PARLIAMENT

REPUBLIC OF TRINIDAD AND TOBAGO

FIRST SESSION OF THE ELEVENTH PARLIAMENT (2015/2016)

THIRD 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:

SENATE 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

INTERIM REPORTS

3. The Committee has reported to Parliament on two (2) previous occasions that its work was not yet complete. In its 2nd Interim Report, your Committee requested and was granted a seven (7) week extension to complete its work. This extension will expire on April 29, 2016.

MEETINGS

4. Since the presentation of its 2nd Interim Report, the Committee has met on three (3) occasions on the following dates:

   - March 23, 2016

- April 05, 2016
- April 26, 2016

5. The Minutes of the Meetings held on March 23, April 5 and April 26, 2016 are attached at **Appendix I**.

REPORT

6. The Committee wishes to report that the consideration of Stakeholder submissions received by the Committee is in progress and the exercise has, thus far, been quite thorough.

7. However, due to the intensity of the schedule of Parliamentary Committee meetings since its last report and intervening public holidays, the work of the Committee has not progressed as expected.

8. While the review of Stakeholder submissions is in progress, the Committee requires additional time to complete this exercise and to and properly review the Bill and compile its suggested amendments.

RECOMMENDATION

9. Your Committee therefore humbly requests a further period of seven (7) weeks to complete its work and to submit its final and comprehensive report to the Parliament by **June 17, 2016**.

Respectfully Submitted,

Sgd.
Mr. Faris Al-Rawi, MP
Chairman

April 28, 2016

MINUTES

OF

PROCEEDINGS

AND

ATTENDANCE RECORD

JOINT SELECT COMMITTEE ON THE WHISTLEBLOWER PROTECTION BILL, 2015

MINUTES OF THE SEVENTH 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 23, 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
Mrs. Sophia Chote, SC	-	Member

ABSENT/EXCUSED

Mr. Stuart Young, MP	-	Member
Mr. Prakash Ramadhar, 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
Mrs. Charlene Taylor-Brasso	-	Law Reform Officer

COMMENCEMENT

1.1 The meeting was called to order by the Chairman at 10:17 a.m.

DISCUSSIONS WITH DR. DERRICK MCKOY, LEGAL CONSULTANT

2.1 The Chairman informed the Committee that arrangements had been made for Dr. McKoy former Contractor General and Dean of the Faculty of Law at the Mona Campus of the University of the West Indies, to join the Meeting via video conferencing to discuss the way forward in relation to the Committee's deliberations on the Bill.

2.2 The Committee commenced discussions with Dr. Derrick McKoy, during which the following matters were discussed:

i. the retrospective effect of the Bill and whether it requires a special Constitutional majority;
ii. the effect of whistleblower protection legislation on official and/or State secrets and the need for an Official Secrets Act;
iii. the Jamaican pre-legislative process and challenges experienced in implementing Whistleblower legislation;
iv. the potential effect of Whistleblower legislation on the Police Service and Defence Force;
v. the need for a designated authority or other coordinating body to monitor compliance with Whistleblower legislative provisions;
vi. whether the Bill is aimed at protecting only employees or whether consideration would be given to widening protection to media, trade unions etc.; and
vii. the enforcement process and whether the Industrial Court should be considered as the Court to deal with matters arising out of the Bill instead of the High Court.

2.3 At the end of discourse, the Committee agreed to allow Dr. McKoy two (2) weeks to review the Bill, submissions received from Stakeholders and members of the public, and submissions and comments from Members of the Committee.

2.4 The Committee also agreed to make arrangements for another video conference call with Dr. McKoy after he considers all documents submitted to him.

CONFIRMATION OF MINUTES

3.1 The Committee considered the Minutes of the 6th Meeting held on March 15, 2016.

3.2 The Minutes were amended by inserting the following:

"4.2 The Chief Parliamentary Counsel requested an extension of time in relation to the following:

i. Preparation of an opinion on whether reasonable ground or reasonable belief should be used in Clause 6(1) of the Bill;

ii. Examination of 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.
iii. Consideration of framework whistleblower legislation from other jurisdictions and examine whether the timelines are included in the legislation or in the regulations and guidelines.
iv. Re-drafting 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 agreed to facilitate this request.

6.4 The Committee agreed that its next meeting will be held on Wednesday 23rd March, 2016 at 10:00 a.m."

3.3 The motion for the confirmation of the Minutes was moved by Mr. Mark and seconded by Mr. Coppin and the Minutes as amended were confirmed by the Committee.

MATTERS ARISING FROM THE MINUTES

4.1 The Chairman advised the Committee that the Stakeholder submissions had been consolidated as one document and circulated to Members.

4.2 The Chairman informed Members that the Second Interim Report was laid in both Houses of Parliament and the request for an extension of time to April 29, 2016 was granted.

DISCUSSION OF ISSUES IN THE WHISTLEBLOWER PROTECTON BILL 2015

5.1 The Chairman advised of the circulation of the following documents prepared by the Chief Parliamentary Counsel:

i. an opinion on whether the phrase "reasonable ground" as opposed to "reasonable belief" should be used in Clause 6(1) of the Bill; and
ii. a draft amendment to Clause 6(4) to include 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.

These documents are attached as Appendix I to the minutes.

5.2 Discussion ensued on both the opinion and the amendment to Clause 6(4).

OTHER BUSINESS

6.1 The Committee discussed the possibility of circulating the Policy Paper entitled "The Introduction of Whistleblower Legislation in Trinidad and Tobago" prepared by the Law Reform Commission to stakeholders. The Chairman undertook to obtain approval for the circulation of the document and revert to the Committee.

6.2 The Committee agreed that its next meeting will be held on Tuesday 5th April, 2016 at 10:00 a.m.

ADJOURNMENT

7.1 The Chairman thanked Members and adjourned the meeting.

7.2 The adjournment was taken at 12:20 p.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

March 23, 2016

Appendix I

OPINION

RE: REASONABLE BELIEF IN CLAUSE 6(1) OF THE WHISTLEBLOWER PROTECTION BILL, 2015

On 23rd February, 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 on whether the phrase "reasonable ground" as opposed to "reasonable belief" should be used in clause 6(1) of the Bill.

Clause 6(1) of the Bill provides as follows:

> "6. (1) An employee of an organisation may make a disclosure of improper conduct to a whistleblowing reporting officer or a Whistleblowing Reports Unit based on his reasonable belief that improper conduct has occurred, is occurring or is likely to occur within the organisation.".

The standard of reasonable belief is provided for in similar legislation of several Commonwealth jurisdictions, including –

- Section 6(1) of the Whistleblower Protection Act (Malaysia): "A person may make a disclosure of improper conduct to any enforcement agency based on his **reasonable belief** that any person has engaged, is engaging or is preparing to engage in improper conduct";

- Section 9(1) of the Protection of the Whistleblower Act (Malta): "A disclosure is a protected disclosure if … (b) the whistleblower **reasonably believes**, at the time of making the disclosure based on information he has at that moment, that: (i) the information disclosed, and any allegation contained in it, are substantially true; (ii) the information disclosed tends to show an improper practice being committed by his employer, another employee of his employer or by persons acting in the employer's name and interests";

- Section 43B(1) of the Employment Rights Act as amended by the Enterprises and Regulatory Reform Act 2013 (UK): "In this Part a "qualifying disclosure" means any disclosure of information which, in the **reasonable belief** of the worker making the disclosure, is made in the public interest and 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.";

- Section 9(1) of the Public Interest Disclosure (Whistleblower Protection) Act (Province of Alberta, Canada): "… if an employee **reasonably believes** that the employee has information that could show that a wrongdoing has been committed or is about to be committed, or that could show that the employee has been asked to commit a wrongdoing, the employee may make a disclosure to the employee's designated officer …".

Section 12 of the Public Servants Disclosure Protection Act (Canada – Federal) provides as follows:

> "12. A public servant may disclose to his or her supervisor or to the senior officer designated for the purpose by the chief executive of the portion of the public sector in which the public servant is employed any information that the public servant **believes** could show that a wrongdoing has been committed or is about to be committed, or that could show that the public servant has been asked to commit a wrongdoing.".

It is submitted that, although the adverb "reasonably" is not used to modify the verb "believe", the standard of reasonable belief would be applicable in keeping with general common law principles.

In Jamaica, the comparative standard for the state of mind of the whistleblower is not reasonable belief but good faith. Section 5 of the Protected Disclosures Act (Jamaica) states that a "disclosure shall not qualify for protection … unless it is made in good faith and in the public interest." The standard of reasonable belief is, however, used in other respects, such as in section 10(1), which provides as follows:

> "10. (1) Subject to section 12, a disclosure may be made by an employee to the designated authority if it is reasonable in all the circumstances of the case, to make the disclosure and any of the following circumstances applies, namely:
>
> (a) at the time of the disclosure, the employee **reasonably believed** that he would be subject to an occupational detriment if he made the disclosure to his employer in accordance with section 7;
>
> (b) …

(c) the employee making the disclosure has **reason to believe** that it is likely that evidence relating to the improper conduct will be concealed or destroyed if he makes the disclosure to his employer;".

With respect to the standard of reasonable belief, the Employment Appeal Tribunal (EAT) in **Darnton v. University of Surrey** [2003] ICR 615, in considering section 43B(1) of the UK Employment Rights Act, endorsed the following commentary in *Whistleblowing: the new law* by John Bowers QC, Jeremy Lewis and Jack Mitchell:

> "To achieve protection under any of the several parts of the Act, the worker must have a reasonable belief in the truth of the information as tending to show one or more of the six matters listed which he has disclosed, although that belief need not be correct (s43B(1)). This has led some to criticise the statute as giving too much licence to employees to cause trouble, since it pays no regard to issues of confidentiality in this respect. Nor need the employee actually prove, even on the balance of probabilities, the truth of what he is disclosing. This is probably inevitable, because the whistleblower may have a good "hunch" that something is wrong without having the means to prove it beyond doubt or even on the balance of probabilities… The notion behind the legislation is that the employee should be encouraged to make known to a suitable person the basis of that hunch so that those with the ability and resources to investigate it can do so."[1]

The EAT also held that it was unable to accept the view that "… the worker must believe in the accuracy of the factual basis of the disclosure on reasonable grounds", thereby rejecting the need for "reasonable grounds" in the sense of a requirement to have evidence demonstrating that the information was probably true.[2] The EAT therefore regarded "belief on reasonable grounds" as importing a slightly heavier evidentiary burden than "reasonable belief", that is to say, a requirement to have evidence demonstrating that the relevant information is probably true. This concept of "belief on reasonable grounds" is in keeping with decisions in which "reasonable grounds to believe" was said to be determined by considering the actual state of affairs[3] or to mean that it was necessary to demonstrate that the person had actual knowledge of a relevant fact or knew facts which provided grounds for a relevant belief established by evidence.[4]

"Belief on reasonable grounds" would therefore require a standard of proof below "beyond reasonable doubt" (the standard for criminal convictions) and "the balance of probabilities" (the standard for civil liability) but above "reasonable belief". The standard of "reasonable belief" is therefore meant to encourage persons to disclose information which could lead to the investigation

---

[1] *Whistleblowing: Law and Practice*, Bowers QC, Fodder, Lewis and Mitchell, Oxford University Press, Oxford 2007, p. 29

[2] Ibid., p. 32

[3] Stroud's judicial Dictionary of Words and Phrases, 6th Edition, p. 2197 citing White v St. Albans City and district Council, The Times, March 12, 1990

[4] Ibid., citing Swain v. Puri [1996] 10 C.L. 499

of improper conduct by those with the ability and resources to do so. Such investigations would then lead to the establishment of reasonable grounds for the issuance of search warrants and ultimately to the obtaining of evidence to secure criminal convictions or findings of civil liability.

In New Zealand, the formula "belief on reasonable grounds" is used in section 6 of the Protected Disclosures Act, which reads as follows:

> "6. (1) An employee of an organisation may disclose information in accordance with this Act if –
>
> (a) the information is about serious wrongdoing in or by that organisation; and
>
> (b) the employee **believes on reasonable grounds** that the information is true or likely to be true; and
>
> (c) the employee wishes to disclose the information so that the serious wrongdoing can be investigated; and
>
> (d) the employee wishes the disclosure to be protected.
>
> (2) ……
>
> (3) If an employee of an organisation **believes on reasonable grounds** that the information he or she discloses is about serious wrongdoing in or by that organisation but the belief is mistaken, the information must be treated as complying with subsection (1)(a) of the purposes of the protections conferred by this Act …".

Thus, it appears that the threshold for obtaining protection of disclosures in New Zealand is higher than in other jurisdictions, in that there seems to be a requirement to have evidence demonstrating that the relevant information is probably true.

In conclusion, it is recommended that the standard of reasonable belief should be retained in the Bill as it is in line with the legislation of most of the Commonwealth jurisdictions surveyed and

would encourage the making of disclosures for investigation by those with the ability and resources to do so.

Ian Macintyre SC

Chief Parliamentary Counsel

<u>Submission by Chief Parliamentary Counsel to</u>

<u>Joint Select Committee on the Whistleblower Protection Bill, 2015</u>

Re-draft of Clause 6(4) of the Whistleblower Protection Bill, 2015 to include a twenty-four (24) hour period, as soon reasonably practicable and "cause to be reduced into writing", as opposed to "reduced into writing.

"6(4) Where a disclosure is made orally, the officer receiving the disclosure shall, as soon as practicable and, in any event, not more than twenty-four hours of receiving it, cause the disclosure to be reduced into writing."

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 EIGHTH MEETING HELD IN THE ARNOLD THOMASOS ROOM (WEST), LEVEL 6, OFFICE OF THE PARLIAMENT, TOWER D, IWFC, #1A WRIGHTSON ROAD, PORT OF SPAIN ON APRIL 5, 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

ABSENT/EXCUSED

Mr. Stuart Young, MP	-	Member
Mr. Prakash Ramadhar, MP	–	Member
Mrs. Sophia Chote, SC	-	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
Mrs. Charlene Taylor-Brasso	-	Law Reform Officer
Mr. Aneil Joseph	-	Legal Counsel II

COMMENCEMENT

1.1 The meeting was called to order by the Chairman at 10:25 a.m.

CONFIRMATION OF MINUTES

2.1 The Committee considered the Minutes of the 7th Meeting held on March 23, 2016.

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

MATTERS ARISING FROM THE MINUTES

3.1 The Chairman advised the Committee that the Secretariat experienced some difficulty (which was later rectified), in providing Dr. McKoy with the following documents:

i. Comments received by the Committee from Stakeholders and members of the public on the Whistleblower Protection Bill, 2015; and

ii. Comments of the Committee on submissions received on Clauses 3, 4, 6 and 7.

3.2 As a result, Dr. McKoy would be granted additional time to complete his examination of the documents.

Review of Submissions Received on the Whistleblower Protection Bill 2015

4.1 The Committee continued its review of 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 7 to 9 of the Bill, the Committee instructed the Chief Parliamentary Counsel to:

i. To examine maximum fines for both summary and indictable offences in relation to clause 21 (e) of the Bill.

ii. Draft a new subsection of the Bill, subsection 9(4) to address the situation where a whistleblower who was previously anonymous subsequently becomes know with or without his/her consent. And to be guided by guideline 13 of the International Principles for Whistleblower Legislation.

iii. To examine the use of the word destroy as opposed to discard.

iv. To examine the Bill in relation to:

a. The proposed Official Secrets Act;

b. Freedom of Information Act; and

c. Data Protection Act

v. Examine legislation from other jurisdictions with a view to identifying how they have treated with the issue of anonymity and what filters are implemented in the legislation.

4.3 The Committee instructed the Secretariat to write to the Law Association of Trinidad and Tobago for their views on Clause 8 of the Bill (Legal Professional Privilege).

OTHER BUSINESS

5.1 The Committee agreed that its next meeting will be held on Tuesday 19 April, 2016 at 9:30 a.m.

ADJOURNMENT

6.1 The Chairman thanked Members and adjourned the meeting.

6.2 The adjournment was taken at 12:18 p.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

April 5, 2016

Appendix I

CLAUSE 7 PROTECTED DISCLOSURE

STAKEHOLDER/ENTITY	SUBMISSIONS/ COMMENTS	COMMITTEES COMMENTS
THE INTEGRITY COMMISSION	• **Clause 7 (2)** Subsection 2 provides that a disclosure is not protected if the whistleblower discloses information which he knows or ought reasonably to have known is false. This provision is of concern because it is unclear who determines whether the whistleblower knew or ought to have known the information is false. Although no offence is created under this bill we think it may be useful to refer to section 32(2) of the IPLA Act Chapter 22:01 for your information.	• **The Committee noted that the threshold in this section of the IPLA created a lower standard than the Bill. However, the Committee agreed to consider raising the fine and conviction period in section 21 (e) of the Bill** • **The Committee instructed the Chief Parliamentary Counsel to examine maximum fines for both summary and indictable offences in relation to 21 (e) of the Bill.**
	What is to happen if a person gives information which is classified as "protected" disclosure and it then turns out that the whistleblower knew or ought to have known that it is false, does that person lose the protection of the Act?	• **The Committee noted that such an individual lost the protection contemplated by the Act.**

CLAUSE 8 INFORMATION PROTECTED FROM LEGAL PROFESSIONAL PRIVILEGE

STAKEHOLDER/ENTITY	SUBMISSIONS/ COMMENTS	COMMITTEE'S COMMENTS
AFRA RAYMOND –MEMBER OF THE PUBLIC	• This is unsatisfactory in my view since it is precisely in such documents that evidence of a wrongdoer having been advised of the illegality of their improper and illegal actions can be found. This was the issue in the invader's Bay case which the JCC brought to seek publication (under the freedom of information Act) of certain legal advice which the then minister of planning and sustainable development was trying to suppress. That legal advice was on a specific issue of whether the State was in breach of the law in relation to the development process for valuable state lands. In July 2014, the JCC won that case in the High court and that ruling effectively elevated the public interest above any legal professional privilege those documents might have had. The state appealed that ruling and the judgment is now reserved, but it seems to me that clause 8 is a significantly retrograde step on this important issue.	
TT SECURITIES AND EXCHANGE COMMISSION	▪ **Information protected by legal professional privilege** This clause would discourage whistleblowers especially as the protections of the Act only extend to the protected disclosures. Moreover, the average man may be overly cautious in disclosing information as he may not know whether such privilege attaches and may opt not to make the disclosure. **Suggestion**:	**The Committee agreed that the comments on Clause 8 from the Stakeholders were more or less identical and instructed the Secretariat to write to the Law Association of Trinidad and Tobago informing them that the Committee was considering the**

	This clause could be reformulated in line with similar provision in the UK. For e.g. The Employment Rights Act 1996 in the UK states: ➢ *"43 B (4). A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) 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".*	**inclusion of 43A (4) of the UK Public Interest Disclosure Act of 1998 in the Bill and to invite their views on the proposed inclusion.**
ENVIRONMENTAL MANAGEMENT AUTHORITY	▪ This clause requires more clarification and explanation as to its effect and consequence.	
AMCHAM	▪ The Expression legal professional privilege should be defined. This can be defined by reference to the Legal Professional Privilege Act	
RODNEY SEEPERSAD - MEMBER OF THE PUBLIC	▪ **Clause 8** speaks to Professional Privilege. Should the Bill also cover other professional relationships?	
DISCLOSURE TODAY (NON-PROFIT ORGANIZATION)	• **Legal Professional Privilege** **Clause 8** exempts information protected by legal professional privilege and provides that disclosure of same is not a protected disclosure. It is suggested that the drafting of this clause is too broad to address the objective of preserving attorney client privilege. The UK U.K. Public Interest Disclosure Act of 1998, Part IVA clause 43A(4) is instructive: 43A(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional	

	legal adviser) 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* *[Emphasis Ours]*. **Recommendation:** The Committee is urged to consider the wording of the UK Public Interest Disclosure Act 1998, Part IVA clause 43A(4) for the protection of legal professional privilege.	

CLAUSE 9 ANONYMOUSLY MADE DISCLOSURES

STAKEHOLDER/ENTITY	SUBMISSIONS/ COMMENTS	
AMCHAM	• **Lack of clarity** "Discard" should include identifying procedures for destroying all documents related to the disclosure, given the potential liability if these false claims are not destroyed and later disseminated.	• **The Committee agreed that this concern would be addressed in the regulations.**
TT SECURITIES AND EXCHANGE COMMISSION	• **Anonymously made disclosures** This clause deals with disclosures made anonymously and denies those so made, the status of a "protected disclosure". This position is undesirable and would not encourage whistleblowers. Consideration could be given to the approach adopted in the US Dodd-Frank Act, in particular Rule 21F7 which allows for information to be submitted anonymously on	• **The Committee disagreed that with this submission and did not consider it a valid point as the Bill does not contemplate automatic discarding of anonymously made disclosures.**

	the condition that such disclosure is made through the Attorney-at-Law for the person. In this way, anonymous tips are not completely ignored nor are they completely anonymous to the extent that there is still some person who can be identified as imparting the information.	
ENVIRONMENTAL MANAGEMENT AUTHORITY	• **Clauses (9) (2) & 9 (3)** These clauses contradict clause 9(1). If the information is considered to be defamatory or libelous, there is no alternative to process the application due to the mandatory direction of clause 9(1).	• **The Committee did not agree with this submission.**
ASSOCIATION OF TRINIDAD & TOBAGO INSURANCE COMPANIES (ATTIC)	• This allows for anonymous disclosures to be made and states that such disclosures are not protected under the Act. Clause 9(3) continues that where the Whistleblowing Reporting Officer or Whistleblowing Reports Unit consider that the disclosure is likely to be defamatory or libelous, they shall discard the information. It is proposed that where the anonymous disclosure is also found to be false or misleading that it should also be discarded. • Clarification is being sought as to whether the Whistleblowing Reporting Officer should inform the whistleblower that the disclosure was discarded for a particular reason in accordance with clause 12 which requires the	*

	Whistleblowing Reporting Officer to provide a status update to the whistleblower.	
CENTRAL BANK OF TRINIDAD AND TOBAGO	• **Clause 9(1)** appears to be inconsistent with the principles of Anonymity discussed at Clause 13 of the International Principles for Whistleblower Protection. • In **Clause 9(3)** consideration should be given to including a standard for determining whether disclosures should be disregarded equivalent to the standard observed for civil liabilities of defamation.	*
NATIONAL TRADE UNION CENTRE OF TRINIDAD AND TOBAGO	• The Bill allows the whistleblowing reporting officer and Whistleblowing Reports Unit to receive and process disclosures made anonymously and confer the right to discard the information after it has taken into account all relevant circumstances and if it considers same to be defamatory or libelous. While we have no objection to same, we believe that in the interest of fairness and natural justice the person against whom the report was made should be informed of an adverse report being lodged against them and if the complaint has been rejected, they should also be informed of same in writing. We believe that all complaints and determinations should be officially recorded and accessible to the Whistleblowing Reports Unit of any designated authority, should they opt to inspect	*

	same. We are of the opinion that this will aid in treating with frivolous reports and at the same time afford limited protection against continuous reports or claims on the same matter by different persons.	
TRINIDAD AND TOBAGO POLICE SERVICE (OFFICE OF THE COMMISSIONER OF POLICE)	• **Clause 9** An anonymous disclosure does not infer that the disclosure is not credible. In present day society, coupled with the current murder rate, anonymous disclosure is one of the tools used by the law enforcement agencies and as such, should be a protected disclosure. • **Clause 9 (1)** Disclosure made anonymously, consideration should be given for it to be a protected disclosure. If anonymous disclosure is not protected, then it will deter persons from making disclosures. • **Clause 9 (2)** What would be the power of the WBRO, would he be charged with investigative powers? • **Clause 9 (3)** Where the information disclosed is considered to be defamatory or libelous, such information should be destroyed not discarded. Would that person be legally trained or would the WBRO have to refer reports for such a determination to be made?	• **The Committee agreed that all whistleblowing units would be responsible for investigating whistleblower reports.** • **The Committee instructed the Chief Parliamentary Counsel to consider the use of destroyed as opposed to discard.**

	NB: It opens the floodgate for anyone to make such statements. This anonymous should be removed from the bill. The intention of the legislation is to remove anonymity, and to allow persons to freely make reports It is recommended that all disclosure of improper conduct should be reviewed and the final determination of credulity of that disclosure should be vested with the WBRU.	
BANKERS ASSOCIATION OF TRINIDAD AND TOBAGO	• **Section 9(3)** Allows the whistleblowing reporting officer or the Whistleblowing Reports Unit to discard information that it deems to be defamatory or libelous. However, the whistleblowing reporting officer or the Whistleblowing Reports Unit may not possess the necessary legal skills to make this determination. It is recommended that this provision should be deleted or that an obligation to seek legal advice should be imposed. Otherwise, this section opens the door to abuse or influence.	*

*After examining the submissions made on clause 9 of the Bill, the Committee agreed to treat with all of the submissions together and agreed that there needed to be more discussion on the issue. The Committee instructed the Chief Parliamentary Counsel to:

I. Draft a new subsection of the Bill, subsection 9(4) to address the situation where a whistleblower who was previously anonymous subsequently becomes know with or without his/her consent. And to be guided by guideline 13 of the International Principles for Whistleblower Legislation.

II. To examine the use of the word destroy as opposed to discard.

III. Examine legislation from other jurisdictions with a view to identifying how they have treated with the issue of anonymity and what filters are implemented in the legislation.

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 NINTH MEETING HELD IN THE ARNOLD THOMASOS ROOM (EAST), LEVEL 6, OFFICE OF THE PARLIAMENT, TOWER D, IWFC, #1A WRIGHTSON ROAD, PORT OF SPAIN ON APRIL 26, 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
Mr. Aneil Joseph	-	Legal Counsel II

COMMENCEMENT

1.1 The meeting was called to order by the Chairman at 10:37 a.m.

DISCUSSIONS WITH DR. DERRICK MCKOY, LEGAL CONSULTANT

2.1 The Chairman informed the Committee that arrangements had been made for Dr. Derrick McKoy, former Contractor General and Dean of the Faculty of Law at the Mona Campus of the University of the West Indies, to join the Meeting via video conferencing to discuss the Committee's work on the Bill.

2.2 However, during the video conference the connection was interrupted as a result of technical difficulties. Attempts by the technical staff of the Parliament to re-establish the connection were unsuccessful.

2.3 The Committee therefore agreed to complete its deliberations on the Stakeholder submissions and submit the Committee's comments on stakeholder submissions to Dr. McKoy.

CONFIRMATION OF MINUTES

3.1 The Committee considered the Minutes of the 8th Meeting held on April 5, 2016.

3.2 There being no corrections, the motion for the confirmation of the Minutes was moved by Mr. Cummings and seconded by Mr. Mark and the Minutes were confirmed by the Committee.

MATTERS ARISING FROM THE MINUTES

Submissions from Law Association of Trinidad and Tobago on Clause 8 of the Bill

4.1 The Chairman informed the Committee that as requested, the President of the Law Association of Trinidad and Tobago made a submission on qualifying the legal professional privilege contained in Clause 8 of the Bill. The submission is attached as **Appendix I** to the Minutes.

4.2 To ensure that all Members of the Committee understand the implications of Clause 9(3) and of legal professional privilege, the Committee agreed that the Chief Parliamentary Counsel should:

- i Re-draft clause 8 of the Bill to include the qualified version of the Legal Professional Privilege as contained in Section 43B (4) of the United Kingdom Public Interest Disclosure Act 1998; and
- ii Examine the effect of the inclusion of qualified Legal Professional Privilege and prepare a comparative of Clause 8 as amended and as originally drafted.

Discussions on submissions by the Office of the Chief Parliamentary Counsel

5.1 The Chairman informed the Committee that, as requested, the Office of the Chief Parliamentary Counsel submitted the following documents for the Committee's review:

i. Advice on Disqualification of Whistleblowers from Immunity on the Basis of Mental Health (attached as **Appendix II);**
ii. Advice on Anonymous Disclosures (attached as **Appendix III)**; and
iii. Table Showing Timelines in Whistleblower Legislation in Other Jurisdictions (attached as **Appendix IV)**

5.2 During discussions the following issues arose:

i. Use of the word "discard" in its ordinary meaning meant to dispose, throw away or reject which implied that the information would be rejected and filed away as opposed to "destroy" which meant to put an end to.
ii. Clause 21 (1) (e) of the Bill makes it an offence where a person purports to make a disclosure under this Act knowing it contains a statement that is false or misleading or reckless as to whether it is false or misleading. In order for prosecutions to be upheld in relation to Clause 9 (3) of the Bill, where a whistleblower who was previously anonymous and subsequently becomes known, a record of the information must be kept.

5.3 Arising out of the deliberations on Clause 9(3), the Committee instructed the Chief Parliamentary Counsel to:

i. Re-draft sub-clause 9 (3) to include the words "information must be kept but not utilized"; and
ii. Consider whether a further requirement of keeping libelous anonymous disclosures filed was necessary.

5.4 The Committee agreed to revisit the issue of prescriptive timelines at a subsequent meeting.

5.5 The Committee agreed to defer discussions on disqualification on the basis of mental health to its next meeting to give all Members an opportunity to review submissions made by the Chief Parliamentary Counsel.

DISCUSSIONS ON THE WAY FORWARD

6.1 The Committee discussed the fact that the work of the Committee has not progressed as expected since its last report. As a consequence, the Committee, by majority, agreed to the following as the most practical course of action:

i. Editable versions of the compiled Stakeholder submissions and a tabular compendium of the clauses of the Bill would be circulated to Members to include their comments, concerns and questions.
ii. Members should submit to the Secretariat, in writing, their comments on the stakeholder submissions received as well as on the twenty- six (26) Clauses and the Schedule of the Bill.

6.2 The Chairman assured the Committee that Members would be allowed to ventilate all concerns during subsequent meetings. However, this approach was necessary to advance the work of the Committee.

6.3 The Committee noted the impending deadline to report to Parliament and agreed that an Interim 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.

6.4 The Committee agreed that a draft Interim Report would be circulated to Members for their review and comments, and that this report would be approved by round-robin.

6.5 The Committee agreed that its next meeting will be held on Wednesday May 4, 2016 at 1:30 p.m.

ADJOURNMENT

7.1 The Chairman thanked Members and adjourned the meeting to Wednesday May 4, 2016 at 1:30 p.m.

7.2 The adjournment was taken at 11:57 a.m.

I certify that these Minutes are true and correct.

Chairman

Secretary

April 26, 2016

Appendix I

Written Submission of the Law Association of Trinidad & Tobago on Clause 8 of the Whistleblower Protection Bill, 2015

Law Association of Trinidad and Tobago
established by the Legal Profession Act 1986

2nd Floor
95-97 Frederick Street
Port-of-Spain
Trinidad, W.I.

Tel: 1-868-225-8715
Tel: 1-868-225-8716

1. By request made by e-mail dated 15 April 2016, the Law Association of Trinidad and Tobago was invited by the Joint Select Committee of Parliament to make a Written Submission on Clause 8 of the Whistleblower Protection Bill, 2015 ("the Bill") insofar as the section affects legal professional privilege (legal professional privilege is hereafter referred to as "LPP").

2. It is of the first importance to understand the rationale, scope and limitations of LPP, developed over more than a century by the common law. A comparatively comprehensive exposition may be found in, among others, the authoritative text, **Disclosure**, by Mathews & Malek. There are two heads to LPP, that of Legal Advice Privilege and the other, Litigation Privilege. *Legal Advice Privilege* applies whether or not litigation is contemplated or pending and covers the narrower range of communications concerned with the seeking and giving of legal advice; *Litigation Privilege* covers litigation which is contemplated or pending and extends over a broad range of documents. They are both integral parts of a single privilege; the rationale for both is the same, being *"founded on a regard to the interests of justice which cannot be upholden and to the administration of justice which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all everyone would be thrown upon his own legal resources: deprived of all professional assistance a man would not venture to consult any skillful person or would only dare to tell his counsel half his case."*(all emphasis supplied). See **Greenough v Gaskell** (1833) 1 Myl. & K. 98, per Lord Broughham at p. 103.The privilege (LPP) is that of the client; it is a strong one, not lost by the death of the client and inures for the benefit of the client's successor in title in the relevant sense.

3. A more recent 1996 affirmation of the principle is found in **R. v Derby Magistrates Court, ex p B.**: *"The public interest in the efficient working of the legal system requires that people should be able to obtain professional legal advice on their rights and liabilities and obligations. This is desirable for orderly conduct of everyday affairs. Similarly, people should be able to seek legal advice and assistance in connection with the proper conduct of court proceedings. To this end communications between clients and lawyers must be uninhibited..."*(all emphasis supplied).

4. Indeed, it has been accepted that adherence to the principle of LPP promotes the rule of law and facilitates access to justice. In **R. (Morgan Grenfell & Co. Ltd.) v. Special Commissioner of Income Tax** [2003] 1 AC 563 at para. 7 Lord Hoffman noted that the LPP: **"...** *is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled legal advice about the law. Such advice cannot be effectively obtained unless the client*

is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice."(all emphasis supplied).

admin@lawassociationtt.com

5. The Bill seeks to enact a regime of protection for "whistleblowers", to combat corruption and other wrongdoings by encouraging and facilitating disclosures of improper conduct in the public and private sector. It is a Bill which addresses a societal malady and therefore has found earlier qualified support of the LATT. Protected disclosures are defined and, there exist clauses which provide for the specific protection of employees from any detrimental action by the employer as a result of the employee making such protected disclosures. The definition clause defines *"employee"* widely; persons classified as *"whistleblowers"* are given protection under the Bill, *"notwithstanding any other law"* so that such a person who makes a protected disclosure is not liable to any criminal, civil or disciplinary proceedings for having made such a disclosure.

www.lawassociationtt.com

6. Clause8 of the Bill nevertheless states, importantly, that *"Nothing in this Act authorizes a person to disclose information protected by legal professional privilege and a disclosure of such information is not a protected disclosure."*

7. Applying the canons of construction that (a) the legislation must be read as a whole and, (b) one must look to the plain meaning of the words used, it follows that clause 8 is intended to place information which is subject to LPP outside the range of protected disclosure. In the result, on its true construction the intention of the draftsman of the Bill is to insulate information and communications passing between clients and their attorneys which qualify for LPP protection, so that these communications will not qualify for protected disclosure under the Bill. Clause 8 therefore retains the sacrosanct LPP nature of those communications.

8. The request of the JSC for comment by the LATT is therefore understood to ask the question whether Clause 8 in its present form is (a) desirable to be retained; and, (b) insofar as the JSC states that the discussion before the JSC has *"thus far focused on comparing clause 8 to section 43(B)(4) of the UK Public Interest Disclosure Act, 1998"* it is understood that the JSC wishes the LATT to comment on whether the ambit of LPP exempted from protection under the Bill should be limited to *Legal Advice Privilege* only, as opposed to the compendium of the larger single privilege discussed supra.

9. Section 43 (B) (4) of the UK Public Interest Disclosure Act, 1998 provides *"A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) 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."* (emphasis supplied).

10. The clear intention of Clause 8 is to recognize that the greater public interest served by the preservation of the general common law principle of LPP will "trump" the other public interest of assisting in detection and investigation of criminal activity by providing whistleblowers with protection for the disclosure of information of wrongdoing. Further, the language used suggests a deliberate intention to retain the two categories of LPP, namely *legal advice privilege* and *litigation* privilege. On the other hand, section 43(B)(4) of the UK *Public Interest Disclosure Act, 1998* only protects *legal advice privilege*, and not *litigation privilege* by the express words: *"if it is made by a person to whom the information has been disclosed in the course of obtaining legal advice."*(emphasis supplied)

11. The rationale and history of the principle of LPP has been wholly accepted and applied by the Parliament of Trinidad and Tobago, in other legislation, without limitation or qualification.The Law Association of Trinidad and Tobago sees no basis for eroding the broader compendium of the LPP principle, acknowledged by the jurisprudence as being consistent with rule of law and the fundamental right of *access to justice*, with

access to justice itself being inherent to the fundamental rights recognized under the Constitution.

12. **We accordingly recommend the wisdom of retaining Clause 8 in its present language.** We do NOT recommend reducing the scope of the LPP preserved by Clause 8 of the Bill to that of the narrower *legal advice privilege* only, which would be the result of adopting the language or approach of the UK legislationunder consideration.

Dated the 25th April, 2016

REGINALD T. A. ARMOUR SC
President,
Law Association of Trinidad and Tobago

President– Reginald T.A. Armour SC• **Vice President** – Gerry Brooks
Treasurer – Lydia Mendonça• **Secretary** – Shankar Bidaisee

Appendix II

ADVICE

RE: DISQUALIFICATION OF WHISTLEBLOWERS FROM IMMUNITY ON THE BASIS OF MENTAL HEALTH

On 23rd February, 2016, the Joint Select Committee of Parliament on the Whistleblower Protection Bill, 2015 (hereinafter referred to as "the Bill") requested that the Office of the Chief Parliamentary Counsel examine the filters that can be used to disqualify the immunity afforded to whistleblowers on the basis of mental health and compare them to existing filters in other pieces of legislation in Trinidad and Tobago.

Neither the Bill nor any of the whistleblower protection statutes in the Commonwealth countries surveyed contains express provisions disqualifying a person from immunity on the basis of mental health. Further, no such filter has been found in Trinidad and Tobago legislation.

Clause 6(1) of the Whistleblower Protection Bill, 2015, however, provides as follows:

> *"6.(1) An employee of an organisation may make a disclosure of improper conduct to a whistleblowing reporting officer or a whistleblowing reports unit based on his **reasonable belief** that improper conduct has occurred, is occurring or is likely to occur within the organisation."*

Where a disclosure of improper conduct is made by a person who is of unsound mind and it is found that a person who is of sound mind could not have had a reasonable belief that such improper conduct occurred, it may be argued that the person who made the disclosure is disqualified from receiving immunity because he did not have a reasonable belief that the improper conduct occurred.

The Committee may recall that it was pointed out in the Opinion on Reasonable Belief that the standard of reasonable belief is provided for in similar legislation of several Commonwealth jurisdictions, including –

- Section 6(1) of the Whistleblower Protection Act (Malaysia): "A person may make a disclosure of improper conduct to any enforcement agency based on his **reasonable belief** that any person has engaged, is engaging or is preparing to engage in improper conduct";

- Section 9(1) of the Protection of the Whistleblower Act (Malta): "A disclosure is a protected disclosure if … (b) the whistleblower **reasonably believes**, at the time of making the disclosure based on information he has at that moment, that: (i) the information disclosed, and any allegation contained in it, are substantially true; (ii) the information

disclosed tends to show an improper practice being committed by his employer, another employee of his employer or by persons acting in the employer's name and interests";

- Section 43B(1) of the Employment Rights Act as amended by the Enterprises and Regulatory Reform Act 2013 (UK): "In this Part a "qualifying disclosure" means any disclosure of information which, in the **reasonable belief** of the worker making the disclosure, is made in the public interest and 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.";

- Section 9(1) of the Public Interest Disclosure (Whistleblower Protection) Act (Province of Alberta, Canada): "… if an employee **reasonably believes** that the employee has information that could show that a wrongdoing has been committed or is about to be committed, or that could show that the employee has been asked to commit a wrongdoing, the employee may make a disclosure to the employee's designated officer …".

Accordingly, it is possible that persons who make disclosures and are of unsound mind may also be disqualified from immunity in the above-mentioned jurisdictions.

However, in light of the Committee's decision to adopt the standard of reasonable grounds as opposed to reasonable belief in clause 6(1) of the Bill, the possible disqualification of persons from immunity on the basis of mental health would no longer be applicable because the Bill would not focus on the state of mind of the whistleblower but on whether the documentation and other evidentiary material disclosed by the whistleblower constitute reasonable grounds that improper conduct has occurred.

Ian Macintyre SC

Chief Parliamentary Counsel

Appendix III

RE: ANONYMOUS DISCLOSURES

On 15th April, 2016, the Joint Select Committee of Parliament on the Whistleblower Protection Bill, 2015 (hereinafter referred to as "the Bill") requested that the Office of the Chief Parliamentary Counsel –

1) draft a new clause 9(4) to address the situation where a whistleblower who was previously anonymous subsequently becomes known with or without his/her consent, being guided by Principle 13 of the International Principles for Whistleblower Legislation;

2) examine legislation from other jurisdictions with a view to identifying how they have treated with the issue of anonymity and what filters are implemented in the legislation; and

3) examine the use of the word "destroy" as opposed to "discard" in clause 9(3) of the Bill.

With respect to item 1 above, Principle 13 of the International Principles for Whistleblower Legislation states as follows:

> "13. *Anonymity* – full protection shall be granted to whistleblowers who have disclosed information anonymously and who subsequently have been identified without their explicit consent."

Clause 9 of the Bill provides as follows:

"Anonymously made disclosures

9. (1) A disclosure made anonymously is not a protected disclosure.

(2) Subject to subsection (3), a whistleblowing reporting officer or whistleblowing reports unit may receive and process an anonymous disclosure and may take the disclosure into account in determining whether improper conduct has occurred.

(3) Where a whistleblowing reporting officer or whistleblowing reports unit, after having taken into account all the relevant circumstances, considers that the information in an anonymous

disclosure is likely to be defamatory or libellous, the officer or unit shall discard the information."

With respect to the said Principle 13, it is submitted that full protection should also be afforded where the anonymous whistleblower consents to the disclosure of his identity as this would encourage anonymous whistleblowers to participate in legal proceedings. Further, it seems odd to deprive persons who consent to the disclosure of their identity of protection, while granting full protection to those who do not consent.

Additionally, care should be taken to ensure that the granting of full protection to an anonymous whistleblower whose identity becomes known without his consent does not result in the protection of disclosures which are defamatory or libellous, or which do not substantially satisfy the criteria for protection in clauses 6 and 7 of the Bill.

Consequently, should the Committee be minded to implement the said Principle 13, it is recommended that clause 9 of the Bill, as amended, read as follows:

"Anonymously made disclosures

9. (1) **Subject to subsection (4),** a disclosure made anonymously is not a protected disclosure.

(2) Subject to subsection (3), a whistleblowing reporting officer or whistleblowing reports unit may receive and process an anonymous disclosure and may take the disclosure into account in determining whether improper conduct has occurred.

(3) Where a whistleblowing reporting officer or whistleblowing reports unit, after having taken into account all the relevant circumstances, considers that the information in an anonymous disclosure is likely to be defamatory or libellous, the officer or unit shall discard the information.

(4) Where the identity of a person who makes an anonymous disclosure becomes known, the disclosure shall be deemed to be a protected disclosure if it would have been a protected disclosure if it had not been made anonymously."

With respect to item 2 above, clause 9 of the Bill is substantially the same as section 11 of Malta's Protection of the Whistleblower Act, 2013. No other provision dealing with anonymous disclosures was found in the jurisdictions surveyed.

With respect to item 3 above, in the context of clause 9(3), the ordinary meaning of "discard" is to dispose of, throw away, get rid of, reject or thrust aside. The ordinary meaning of "destroy", however, would be to cause (something) to end or no longer exist. It is possible that a disclosure which appears to be defamatory or libellous may subsequently turn out to have some merit. It is therefore recommended that the information should not be destroyed but be rejected if it is considered to be defamatory or libellous.

Ian Macintyre SC

Chief Parliamentary Counsel

Appendix IV

The Joint Select Committee of Parliament on the Whistleblower Protection Bill,2015 (herein referred to as "the Bill") on March 23, 2016, requested that the Chief Parliamentary Counsel consider the framework legislation from other jurisdictions and examine whether timelines are included in the primary legislation, regulations and guidelines.

The table below shows the timelines present in the primary legislation of several Commonwealth countries. The federal legislation of Canada is the most prescriptive with 15 timelines, followed by Jamaica with 6, Malaysia with 5, Malta with 4, the Province of Alberta with 4 and New Zealand with 1. By comparison, the Bill contains 3 timelines in clauses 14(3), 14(4) and 15(1), which are set out at the end of the table.

No regulations have been found under the whistleblower protection legislation of the Commonwealth countries considered.

Jamaica has issued procedural guidelines under its primary legislation. The purpose of these procedural guidelines is to inform the public about the provisions of the Jamaican Protected Disclosures Act, 2011. The timelines in the procedural guidelines are therefore the same timelines in the primary legislation. No other guidelines have been found.

The table below is therefore submitted for the consideration of the Joint Select Committee.

TABLE SHOWING THE TIMELINES IN WHISTLEBLOWER LEGISLATION

COUNTRY	CLAUSE	LAW
Jamaica	6(2)	(2) Where a disclosure is made orally, the person receiving the disclosure shall within **twenty-four hours** after receiving the disclosure, cause the disclosure to be reduced into writing containing the same particulars as are specified in subsection (1).
	10 (d)	(1) Subject to section 12, a disclosure may be made by an employee to the designated authority if it is reasonable in all the circumstances of the case, to make the disclosure and any of the following circumstances applies, namely: … (d) the employee making the disclosure had made a disclosure on a prior occasion to his employer or to a prescribed person in respect of which no action was taken within **thirty days**.
	14(1)	(1) Where an employee makes an internal disclosure in accordance with section 13 and steps to deal with the disclosure have not been taken by the employer or the designated officer within **thirty days**, the employee may make an external disclosure in accordance with section 9 or 10.
	18(3)(a)	(3) Having considered that an investigation should be proceeded with, the person shall- (a) commence investigations forthwith and issue periodic updates on the investigation to the employee making the disclosure, at intervals of **thirty days**;
	19(3)	(3) Where an employer decides to refuse to carry out an investigation the employer shall provide reasons in writing to the employee within **fifteen days** of the decision.
	21(4)	(4) The designated authority shall, within **six months** after the end of each year or within such longer period as the Minister may in special circumstances approve, cause to be made and transmitted to the Minister a report dealing generally with the activities of the authority during the preceding year.
Malaysia	13(2)(b)	(2) Where the enforcement agency has referred a matter under paragraph (1)*(b)*, the appropriate disciplinary authority or other

		appropriate authority or the employer or other appropriate person shall inform the enforcement agency— *(a)* the steps taken, or intended to be taken, to give effect to the finding and recommendation within **six months** from the date of receipt of the finding and recommendation; or *(b)*the reason for not initiating any disciplinary proceedings or for not taking the steps recommended by the enforcement agency within **fourteen days** of making such decision, as the case may be.
	14(3)	(3) Where the enforcement agency has referred a matter under paragraph (2)*(b)*, the appropriate disciplinary authority or other appropriate authority or the employer or other appropriate person shall inform the enforcement agency— *(a)* the steps taken, or intended to be taken, to give effect to the finding and recommendation within **six months** from the date of receipt of the finding and recommendation; or (b) the reason for not initiating any disciplinary proceedings or for not taking the steps recommended by the enforcement agency within **fourteen days** of making such decision, as the case may be.
	15(1)	**15.** (1) Upon request made by a whistleblower— *(a)* within **three months** after being informed by the enforcement agency under subsection 14(6) that detrimental action in reprisal for a disclosure of improper conduct has been taken against him; or
Malta	16(3) and 16(4)	(3) If a person makes a disclosure to an authority in accordance with this Part, the authority must within **forty-five (45) days** after receiving the disclosure consider and reach a conclusion as to whether it is appropriate for the disclosure to be made externally. (4) If the authority concludes that a disclosure should not have been made externally, then it must within a reasonable time, not exceeding **45 days**, notify in writing the whistleblower that an internal disclosure in accordance with

		Section 2 of this Part must be made and that it will not be dealing further with the disclosure.
	18(1)	**18.** (1) Where the authority to whom a protected disclosure is made considers that the information disclosed can be better investigated by another authority or in the case of an improper practice which constitutes a crime or contravention under any applicable law by the police, the authority to whom the disclosure is made may, within not more than **30 days**, refer that information to such other authority or the police, as the case may be, and immediately inform in writing the whistleblower accordingly: Provided that the identity of the whistleblower shall not be disclosed except with his prior consent in writing.
	20(4)	(4) Except for amendments to the guidelines which are purely administrative in nature, and are expressly declared to be so by the authority, which come into force immediately upon the posting thereof on the official website of the said authority, any new guidelines or amendments to guidelines shall come into force on the lapse of **fifteen days** after they are posted on the official website of the authority or on such later date as may be stated therein.
New Zealand	9(1)(c)	**9. Disclosure may be made to appropriate authority in certain circumstances-** (1) A disclosure of information may be made to an appropriate authority if the employee making the disclosure believes on reasonable grounds— (a) that the head of the organisation is or may be involved in the serious wrongdoing alleged in the disclosure; or (b) that immediate reference to an appropriate authority is justified by reason of the urgency of the matter to which the disclosure relates, or some other exceptional circumstances; or (c) that there has been no action or recommended action on the matter to which the disclosure relates within **20 working days** after the date on which the disclosure was made.
Canada (Alberta)	33(2)	(2) The report under subsection (1) must be given to the Speaker of the Legislative Assembly, who must table a copy of it in the Legislative Assembly within 15 days after receiving

		it if the Legislative Assembly is then sitting or, if it is not, within **15 days** after the start of the next sitting.
	35(4)	(4) For the purposes of subsection (3), when the Legislative Assembly is adjourned for a period of more than **14 days**, the Assembly is deemed not to be in session during the period of the adjournment.
	39(2)	(2) An individual holding office as Commissioner continues to hold office after the expiry of that individual's term of office until that individual is reappointed, a successor is appointed or a period of **6 months** has expired, whichever occurs first.
	44(6)	(6) The chair of the Standing Committee must lay a copy of each order made under subsection (3) before the Legislative Assembly if it is then sitting or, if it is not, within **15 days** after the start of the next sitting.
Canada(Federal)	5(4)	(4) The President of the Treasury Board must cause the code of conduct established by the Treasury Board to be tabled before each House of Parliament at least **30 days** before it comes into force.
	19.1 (2)	(2) The complaint must be filed not later than **60 days** after the day on which the complainant knew, or in the Commissioner's opinion ought to have known, that the reprisal was taken.
	19.1(5)(b)	(5) A member or former member of the Royal Canadian Mounted Police may not make a complaint under subsection (1) in relation to any action under section 20.2, or any matter that is the subject of an investigation or proceeding under Part IV of the *Royal Canadian Mounted Police Act*, unless - *(a)* he or she has exhausted every procedure available under that Act for dealing with the action or matter; and *(b)* the complaint is filed within **60 days** after those procedures have been exhausted.
	19.2 (2)	(2) The public servant may file the complaint within **60 days** after the later of (*a*) the day on which section 19.1 comes into force, and (b) the day on which he or she knew or, in the opinion of the Commissioner, ought to have known that the reprisal was taken.

	19(4)(1)	**19.4** (1) The Commissioner must decide whether or not to deal with a complaint within **15 days** after it is filed.
	38(1)	(1) Within **three months** after the end of each financial year, the Commissioner must prepare an annual report in respect of the activities of the Commissioner during that financial year.
	38(3.1)	(3.1) If the Commissioner makes a report to a chief executive in respect of an investigation into a disclosure or an investigation commenced under section 33 and there is a finding of wrongdoing in the report, the Commissioner must within **60 days** after making the report, prepare a case report setting out- (*a*) the finding of wrongdoing; (*b*) the recommendations, if any, set out in the report made to the chief executive; (c) the time, if any, that was specified in the report to the chief executive for the chief executive to provide the notice referred to in section 36; (d) the Commissioner's opinion as to whether the chief executive's response to the report to the chief executive, up to that point in time, is satisfactory; and (*e*) the chief executive's written comments, if any.
	38(3.3)	(3.3) Within the period referred to in subsection (1) for the annual report and the period referred to in subsection (3.1) for a case report, and at any time for a special report, the Commissioner shall submit the report to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides forthwith after receiving it or, if that House is not then sitting, on any of the first **fifteen days** on which that House is sitting after the Speaker receives it.
	38.1 (1)	**38.1** (1) Within **60 days** after the end of each financial year, each chief executive must prepare and submit to the Chief Human Resources Officer appointed under subsection 6(2.1) of the *Financial Administration Act* a report for that financial year on the activities, in the portion of the public sector for which the chief executive is responsible, respecting disclosures made under section 12. (2) Within **six months** after the end of each financial year, the Chief Human Resources Officer must prepare and submit to the President of the Treasury Board a report for that financial

		year that provides an overview of the activities, throughout the public sector, respecting disclosures made under section 12.
	38.1 (4)	(4) The President of the Treasury Board must cause the report to be laid before each House of Parliament on any of the first **15 days** on which that House is sitting after the President of the Treasury Board receives the report.
	39 (4)	(4) In the event of the absence or incapacity of the Commissioner, or if that office is vacant, the Governor in Council may appoint any qualified person to hold that office in the interim for a term not exceeding **six months**, and that person shall, while holding office, be paid the salary or other remuneration and expenses that may be fixed by the Governor in Council.
	51.1 (3)	(3) The assignment may be for a period of up to **three months**, but the chief executive may renew the assignment one or more times if he or she believes that the conditions giving rise to it continue to exist on the expiry of a previous period.
	54	**54. Five years** after this section comes into force, the President of the Treasury Board must cause to be conducted an independent review of this Act, and its administration and operation, and must cause a report on the review to be laid before each House of Parliament on any of the first **15 days** on which that House is sitting after the review is completed
Trinidad and Tobago, WPB Bill 2015	14(3)	(3) Where a person makes a disclosure to a whistleblowing reports unit in accordance with this Division, the director of the whistleblowing reports unit shall, within **forty-five days** after receiving the disclosure, consider and reach a conclusion as to whether it is appropriate for the disclosure to be made externally.
	14(4)	(4) Where the director of a whistleblowing reports unit concludes that a disclosure should not have been made externally, then he shall within a reasonable time, not exceeding **forty-five days**, notify in writing the whistleblower that an internal disclosure in accordance with Division 2 of this Part shall be made and that the whistleblowing reports unit will not be dealing further with the disclosure.
	15(1)	(1) Where a whistleblowing reports unit to whom a protected disclosure is made considers that the disclosure can be better processed by another whistleblowing reports unit, the

		whistleblowing reports unit to whom the disclosure is made may, within not more than **thirty days**, refer the disclosure to that other whistleblowing reports unit and immediately inform in writing, the whistleblower accordingly.

Ian Macintyre SC

Chief Parliamentary Counsel

ATTENDANCE RECORD

ATTENDANCE RECORD OF THE JOINT SELECT COMMITTEE APPOINTED TO CONSIDER AND REPORT ON WHISTLEBLOWER PROTECTION BILL, 2015			
Member	7th Meeting (23-03-2016)	8th Meeting (05-04-2016)	9th Meeting (26-4-2016)
Mr. W. Michael Coppin	PRESENT	PRESENT	PRESENT
Mr. Foster Cummings	PRESENT	PRESENT	PRESENT
Mr. Wade Mark	PRESENT	PRESENT	PRESENT
Ms. Sophia Chote, SC	PRESENT	EXCUSED ABSENT	EXCUSED ABSENT
Mr. Stuart Young	EXCUSED ABSENT	EXCUSED ABSENT	EXCUSED ABSENT
Mr. Faris Al Rawi	PRESENT	PRESENT	PRESENT
Maj. Gen. (Ret.) Edmund Dillon	PRESENT	EXCUSED ABSENT	PRESENT
Mr. Prakash Ramadhar	EXCUSED ABSENT	EXCUSED ABSENT	EXCUSED ABSENT