will have immunity.
THE INTEGRITY COMMISSION	• Clause 6 (3) We note that subsection 3 requires that the disclosure should be made orally or in writing. As a matter of process we feel that it may be necessary to have some sort of safe guard mechanism that allows verification that the report made orally to the officer receiving the report, is a true and accurate account of what the employee is actually reporting. This may require some sort of certificate to be signed by the person giving the information that the record reduced into writing accurately reflects what was told to the reporting officer. • Clause 6 (5) In relation to subsection 5 we think the words “by a member of parliament” needs to be inserted after the word “made”.	• The Committee has already addressed a similar concern raised by the Trinidad and Tobago Police Service. • The Committee agreed that this provision would be deleted.

COMMENTS ON CLAUSE 7 OF THE WHISTLEBLOWER PROTECTION BILL, 2015

STAKEHOLDER/ENTITY	SUBMISSIONS/ COMMENTS	COMMITTEE'S COMMENTS
ASSOCIATION OF TRINIDAD & TOBAGO INSURANCE COMPANIES (ATTIC)	• 7 (1)(i) A protected disclosure is one made amongst other things "in good faith". I think that a definition of good faith is required in Clause 3-Interpretation. *"Good faith means the honest intent to act without taking an unfair advantage over another person and includes honesty, fairness, lawfulness of purpose, and absence of any intent to defraud".* • There is a broader principle that goes beyond the "good faith" requirement and speaks to disclosures being made in the "public interest". This reduces the risk on personal motives and vexatious reports. Some jurisdictions have added this legal test. • (1)(c)(ii) References preparing to engage in improper conduct.	• The Committee agreed that the term good faith was a matter or the Courts to determine judicially. • The Committee agreed that improper conduct was widely defined in public interest terms. It goes through (a) to (i) and deals comprehensively with the public interest factor. • The Committee agreed to retain this provision of the Bill
THE OMBUDSMAN- LYNETTE STEPHENSON,S.C.	• Clause 7(1) (c) (ii) - The insertion of the phrase "is preparing to engage in improper conduct." Again how is this determined? • Clause 7(1) (d) – Who determines whether the disclosure is not made for personal gain? • Clause 7 (2) – How does one prove that the whistleblower discloses information which he knows or ought reasonably to have known is false? What evidence must be put forward to prove that fact?	• The Committee agreed that this should be determined judicially in a case by case manner. • The Committee decided this was a matter for the Courts to decide. • The Committee decided this was for the Courts to decide.

MIRIAM SAMARU-PRINCIPAL, HUGH WOODING LAW SCHOOL	• Who determines what is the extent and meaning of "in good faith" as stated in clause 7 (1) (b)? Is it the Whistleblowing Reports Unit? The person who makes that determination should be identified so that it is not a determination made by various persons based on their subjective view of what the terms mean.	• The Committee instructed the CPC look at any other formulation that may exist, with respect to third parties, where there is a nexus between them, in terms of mind and management like a corporation sole connection.
RODNEY SEEPERSAD – MEMBER OF THE PUBLIC	• Clause 7 (1) (c) (ii) Refers only to employer/employee relation. What about 3rd parties getting info and passing it on about an organisation or person outside of their own Organisation, can they be protected from job loss or other sanctions under this legislation?	• The committee agreed that the definitions of employer and employee were wide enough.
RACHEL MAIKHOO – MEMBER OF THE PUBLIC	• Clause 7(1) (d) What about rewards or recognition to eliminate the snitch culture we have in Trinidad and Tobago	• The Committee agreed that legislatively encouraging a reward to do something could be dangerous. The Bill does not preclude persons from getting pecuniary rewards where rewards are being offered to assist Crime Stoppers or 800 TIPS
TRINIDAD AND TOBAGO POLICE SERVICE (OFFICE OF THE COMMISSIONER OF POLICE)	• Clause 7 (1) (c) (ii) This clause supports the view that the WBPO should be independent of the employer. The disclosure may be in relation to the said employer, and may preclude action being taken and thus defeat the intention of the legislation • Clause 7 (2) Is the Whistleblower exposed to civil liability at this stage? • Clause 7 (b) This clause deals with a protected disclosure made in good faith. The	• The Committee agreed that this issue was sufficiently covered by the proposed Bill as there is an external reporting mechanism contemplated by the Bill. • The Committee agreed that whistleblower is open to civil liability but if a suit for detrimental action is brought the whistleblower would be clothed with immunity. • The Committee noted this point.

	clause also contains a provision that the onus is not on the employee to prove good faith. Where there is allegation of the lack of good faith, it must be proved by the employer.	
DISCLOSURE TODAY (NON-PROFIT ORGANIZATION)	• Protected Disclosures 7.(1) A disclosure is a protected disclosure if *(a) it is made in accordance with clause 6;* *(b) it is made in good faith;* *(c) at the time of making the disclosure, the whistleblower reasonably believes, based on the information he has at that time, that—* *(i) the information disclosed, and any allegation contained in it, are substantially true; and* *(ii) the information disclosed tends to show that his employer, another employee of his employer or a person acting in his employer's name and interests has engaged, is engaging or is preparing to engage in improper conduct;* *(d) the disclosure is not made for purposes of personal gain;* *(e) in the case of an internal disclosure, if it is made substantially in accordance with the internal procedures established under section 11(1); and* *(f) in the case of an external disclosure, if the director of a Whistleblowing Reports Unit concludes that a disclosure has been properly made under section 14(5).* (2) A disclosure is not a protected disclosure if the whistleblower discloses information which he knows, or ought reasonably to have known, is false. • The list above is cumulative and so all criteria must be met.	• The Committee agreed that the list was cumulative.

	• Two tiered system: Firstly, a disclosure is protected if it is made in accordance with clause 6. Clause 6 provides that "an employee of an organization may make a disclosure of improper conduct to a Whistleblowing Reporting Officer [internal] or a Whistleblowing Reporting Unit [external]." This means that any disclosure outside of this framework is not a protected disclosure. This therefore excludes information disclosed directly to the public through the media, to trade unions, lawyers, civil society organizations etc. Media, Members of Parliament, Trade Unions & Civil Society: In our view, this exclusion represents a significant drawback in the effectiveness of this proposed WPL on combatting corruption. There are a plethora of examples worldwide of WPL addressing public disclosure as a last resort, once certain conditions have been met. WPL in South Africa and the U.K. recognize such disclosure as a last resort (or 'third tier') after internal procedures have been exhausted. In the case of Canada, disclosures can be made to the public if it is not prohibited under the law and there is not sufficient time to make a disclosure of what constitutes a serious offence or "an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment." [Public Servants Disclosure Protection Act 2005, c.6 s.16 (a)(b)] In some of its states, Australia provides that a public interest disclosure can be made to a journalist if the entity to which the disclosure was made decided not to investigate it, or investigated it but	• The Committee agreed that the approaches recommended by Disclosure Today was taking the law too far as the jurisdictions upon which their considerations were built have complex secrecy Acts and legislations on Media that is significantly different from Trinidad and Tobago. As such, there was danger in adopting the recommendations wholeheartedly.

	did not recommend any action, or did not notify the whistleblower after six months [Queensland Public Interest Disclosure Act of 2010, Part 4] Of-times, direct media disclosures are protected where the matter concerns a significant and urgent danger to public health and safety, or where the whistleblower has engaged unsuccessfully with formal internal and external channels. Moreover, trade unions, civil society organisations and professional associations provide support to persons desirous of making disclosures in the public interest. These organisations typically provide legal representation advice and advocacy and even conduct investigations. The exclusion of protection from criminal and civil liability and disciplinary procedures, for persons reporting to these bodies, kicks away the only familiar ladder for responsible whistleblowing in a society where there is no WPL. This creates a substantial erosion for persons who are fearful of being identified. The proposed WPL may therefore have the effect of giving with one hand and taking away with another by undermining the fundamental human right to freedom of expression and the critical role played by the media, trade unions and other civil society organizations in modern democracies promoting accountability and transparency. Systematic research on the relationship between whistleblowing and informal public disclosure and its effectiveness to expose, prevent and/or hold decision-makers accountable is	

	surprisingly rare. All the same, despite being only the public tip of the whistleblowing iceberg, informal public disclosures play an important role in defining social and political responses to whistleblowing and often represent whistle- blowing at its highest-stake stage. The protections available to disclosers under common law and statute vary massively for public as opposed to internal or regulatory disclosures. Increasingly, the general legislative trend builds public disclosure into countries' whistleblowing regimes, as a third 'tier' of disclosure if internal or regulatory disclosures fail or are impractical [Lewis, Brown & Moberly, International Handbook on Whistleblowing Research, 2014, Chapter 1. (Vandekerckhove 2010; Brown 2011b)]. Some authors have argued that when WPL does not protect public disclosure, this can be interpreted as an indication that WPL aims more at "domesticating dissent rather than acting against wrongdoers." They further stress that disclosure to the media or members of parliament should be encouraged, respected and protected as a fundamental democratic corner stone [U4 Anti-Corruption Resource Centre – Good Practice in WPL, 2009 at p.5-6] .The Committee is strongly urged to consider including this 'third tier' external disclosure in the proposed WPL. Distinguishing Motive: The requirement for "good faith" and "reasonable grounds for believing" that there has been "improper conduct" is considered standard. However, recently a number of	

	different approaches have been adopted in relation to the aspect of good faith and how it is interpreted. In a number of jurisdictions, concerns have been raised regarding the risk of over-emphasizing the good faith element or of mixing it up with "motive". Where individuals believe the main focus would be on their motive for reporting rather than on a proper assessment of the merits of the information they could provide in good faith, they might not speak up at all. Due to this risk, the Council of Europe has not included the element of good faith in its recommendations. Under Norwegian law, for example, bad faith does not rule out lawful reporting. This recognizes that the public interest is served if an employee reports reasonable suspicions, even if his or her personal motivation is malicious. In other words, the information could be necessary and useful to uncover corruption, and the motive of the person reporting does not change this. In 2013, the United Kingdom removed the term "good faith" from its law in relation to determining whether a disclosure qualifies for protection, but retained the criteria in relation to deciding the remedial compensation or reimbursement [United Kingdom (2013), Enterprise and Regulatory Reform Act, which changes the provisions of the Public Interest Disclosure Act (1998) and Employment Rights Act (1996)]. The 2015 UNCAC Resource Guide suggests that the risk could also be minimized by providing that good faith means "honestly" or "bona fide" with respect to the information, thus linking it with the	

	information, and not the personal motivation of the reporting person. In recent years, several WPLs while keeping the notion of good faith, emphasize the quality of the whistleblower's information and make no mention of motive, nor clarify or limit the issue of motive: ➢ Bosnia and Herzegovina's Law on Whistleblower Protection in the Institutions of Bosnia and Herzegovina (2013) defines good faith as "the stance of the whistleblowers based on facts and circumstances of which the whistleblower has his own knowledge of and which he or she deems to be true." ➢ Zambia's Public Interest Disclosure Act (2010) states in its article 22 that a protected disclosure is made in good faith by an employee "who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law". A consideration of the bill manifests this approach to "good faith" by 7(c) carefully outlining the state of mind of the whistleblower as being a reasonable belief that the information he has disclosed and any allegation contained therein are substantially true. Persons who deliberately make false disclosures are not usually afforded protection. Some laws expressly refer to this; for example, Korea's ACRC Act states that "a person who reports an act of corruption despite the fact that he or she knew that	

	his/her report was false shall not be protected by this Act." [Korea ACRC Act 2009, Chapter V, Article 57] In the bill clause 7(2) imposes a higher standard on the whistleblower. Here a disclosure is not protected if the whistleblower discloses information "which he knows or ought reasonably to have known is false." This places the burden of constructive knowledge on the whistleblower. However it does not go as far as to impose a criminal penalty for making a false disclosure. The adoption of criminal sanctions for false reporting is controversial; some argue that it may deter whistleblowing and have a chilling effect [See D. Banisar, Whistleblowing: International Standards and Developments, (2009), p24.] Here the drafters have sought to strike a balance between ensuring responsible whistleblowing and having chilling effect. However, there is still a requirement that the "disclosure is not made for the purpose of personal gain" (clause 7 (d)) in order for it to be a protected disclosure. This seems to place too much emphasis on motivation. If a disclosure is true and reveals improper conduct what relevance is it that the reporter is obtaining some personal advantage, pecuniary or otherwise. Notably, while the UK WPL framework prohibits "disclosures for purposes of personal gain" this stipulation applies only to "wider" or "third tier" disclosures. No such criteria is stipulated for formal internal and external reporting channels. The rationale for the "personal gain" criteria was to stymie the grosser excesses of	

	'cheque book journalism' which had been gaining traction in the UK. This notwithstanding the employment tribunal in Kajencki v Torrington Homes (E.T. Case No. 3302912/01) expressed the view that "personal gain" was capable of encompassing other forms of personal advantage. There may reasonably be many reasons why a reporter may stand to personally gain from making a disclosure. It is here posited that in such a case of mixed motivation, if there is sufficient public interest, such disclosure should still receive protection. Clause 18 which provides for sentence mitigation for parties to a corrupt transaction coming forward with information is one such case. There seems to be a legislative irrationality that corrupt parties may receive "personal gain" in the form of sentence mitigation but passive observers coming forward can receive no incentive. The Committee is urged to consider the potential chilling effect of the "personal gain" criteria. It places a higher standard on the whistleblower that may work counter productively for anti-corruption efforts. Unilateral Power of Whistleblowing Unit: Clause 7 (1) (f) provides an additional stipulation before the disclosure is deemed protected and that is in the case of an external disclosure, a director of a Whistleblowing Reports Unit (WRU) must conclude that a disclosure has been properly made under clause 14(5). The impact of this provision is that even if a reporter is acting in good	

	faith and on reasonable grounds and does report information of improper conduct within the definition of the bill, this is insufficient to deem the disclosure protected. A priori positive obligation is placed on a WRU in respect of external disclosures to conclude that the disclosure has been properly made and therefore protected under clause 7. Given the lack of statutory oversight of the WRUs this power presents a serious risk of abuse. The additional requirement of a decision of a director of a WRU provides an easy loophole for a rogue WRU which has been dragging its feet on a particular disclosure. If the objective of this provision is to grant such unilateral power to a WRU to conclude that a disclosure has been properly made under clause 14(5), this can be addressed, but perhaps on balance it is better addressed as a criteria upon which the WRU may rely when making a decision not to take further action on a disclosure. Recommendation: It is recommended that this requirement couched in terms of a positive a priori obligation be removed. A protected disclosure can be a protected disclosure until it is deemed otherwise by a WRU. It provides an additional and wholly unnecessary barrier for a whistleblower acting in good faith and exposes such whistleblower to unnecessary risk of reprisal if there are delays in the processing of the disclosure.	