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TRANSPARENCY ON DEMAND

REVIEW OF WHISTLEBLOWER PROTECTION BILL 2015 TRINIDAD AND TOBAGO

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Prepared By
Disclosure Today
Non-Profit Organization
Committed to Advancing Transparency on All Matters of Public Interest
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Dedicated
to

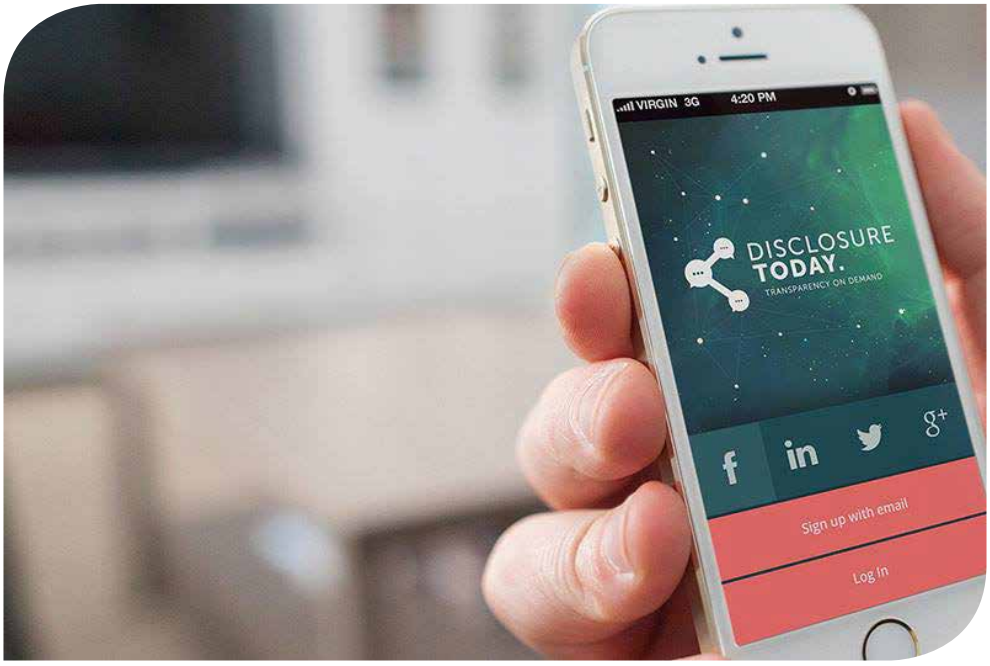
Dana Saroop Seetahal S.C.,

'Gone But Not Silenced'

July 8, 1955 – May 4, 2014

Dana S. Seetahal S.C., contributed significantly to the development of the criminal law, practice and procedure. She was a distinguished Senior member of the legal profession in Trinidad and Tobago who served as a Magistrate, State Prosecutor, Independent Senator and Defence Attorney at law as well as a long standing Criminal Law Lecturer at the Hugh Wooding Law School.

Ms Seetahal S.C., epitomised fearlessness, integrity and independence and was a champion of reform of the criminal justice system in Trinidad and Tobago.



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EXECUTIVE SUMMARY

Why Protect Whistleblowers?

1.0 Corruption is a vexing problem for Governments and people worldwide. The World Bank has conservatively estimated that every year approximately one trillion dollars is being lost to bribery. This estimate refers to annual worldwide transactions only - and of a particular type _ and does not account for the significant losses in investment, private sector development, and economic growth to a country, or to the increases in infant mortality, poverty and inequality, all resulting from corruption and mis-governance.

2.0 As corruption typically takes place behind closed doors, encouraging individuals who may have information to speak up and creating a facilitating environment for same, are recognised as fundamental to an effective anti-corruption framework. Further, given the vulnerability to reprisals and recrimination as a result of disclosing information, an effective protection framework for whistle-blowers is also critical.

Objectives of Whistle-blower Protection Legislation (WPL)

3.0 A survey of legislative approaches reveals that WPL typically has five major objectives:

I. Supporting public interest disclosure by facilitating disclosure of wrongdoing;
II. Protecting whistleblowers against potential retaliation;
III. Ensuring that public interest disclosures are properly assessed, investigated and acted upon;
IV. Promoting a culture of transparency, integrity and accountability (symbolic value of the legislation);
V. Preventing abuse and misuse of available protections for personal advantage or vendettas against the employer.

4.0 These five objectives are based on either of or an overlap of the two primary ideological approaches to Whistle-blower Protection Legislation (WPL).

(a) **Human Rights & Justice** – This approach is concerned primarily with *protection* of individual human rights, and fairness both to the reporter and to persons who may be implicated by the report *(Narrow)*

(b) **Good Governance & Utilitarianism** – This approach is concerned primarily with *encouraging disclosures* aimed at anti-corruption and institutional reform i.e. the detection and prevention of wrongdoing and with upholding and enforcement of the law. *(Broad)*

5.0 The justice and utilitarian approaches necessarily overlap and there are sometimes conflicts and competing interests between them that must be balanced by legislators. For example, whereas from a utilitarian perspective it may be appropriate to take action on the basis of an anonymous report, to do so may result in unfairness to the person who may be implicated by the report. Even within each approach there may be competing interests, for example, allowing anonymous reporting may protect the reporter but excludes the person against whom a report has been made from being able to confront his accuser.

6.0 The effectiveness of specific WPL must be assessed as against its objectives. Are legislators concerned with the narrower concern of protecting whistleblowers or with the broader governance and institutional reform objectives, or with both? The United Nations Convention Against Corruption (UNCAC) of which Trinidad and Tobago is a party favours the broader objective.

TT Whistle-blower Protection Bill No. 15 of 2015

7.0 The following are observations, comments and recommendations on the Trinidad and Tobago Whistle-blower Protection Bill No. 15 of 2015 ('WP Bill 2015').

8.0 The WP Bill 2015 has the following express objectives which manifests an intention to take a broader approach to WPL reform:

> 'to combat corruption and other wrongdoings by encouraging and facilitating disclosures of improper conduct in the public and private sector, to protect persons making those disclosures from detrimental action, to provide for the matters disclosed to be investigated and dealt with and to provide for other matters connected therewith'

(1) Narrow – Rights Based Approach

9.0 However, an analysis of the provisions of the WP Bill 2015 on balance reveals the narrower more rights based approach. This observation is made for the following reasons:

(a) Limitations on Who Is Protected

10.0 Article 33 of the UNCAC states that parties should 'consider measures to provide protection against any unjustified treatment for **any person** who reports in good faith and on reasonable grounds to the competent authorities any facts concerning corruption offences.'

11.0 Under the WP Bill 2015, an Employee can make a Protected Disclosure and an employee is defined as (a) any person who works or worked for another person; and receives, received, or is entitled to receive, any remuneration for work done (b) any person who in any manner

assists or assisted in the carrying on or conduct of the business of an employer, without any entitlement to receive remuneration or reward or (c) any person who is, or was, engaged or contracted under a contract for services to do work for another person or any agent of the person.

12.0 The confinement of protection to employees as defined above evidences an application of the narrower concept of whistleblowing.[1] Contractors for works, suppliers of goods, consumers, students, job applicants, prisoners, blacklisted firms and their family members etc., are not covered.

13.0 Preoccupation with workplace/insider reporters only manifests a de-prioritizing of the objective of combatting corruption and is not fully in alignment with the recommendations in the UNCAC.

14.0 Contractors for works, suppliers of goods, consumers, students, job applicants, prisoners, blacklisted firms and their family members etc., are not covered.

(b) Limitations on Public Whistleblowing

15.0 A disclosure is protected if it is made in accordance with section 6. Section 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 organisations etc.

16.0 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,[2] once certain conditions have been met. WPL in South Africa and the U.K. recognise 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."[3] 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 did not recommend any action, or did not notify the whistleblower after six months.[4]

1 Ibid paras. 1.3-1.5, paras 1.9 – 1.10

2 Even the UK system which has been criticized as being unduly restrictive allows for wider disclosures once specific criteria have been satisfied. Sections 43G and 43H and the ERA set out the circumstances in which other disclosures, including to the media may be protected.

3 Public Servants Disclosure Protection Act of 2005, c. 46, §16(a)(b).

4 Queensland Public interest Disclosure Act of 2010, part 4

17.0 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.

18.0 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.

(2) Harmonization of WPL

19.0 Although there is no overarching whistleblower protection framework in Trinidad and Tobago, a lacuna which the subject bill seeks to address, there are divers whistleblowing provisions contained in sectoral laws that, though piecemeal, provide important context for the proposed reforms. The scope of protection is limited to certain types of persons or offences and when examining the current state of WPL in Trinidad and Tobago these existing protections must be considered in tandem with mandatory disclosure obligations and also confidentiality and secrecy provisions.

20.0 Of significance, defamation and libel laws, restrictive confidentiality rules, data protection rules and bank secrecy or other secrecy laws (such as the Official Secrets Act 1911 to 1939 UK which still forms a part of the Trinidad and Tobago law) could pose a challenge. Save for expressly addressing confidentiality provisions in employment agreements[5] and legal professional privilege[6], other secrecy provisions have not been expressly rationalized. Some of the existing legislative provisions to be rationalized are hereto attached and marked **Annexure E**.

5 See section 6(2) and section 25

6 See section 8

(3) No Centralized Whistleblower Complaints Authority

21.0 Under the WP Bill 2015 disclosures are protected once made to a WRO and in certain circumstances directly to a WRU. Notably, to centralized unit has been established with the following powers:

(a) Receive, Investigate, Correct & Protect (Including Providing Redress)
(b) Monitor & Provide oversight of WRUs and WROs
(c) Data Collation, Analysis & Dissemination
(d) Training, Capacity Building
(e) Review & Make Recommendations for Reform

22.0 The issue of culture and whistleblowing in Trinidad and Tobago is a complicated and vexing one, which can only be meaningfully addressed by first defining the phenomenon on the basis of the systematic collation and analysis of local data and then utilizing this research to inform policy positions. The lack of a central monitoring and oversight agency responsible for collating, analyzing and disseminating whistleblowing statistics as the proposed WPL is implemented, squanders a critical opportunity to advance our understanding of the effectiveness of the proposed regime and the impact of culture on whistleblowing.

(4) Remedies

23.0 Section 20 (1) provides for a right of action in the High Court in pursuit of civil remedies inclusive of injunctions, compensation for damages and any other relief deemed suitable.

24.0 These protections and new rights theoretically are a step forward, however, given the cost of litigation, for practical purposes it may be difficult for an employee who has suffered reprisal on his workplace and may have even lost his job, to access the funding to pursue this type of litigation.

(5) Financial Incentives

25.0 Despite reluctance on the part of many to accept the impact of pecuniary awards on incentivizing persons to come forward with information on 'improper conduct' there are a growing number of countries beginning to follow in the pioneering footsteps of the US.[7] The United States False Claims Act has been said to be one of the most successful whistleblowing laws in the world.

26.0 The 2015 UNCAC Resource Guide posits that "Qui tam" legislation represents a distinct and separate branch of whistleblower law, which, in the United States in particular, has enabled policing of government expenditures that involve the private sector. This regulatory model is different from bounty or reward systems which offer monetary compensation for information,

7 This is also the case in South Korea, where its Anti-Corruption Act allows whistleblowers to recover up to 20% of the recovered amount. The success of this practice has encouraged countries such as Canada to also consider its implementation.

but which tend to leave the reporting person in the role of a passive observer in the process.

27.0 Given the cultural, social and political makeup of Trinidad and Tobago, this type of legislative intervention could catalyse a radical anti-corruption effort bringing corrupt actors to justice. Further, for whistleblowers who have suffered financially, qui tam rights of action would provide much needed leverage in obtaining legal representation. However, it is accepted that this is a reform that may attract widely differing views. Some are skeptical with regard to providing monetary incentives to whistleblowers, arguing that such provisions may detract from the public interest principles of the legislation and pervert the whistleblower's motives to report. There is need for comprehensive stakeholder consultation to see whether the population shares this view.

(6) Civil Society Engagement

28.0 Experience shows that laws developed through consultation with relevant stakeholders are more likely to be effective. Proper consultation is a vital step in creating legitimacy for any programme of reform and is essential when seeking to support public engagement with the system. This is all the more important in cases where the social and cultural environment is particularly hostile, for historical or other reasons, to the idea of someone alerting the authorities about a problem that does not directly affect them.

29.0 Whistleblowers are not "traitors", but people with courage who prefer to take action against abuses they come across rather than taking the easy route and remaining silent. It requires tackling deeply engrained cultural attitudes dating back to social and political circumstances such as dictatorship and/or foreign domination under which distrust towards "informers" of the despised authorities was only normal.

30.0 In some jurisdictions, civil society and community groups play an active role in supporting new laws and in helping to ensure they are properly implemented. Such groups can help ensure that information about wrongdoing, corruption and risk is reported and investigated.

Summary of Recommendations & Final Observations

1. The Committee is urged to consider how to harmonize the various sectoral provisions. Failing to take into account how different duties and obligations apply to reporting persons risks may undermine the effectiveness of the proposed WPL. If individuals are uncertain as to what protective measures are available to them and in what circumstances, they are more likely to remain silent. Experience shows that even very good reporting systems will not be used if they conflict with existing rules and obligations.

2. The Committee is strongly urged to establish a 'third tier' in the proposed WP system which allows for wider disclosures to the media, trade unions, civil society organization and other members of society if the public interest so demands.

3. 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.

4. The Committee is urged to consider a burden shifting regime to the employers and/or reducing the burden of proof on whistleblowers.

5. The Committee should give consideration to whether more defined criteria for "gross mismanagement" should be given or whether this will be addressed in the regulations. Further in respect of (f) the reference to 'public funds' as opposed to the more robust statutory concept of 'public money' as defined in the Public Procurement & Disposal of Property Act No. 1 of 2015 should be rationalized so as to bring alignment between the two pieces of legislation both with the aim, inter alia, of combatting corruption. (See Para. 4.5.6)

6. It is recommended that the requirement that a WRU must deter protected disclosure t 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.

7. The Committee is urged to consider the wording of the UK Public Interest Disclosure Act 1998, Part IVA section 43A(4) for the amendment of the section on protection of legal professional privilege.

8. The Committee is strongly urged to revisit Part II Division 2 with a view to substantially revamping the internal reporting procedures to provide for accountability in the handling of internal disclosures.

9. The Committee is strongly urged to consider the establishment of a Centralized Whistleblower Complaints authority to provide monitoring, investigation and oversight of WROs and to collect, analyse and if required disseminate statistics so as to inform the maintenance of a responsible, and effective whistleblower protection system which inspires trust and confidence.

10. The Committee is strongly urged to revisit Part II Division 3 with a view to substantially revamping the external reporting procedures to provide for accountability and to strengthen the anti-corruption component of the proposed WPL.

11. The recommendation for the Committee to consider the establishment of a Centralized Whistleblower Complaints authority with robust investigatory powers and to provide monitoring and oversight of WROs and to collect, analyse and if required disseminate statistics so as to inform the maintenance of a responsible, and effective whistleblower protection system which inspires public trust and confidence.

12. The Committee is urged to establish mechanisms for robust stakeholder consultation on remedies for whistleblowers including in particular the consideration of financial incentives.

13. The Committee is urged to consider strengthening the anti-corruption component of the proposed reforms by taking a NO LOOPHOLES APPROACH –In this regard it is specifically recommended that a more expansive protection be provided to different categories of whistleblowers consistent with Article 33 of the UNCAC.

14. The Committee is urged to consider increasing the penalties for criminal offences in particular for offences created by sections 21 and 24.

1.0 Introduction

1.1 On 26th November 2015, the Whistleblower Protection Bill No. 15 of 2015 was published in Legal Supplement Part C to the 'Trinidad and Tobago Gazette' Vol. 54, No. 122. On 14th December, 2015 Disclosure Today received a letter of invitation from the Joint Select Committee of Parliament of Trinidad and Tobago to submit proposals on the proposed legislation on or before 8th January 2016 On 6th January 2016 the Committee extended the deadline for receipt of proposals to 20th January 2016.

1.2 These observations and comments are submitted in response thereto.

Defining Whistleblowing

1.3 One standard legal definition of whistleblowing is not available. However, a common understanding of the concept emerges from the various definitions that have been developed overtime. One of the first modern uses of the term by Ralph Nader in 1971 described it as 'an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity'.[8]

1.4 Academics Near and Miceli in their seminal work on whistleblowing in 1985 defined it as 'disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action'[9]

1.5 The International Labour Organisation (ILO) defines whistleblowing in more narrow terms as 'the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers.'[10] The UK Committee on Standards in Public Life also defines it narrowly as 'raising a concern about wrongdoing within organisations or through an independent structure associated with it.'

1.6 A broader more far ranging definition is provided by The UNCAC which refers to "any person who reports in good faith and on reasonable grounds to the competent authorities". The Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights (COER 2010) regarded 'whistleblowing' as: 'concerned individuals sounding the alarm in order to stop wrongdoings that place fellow human beings at risk'. The US Government Accountability Project also broadly defines whistleblowers as 'individuals who use free-speech rights to challenge abuses of power

8 Nader, Petkas and Blackwell, Whistleblowing(1972)

9 Near and Miceli *Organizational dissidence: The case of whistle-blowing,* Journal of Business Ethics 1985 Vol. 4 Pg 1-16

10 ILO Thesaurus 2005. At http://www.ilo.org/public/libdoc/ILO-Thesaurus/english/index.htm

that betray the public trust'.[11]

1.7 Transparency International takes a middle path relying on a more flexible interpretation of Near and Miceli ('the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being com- mitted in or by public or private sector organizations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action'), but also goes on to make clear its view that a whistleblower is an insider for whom the organization has responsibility: "a whistleblower is any public or private sector employee or worker who discloses information [as defined above] ... and who is at risk of retribution. This includes individuals who are outside the traditional employee-employer relationship, such as consultants, contractors, trainees/ interns, volunteers, student workers, temporary workers, and former employees."[12]

1.8 Australian academic Peter Jubb posits that whistleblowing is an element of the right to free speech and of individuals to express dissent and defines it as necessarily a public action:

'Whistleblowing is a deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or information of an organization, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organization to an external entity having potential to rectify the wrongdoing.'[13]

1.9 This paper embraces the more broad and expansive view of whistleblowing in order to provide the most effective anti-corruption mechanism and also to protect the fundamental human rights of individuals in Trinidad and Tobago to equality and freedom of expression as encapsulated in section 4 of the 1976 Republican Constitution of Trinidad and Tobago and to fair labour practices.

1.10 The importance of the distinction between a broad and narrow approach to the definition of whistleblowing relates particularly to the question of who can make a protected disclosure and what can be disclosed. In respect of the former, recent research has demonstrated that a pedantic focus on employees and/or insiders within an organization alone ignores the growing phenomenon of both insider and outsider 'bell ringers' the latter of which can have a significant contribution to anti-corruption efforts.[14]

11 See Devine and Massarani 2011: 4

12 Worth 2013: 87; see also Osterhaus and Fagan 2009: 44–5

13 Peter B. Jubb, Whistleblowing: A Restrictive Definition and Interpretation, Journal of Business Ethics 21, 77-94, 1999

14 'Outsider "Whistleblowers": Conceptualizing and Distinguishing "Bell-Ringing Behavior"', Marcia P. Miceli, Suelette Dreyfus and Janet P. Near (2014 – Chapter 3 International Handbook on Whistleblowing Research) provide real world examples of bell-ringers, such as Harry Markopolos, who made public attempts to have the US Securities and Exchange Commission deal with the alleged Ponzi scheme of Bernard Madoff, which saw thousands of investors defrauded of US$65 billion. Despite often being called a whistleblower, Markopolos was not a member of staff and thus could not raise his concerns within Bernard Madoff's organization, nor did he have that status when he approached regulators.

1.11 In respect of what can be disclosed, perceived wrongdoing can theoretically be spread on a continuum between wrongdoing that only affects individual, private or personal interests and 'wrongdoing that threatens wider organizational and/or public integrity, above and beyond any outcomes for affected individuals (public interest)'[15]

1.12 Such distinctions may be important for the different complaint avenues, institutional and regulatory responses and protections that can or should be triggered by whistleblowing. However in practice the demarcations are not always clear. In some cases, a personal grievance about bullying, harassment or favoritism may be entirely that, or it may indicate more general problems in a workplace, or be so serious that it represents a breach of criminal law, or be so systemic that it affects the integrity and performance of the entire institution.

1.13 This raises the question for WPL policymakers to consider the merit of protecting disclosures which may be in the public interest but which also have the potential to provide personal gain to the whistleblower.[16]

Why Does It Matter?

1.14 It has been argued that whistleblowing laws can be used as a measure of 'the democratic maturity as well as the humaneness of a country.'[17]

1.15 Transparency is the foundation of accountability and integrity. In the modern age of institutions, whistleblowing is now posited as one of the most important processes – if not *the* single most important process – by which governments and corporations are kept accountable to the societies they are meant to serve and service. The ability for organizational 'insiders' to speak up about wrongdoing, and what happens afterwards in terms of corrective responses and treatment of the people involved, lies at the very heart of the health of all institutions and modern regulatory processes, right across society.

15 Brown and Donkin *Whistleblowing in the Australian Public Sector* 2008, at 9

16 See Paras … for a fuller discussion and recommendations on the "personal gain criteria"

17 Vinten G., *Whistleblowing: Subversion or Corporate Citizenship?* Sage Publications, UK,1994

1.16 By revealing concealed information that is critically important to public good, whistleblowers provide an opportunity to address public interest concerns before harm is done.

1.17 Whistleblowing is central to democratic values, social justice and fundamental human rights and lays the foundation for a democratic and open society in which government is based on the will of the people and every person is equally protected by the law.

1.18 Despite the ready acceptance of the importance of whistleblowing to a modern democracy, legislative reform efforts still remain a daunting task. This is primarily as a result of the diverse and competing interests and objectives involved. On the one hand there is the whistleblower with the rights to equality, freedom of expression and fair labour practices. On the other hand there is the individual or entity against which an allegation is made who has rights to reputation and to be treated fairly. Complicating issues further, there is the objective of eliminating corruption and strengthening transparency and accountability within the public sector and society more generally.

1.19 Developing and implementing Whistleblower Protection Legislation (WPL) is a complicated exercise, which has to balance these oftentimes opposing rights and interests in a manner that is effective and relevant given the historical and cultural realities in the society in which it is to be implemented.

2.0 Whistleblower Protection International Standards

2.1 Legislation aimed at encouraging and facilitating the reporting of acts of corruption and other wrong doing within the public sector is widely recognized as a key component of an effective public accountability framework. Corruption is a crime usually committed behind a cloak of secrecy with corrupt participants bound together in a mutually beneficial oath of silence, concealment and misdirection. Passive actors in a corrupt transaction i.e. those who do not receive any benefit or financial gain fortify this secrecy by turning a blind eye, a deaf ear or refusing to speak up, for fear of reprisal.

2.2 Their silence is understandable as historical references suggest persons who bring these issues to light have not only faced social stigma; some lose their jobs and/or are ostracized for their actions. Some can be charged with crimes for violating laws or incur civil liability for breaching employment contracts. In extreme cases in some societies persons making disclosures can even face physical danger.

2.3 Corruption being a rational offence occurs when a participant assesses that the benefit of the corrupt transaction far exceeds its costs including any penalties and the possibility of detection18. Corruption is therefore most attractive where the risk of detection is low and/or the penalties for detection are slight. Whistleblower Protection Legislation (hereinafter referred to as 'WPL') legitimizes and structures the mechanisms under which public officials can disclose wrongdoings in the public sector, protects public officials against reprisals, and, at the same time, encourages them to fulfil their duties in performing efficient, transparent and high quality public service. If adequately implemented, legislation protecting public sector whistleblowers can become one of the most effective tools to support anti-corruption initiatives, detecting and combating corrupt acts, fraud and mismanagement in the public sector.[19] The absence of appropriate legislation impedes the fight against corruption and exposes whistleblowers to risks of retaliation.[20]

2.4 Many international anti-corruption instruments have recognized the importance of having WPLs in place and now require domestic states to adopt these laws as part of an effective anti-corruption framework. Whistleblower protection requirements have been introduced in the

(a) United Nations Convention against Corruption,[21]
(b) 2009 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation),[22]
(c) 1998 OECD Recommendation on Improving Ethical Conduct in Public Service,[23]
(d) Council of Europe Civil and Criminal Law Conventions on Corruption,[24]
(e) Inter-American Convention against Corruption,[25]
(f) African Union Convention on Preventing and Combating Corruption.[26]

2.5 Of these instruments Trinidad and Tobago (a) signed the UNCAC on 11th December 2003 and ratified same on 31st May 2006 and (b) signed and ratified the IACAC on 15th April 1998.27

18 See Diagram No. 1

19 See, for example Council of Europe Parliamentary Assembly, The protection of "whistleblowers": Introductory memorandum (2008) 09, 3 April 2008, available at http://omtzigt.cda.nl/Portals/13/docs/whistle%20blowers%20memo%20Omtzigt.doc.

20 David Banisar, "Whistleblowing: International Standards and Developments" in Sandoval, I. (editor), Corruption and Transparency: Debating the Frontiers between State, Market and Society, World Bank-Institute for Social Research, UNAM, Washington, D.C. 2011, p. 7, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753180 (hereinafter Banisar)

21 UNCAC Articles 8, 13 and 33

22 OECD Anti-Bribery Convention 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Section IX.iii and Section X.C.v., and Annex II of the Recommendation, Good Practice Guidance on Internal Controls, Ethics and Compliance, Section A.11.ii

23 OECD Recommendation on Improving Ethical Conduct in the Public Service, Principle 4

24 Council of Europe Civil Law Convention on Corruption, Article 9; Council of Europe Criminal Law Convention on Corruption, Article 22

25 Council of Europe Civil Law Convention on Corruption, Article 9; Council of Europe Criminal Law Convention on Corruption, Article 22

26 African Union Convention on Combating Corruption Article 5(6)

27 Guidance from UNCAC and IACAC on the protection of whistleblowers is referenced in this paper and attached at Annexures B and C.

2.6 Over thirty (30) countries have implemented comprehensive WPL and since 2010 these laws have been passed in more than 15 countries, including Australia, Bosnia and Herzegovina, Ethiopia, India, Ireland, Jamaica, Malaysia, Malta, Peru, the Republic of Korea, Serbia, Slovakia, Uganda, the United States, Viet Nam and Zambia. This notwithstanding, there is as yet no uniform legislative means for establishing and implementing effective whistleblower protections.

2.7 A review of legislative models worldwide reveals an extreme disparity of approach that we consider in greater detail below.28

2.8 Good practice WPL includes movement away from a piecemeal sectoral approach and the adoption of comprehensive free standing laws that have a broad scope and coverage, provide adequate alternative channels of reporting both internally and externally, protect as far as possible the whistleblower's confidentiality and provide for legal remedies and compensation. As WPL is still in relative infancy, limited research on the impact and the conditions of effective implementation can be cited.

2.9 A survey of legislative approaches reveals that WPL typically has five major objectives:

VI. Supporting public interest disclosure by facilitating disclosure of wrongdoing;
VII. Protecting whistleblowers against potential retaliation;
VIII. Ensuring that public interest disclosures are properly assessed, investigated and acted upon;
IX. Promoting a culture of transparency, integrity and accountability (symbolic value of the legislation);
X. Preventing abuse and misuse of available protections for personal advantage or vendettas against the employer.

2.10 These five objectives are based on either or an overlap of the two primary philosophical underpinnings of WPL (a) protection of rights (both of the whistleblower and the person or entity against whom the allegation is made) (ii, iii, v) and (b) anti-corruption (i, ii, iii, iv).

2.11 At the Seoul Summit in November 2010, G20 Leaders identified the protection of whistleblowers as one of the high priority areas in their global anticorruption agenda. Recognizing the importance of effective whistleblower protection laws, Leaders, in point 7 of the G20 Anti-Corruption Action Plan, called on G20 countries to lead by:

28 Refer to Part 4.0 and the WPL Country Comparison Table – Annexure D

To protect from discriminatory and retaliatory actions whistleblowers who report in good faith suspected acts of corruption, G-20 countries will enact and implement whistleblower protection rules by the end of 2012. To that end, building upon the existing work of organisations such as the OECD and the World Bank, G-20 experts will study and summarise existing whistleblower protection legislation and enforcement mechanisms, and propose best practices on whistleblower protection legislation.

2.12 The following guiding principles emanated from the G20 Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation and provide a useful reference for countries intending to establish, modify or complement whistleblower protection frameworks. In this sense, they are prospective and offer guidance for future legislation. They do not constitute a benchmark against which current legislation should be tested.

2.13 The guiding principles are broadly framed and can apply to both public and private sector whistleblower protection29.

2.14 Taking into account the diversity of legal systems among G20 countries, the six guiding principles offer flexibility to enable countries to effectively apply them in accordance with their respective legal systems and provide a useful framework for Trinidad and Tobago legislators to test the proposed WPL. The Six Guiding Principles for WPL are:

1. Clear legislation and an effective institutional framework are in place to protect from discriminatory or disciplinary action employees who disclose in good faith and on reasonable grounds certain suspected acts of wrongdoing or corruption to competent authorities.

2. The legislation provides a clear definition of the scope of protected disclosures and of the persons afforded protection under the law.

3. The legislation ensures that the protection afforded to whistleblowers is robust and comprehensive.

4. The legislation clearly defines the procedures and prescribed channels for facilitating the reporting of suspected acts of corruption, and encourages the use of protective and easily accessible whistleblowing channels.

29 The Study and a non-exhaustive menu of examples of best practices setting out more specific and technical guidance that countries may choose to follow is hereto attached and marked **Annexure A.**

5. The legislation ensures that effective protection mechanisms are in place, including by entrusting a specific body that is accountable and empowered with the responsibility of receiving and investigating complaints of retaliation and/or improper investigation, and by providing for a full range of remedies.

6. Implementation of whistleblower protection legislation is supported by awareness-raising, communication, training and periodic evaluation of the effectiveness of the framework of protection.

2.15 The above guidelines in addition to the Draft Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses30 provide a framework in this paper for the recommendations contained at section 4.0.

2.16 In August 2015 the UNODC published the Resource Guide on Good Practices in the Protection of Reporting Persons31 and this too has been used as a reference for the recommendations made herein.

3.0 Current State of Whistleblower Protection Law in Trinidad and Tobago

3.1 Although there is no overarching whistleblower protection framework in Trinidad and Tobago, a lacuna which the subject bill seeks to address, there are divers whistleblowing provisions contained in sectoral laws that, though piecemeal, provide important context for the proposed reforms. The scope of protection is limited to certain types of persons or offences and when examining the current state of WPL in Trinidad and Tobago these existing protections must be considered in tandem with mandatory disclosure obligations and also confidentiality and secrecy provisions.

3.2 Below is a non-exhaustive list of laws and rules that the Committee should take into account when considering the proposed WPL:

- Criminal law, in particular with respect to criminal prosecution for defamation and false reporting, sanctions for failure to report certain categories of crimes, prohibiting retaliation against those who report a crime, obstruction of justice, and laws on the protection of witnesses.

- Sector-based laws, for example legislation on anti-corruption, competition, health and safety, accounting, environmental protection, corporations and securities.

30 On 21 March 2013 representatives of the 31 states that make up the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC) approved the Draft Model Law which is hereto attached and marked **Annexure B**

31 Hereto attached and marked **Annexure C**

- Specific anti-corruption measures, including any laws on conflict of interest, etc.
- Human rights law, with particular regard to protecting the right to freedom of expression, as required by section 4 of the Constitution of Trinidad and Tobago.
- Access or right-to-information laws, with specific regard to any limits to the disclosure of information on the basis of national security or foreign relations, and any rules that undermine the ability of public officials to fulfill their duties to provide information under the law.
- Laws on classified or privileged information, professional secrecy and/or confidentiality, and personal data protection.
- Media law, in particular the protection of journalists and their sources and copyright rules.
- Contract and employment law, in particular protection against breach of confidentiality or loyalty; prohibition or nullification of any agreement that purports to preclude an individual from making a public interest report or disclosure; protection from unfair dismissal or any other form of employment-related retaliation, including acts committed by peers or colleagues.
- Labour law and labour agreements, in particular the collective right to report or disclose public interest concerns.
- Professional reporting duties: protection for those who have specific duties to report or disclose (for example, compliance officers, health and safety officers, company directors and child protection officers).
- Codes of conduct: rules on conduct and integrity and the reporting of breaches of those rules.
- Disciplinary policies and procedures, particularly with regard to (administrative) offences of breaches of confidentiality or defamation.
- Other organizational policies or rules, including implementation of data protection laws, codes of conduct and ethics, disciplinary codes, policies on media communications and publication rules.

3.3 Of significance, defamation and libel laws, restrictive confidentiality rules, data protection rules and bank secrecy or other secrecy laws (such as the Official Secrets Act 1911 to 1939 UK which still forms a part of the Trinidad and Tobago law) could pose a challenge. Save for expressly addressing confidentiality provisions in employment

agreements[32] and legal professional privilege[33], other secrecy provisions have not been expressly rationalized. Some of the existing legislative provisions to be rationalized are hereto attached and marked **Annexure E**.

The Committee is urged to consider how to harmonize the different provisions. Failing to take into account how different duties and obligations apply to reporting persons risks may undermine the effectiveness of the proposed WPL. If individuals are uncertain as to what protective measures are available to them and in what circumstances, they are more likely to remain silent. Experience shows that even very good reporting systems will not be used if they conflict with existing rules and obligations.[34]

3.4 Ireland in 2012 after the Mahon inquiry provides a useful and recent case study of a State seeking to rationalize existing sectoral laws in a new free standing comprehensive WPL. The Government implemented a single overarching framework protecting whistleblowers in a uniform manner in all sectors of the economy a new law, the Protected Disclosures Act, 2014 was just promulgated.

4.0 Analysis of Proposed Legislation

4.1 The objectives of the Whistleblower Protection Bill No. 15 of 2015 are expressly stated to combat corruption and other wrongdoings by encouraging and facilitating disclosures of improper conduct in the public and private sector, to protect persons making those disclosures from detrimental action, to provide for the matters disclosed to be investigated and dealt with and to provide for other matters connected therewith.

WP Bill 2015 SNAPSHOT

Below the proposed WPL is benchmarked against the G20 Six Guiding Principles and is rated between 0-5 Stars for each principle with 5 representing that the standard has been fully met. This is followed by an analysis of each Part of the bill.

32 See section 6(2) and section 25

33 See section 8

34 2015 UNCAC Resource Guide on Good Practice for Protecting Reporting Persons

G20 Six Guiding Principles[35]

Principle 1 *Clear legislation and an effective institutional framework are in place to protect from discriminatory or disciplinary action employees who disclose in good faith and on reasonable grounds certain suspected acts of wrongdoing or corruption to competent authorities.*

3.5 Stars

4.2 The proposed WPL does bring greater legal certainty and clarity on the issue of whistleblower protection and seeks to move past the fragmented approach currently existing. The bill provides for employees who make disclosures of improper conduct in good faith and on reasonable grounds to be protected from discriminatory or disciplinary action. The bill also provides for employers to establish, publish and republish at regular intervals internal procedures for whistleblowing.

4.3 This notwithstanding there are pragmatic weaknesses with respect to the internal and external whistleblowing process which will be outlined below.

Principle 2 *The legislation provides a clear definition of the scope of protected disclosures and of the persons afforded protection under the law.*

3 Stars

4.4 The proposed WPL does provide a definition of the scope of the protected disclosures and the list is not unduly restrictive but there is some ambiguity that is discussed in the analysis below. With respect to the issue of who can make a protected disclosure, this is clear but not as expansively drawn as could be in order to maximize the opportunity to combat corruption.

Principle 3 *The legislation ensures that the protection afforded to whistleblowers is robust and comprehensive.*

2 Stars

4.5 The proposed WPL provides for a two tiered system of internal and external whistleblowing protection. Whistleblowers who stand to personally gain may not receive protection. Disclosure of information protected by legal professional privilege is not covered. Provisions on burden of proof are not included. Protection is not extended to employees whom employers mistakenly believe to be whistleblowers.

Principle 4 *The legislation clearly defines the procedures and prescribed channels for facilitating the reporting of suspected acts of corruption, and encourages the use of protective and easily accessible whistleblowing channels.*

2 Stars

35 Please refer to Annexure A for the compendium of best practices supporting these Guiding Principles.

4.6 There is provision of protection for disclosures made internally or externally. There is the establishment of internal channels for reporting with the public sector and protection for disclosures made directly to law enforcement authorities. There is no express provision for specific channels and additional safeguards for dealing with national security or state secrets-related disclosures.

4.7 There is no provision protecting disclosures made directly to external channels, including the media, civil society, trade unions etc.,

4.8 There are no incentives financial or otherwise encouraging whistleblowers to come forward. Provision of information, advice and feedback to the whistleblower on action being taken in response to disclosures is not always required.

Principle 5 *The legislation ensures that effective protection mechanisms are in place, including by entrusting a specific body that is accountable and empowered with the responsibility of receiving and investigating complaints of retaliation and/or improper investigation, and by providing for a full range of remedies.*

1 Star

4.9 There is no appointment of a centralized accountable whistleblower complaints body responsible for investigating and prosecuting retaliatory, discriminatory or disciplinary action taken against whistleblowers. Whistleblowers are provided with rights of legal action. There are penalties for retaliation inflicted upon whistleblowers but they are not significant.

Principle 6 *Implementation of whistleblower protection legislation is supported by awareness-raising, communication, training and periodic evaluation of the effectiveness of the framework of protection.*

0 Stars

4.10 There is no provision for the promotion of awareness of whistleblowing mechanisms, provision of general advice, monitoring and periodically reviewing the effectiveness of the whistleblowing framework nor for the collection and dissemination of data.

4.11 There is no provision for the raising of awareness with a view to changing cultural perceptions and public attitude toward whistleblowing, to be considered an act of loyalty to the organization.

4.12 There is no provision for training within the public sector to ensure managers are adequately trained to receive reports, and to recognize and prevent occurrences of discriminatory and disciplinary action taken against whistleblowers.

4.13 Save for an obligation to publish and republish widely in the organization and at regular intervals information about the existence of internal procedures and how to use them, there is no requirement for the employer to post notices about employees rights in connection with protected disclosures.

With 11.5 Stars out of a possible 30 there is much room for improvement of this bill. We consider the provisions more closely hereinbelow.

The Bill

4.14 The bill is divided into four parts and each is addressed below.

Part I (Sections 1-5)
Preliminary Provisions

4.15 This Part contains preliminary provisions pertaining to the coming into force of the legislation upon proclamation, definitions and scope. Throughout this section, comparisons will be made to the WPL in UK, Jamaica, Canada, South Africa, Australia, Japan and New Zealand.[36] For the avoidance of doubt, references to the bill are in relation to the Whistleblower Protection Bill No. 15 of 2015.

Key Definitions & Points Arising in Section 3

4.16 Who Can Make A Protected Disclosure?

"Employee"

4.16.1 An Employee can make a Protected Disclosure and an employee is defined as (a) any person who works or worked for another person; and receives, received, or is entitled to receive, any remuneration for work done (b) any person who in any manner assists or assisted in the carrying on or conduct of the business of an employer, without any entitlement to receive remuneration or reward or (c) any person who is, or was, engaged or contracted under a contract for services to do work for another person or any agent of the person.

4.16.2 The confinement of protection to employees as defined above evidences an application of the narrower concept of whistleblowing.[37]

4.16.3 However, preoccupation with workplace/insider reporters only manifests a de-prioritizing of the objective of combatting corruption and is not fully in alignment

36 See WPL Country Comparison Table hereto attached and marked Annexure D

37 Ibid paras. 1.3-1.5, paras 1.9 – 1.10

with the recommendations in the UNCAC. Article 33 of the UNCAC states that parties should 'consider measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning corruption offences.'

4.16.4 There are many variations across countries of whose disclosures are protected. Some legal regimes restrict protection to employees only, while others extend protection to external consultants and contractors. As public sector functions can be outsourced to contractors, another issue is whether to protect contractors' disclosures. For example, the South African act excludes independent contractors from whistleblower protection, while the UK legislation protects contractors' disclosures. The Jamaica legislation[38] like the Bill includes the independent contractor, that is a person who is under a contract for services, but the protection is still confined to the employment relationship[39]. On the other hand, Korea[40] for example, expressly applies to "any person" who reports a violation of the public interest; and Australia provides whistleblower protection for persons performing functions "in or for an agency" thereby including external contractors.

4.16.5 Contractors for works, suppliers of goods, consumers, students, job applicants, prisoners, blacklisted firms and their family members etc., are not covered. With this approach the anti-corruption component of WPL is not maximized. Experts recommend that a "no loophole" approach to WPL should include these categories.[41]

4.16.6 The 2015 UNCAC Resource Guide[42] proffers that in jurisdictions that use the term "whistleblower" in relation to workplace-related reporting and protection, lawmakers should be aware of two aspects: first, they should consider including a wider range of persons from the public and private sectors (e.g. employees, contractors, consultants, trainees, volunteers, workers in informal economy sectors and other insiders); and second, they should consider the need to provide protection for other reporting persons who would fall neither under the scope of the workplace-related whistleblower protection nor under witness protection. This would include persons who report information that is not sufficiently detailed as to constitute evidence in criminal proceedings, but still related to alleged corruption.

4.16.7 **It is recommended that a more expansive protection be provided consistent with Article 33 of the UNCAC. The UNCAC 2015 Guide also provides a plethora of examples that address other reporting persons and seek to support State strategies for handling such a large range of case scenarios and reports. In a WPL reform effort, legislators must give consideration to how best to protect members of the public, who can also face serious intimidation and reprisals if**

38 JA Protected Disclosures Act 2011

39 McKoy, D., Whistleblowing and the Law, Conference Paper, CPPC 2012 October 18th 2012

40 Protection of Public Interest Whistleblowers (PPIW Act) 2011

41 U4 Anti-Corruption Resource Centre, Marie Chêne Good Practice in Whistleblowing Protection Legislation, 2009 at p.4

42 Annexure C at page 9

they dare to report or otherwise cooperate with the authorities.

A Note on Public & Private

4.16.8 Notably no distinction is made between public and private sector employees and so both receive coverage under the bill. Some countries such as the UK[43], New Zealand[44] and South Africa45 have adopted a single disclosure regime for both the private and the public sectors while others limit protection to public servants or private employees. The Japanese whistleblower protection act for example only covers private sector employees, while the Canadian Public Servants Disclosure Protection Act 2005 only applies to disclosures by members of the Canadian federal public service and to a number of federal Crown corporations. Nonetheless, the general international trend in this regard seems to adopt specific legislation for both the public and private sector.

4.17 What is Protected?

"Improper Conduct"

4.17.1 There is a difficulty with the definition of 'Protected Disclosure' which is expressed to mean 'an internal disclosure referred to in section 11(4) or an external disclosure referred to in section 14(6)'. Firstly, neither sections 11(4) or 14(6) exist in the version of the bill presently under consideration in this paper[46]. A cooperation of Part II sections 6 and 7 and the definition of 'Improper Conduct' in section 3 outlined hereunder provides the framework for what is a Protected Disclosure. This will be considered in more detail in Part II, and comment is provided on the definition of 'improper conduct'

"improper conduct" means any—

(a) criminal offence;
(b) failure to carry out a legal obligation;
(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;
(f) conduct that shows gross mismanagement, impropriety or misconduct in the carrying out of any activity that involves the use of public funds;
(g) act of reprisal against or victimization of a whistleblower or person related to, or associated with, a whistleblower;
(h) (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

43 UK Public Interest Disclosure Act 1998

44 New Zealand Protected Disclosures Act 2000

45 SA Protected Disclosures Act 2000

46 There may have been an error in the definitions section of the bill and in the definition of 'Protected Disclosure' 11(4) and 14(6) should perhaps be replaced by 11(1) and 14(5) as specified in section 7.

(i) willful concealment of any act described in paragraphs (a) to (li);

4.17.2 There are nine (9) categories here. The definition is widely drawn and it is suggested that this is one of the strongest sections of the bill. It surpasses the UK Employment Rights Act (section 43B1) which provide for only six (6) complete categories outside of which disclosure is not permitted. The six categories dovetail with the first five (5) categories (a) – (e) herein and also includes (i) relating to 'willful concealment.' The ERA plus categories in the bill include disclosures of 'gross mismanagement', 'impropriety or misconduct in the carrying out of any activity that involves the use of public funds',[47] 'conduct that tends to show unfair discrimination',[48] and 'acts of reprisal against or victimization of a whistleblower'.

4.17.3 The broader more flexible casting of the definition of 'improper conduct' is consistent with best WPL practice which is 'to promote and protect free expression with "no loopholes" and cover a wide variety of behaviours. Protected Disclosures should cover any wrongdoing, including disclosure of abuse of authority, violation of laws and ethical standards, danger to public health or safety, gross waste, illegality and mismanagement.[49]

4.17.4 It is cautioned that the use of the word "gross" does create some ambiguity as to the standard which must be applied. In the US which has a comparable provision, to qualify as 'gross' there must be something more than a debatable difference in opinion; the agency's ability to accomplish its mission must be implicated. Moreover, under US law, disclosures of 'trivial' violations do not constitute protected disclosures.[50] In the Australia Public Service Regulations there is no obligation to investigate whistleblower reports that are 'frivolous or vexatious'.[51] No such limitations are provided in the bill.

4.17.5 **The Committee should give consideration to whether more defined criteria for "gross mismanagement" should be given or whether this will be addressed in the regulations. Further in respect of (f) the reference to 'public funds' as opposed to the more robust statutory concept of 'public money' as defined in the Public Procurement & Disposal of Property Act No. 1 of 2015 should be rationalized so as to bring alignment between the two pieces of legislation both with the aim, inter alia, of combatting corruption.**

47 Which are comparable to the provisions in the US Whistleblower Protection Act 1989 which covers disclosures of 'gross mismanagement', 'gross waste of funds' and 'abuse of authority' and maladministration provisions included in the India and Canada Public Servants Disclosure Act.

48 Which is comparable to the provisions in the South African Protected Disclosures Act

49 U4 Anti-Corruption Resource Centre – Good Practice in Whistleblowing Protection Legislation, 2009 at p.5

50 The Federal Circuit court defined 'trivial' as 'arguably minor and inadvertent miscues occurring in the conscientious carrying out of one's assigned duties' Drake v Agency for Int'l Dev., 543 F.3d. 1377, 1381 (Fed. Cir. 2008).

51 Australia Public Service Regulations (1999), Reg. 2.5

What Is the Protection Against?

"Detrimental Action"

4.18 WPL should provide comprehensive protection against discriminatory or retaliatory personnel action[52]. The definition of 'detrimental action' in the bill is widely drawn and is consistent with other jurisdictions that have attempted to give robust protection against retaliation. 'Detrimental action' is defined as follows:

> "detrimental action" means any act or omission that results in a person being
>
> (a) subject to disciplinary action;
>
> (b) dismissed, suspended or demoted;
>
> (c) harassed, intimidated or victimized;
>
> (d) transferred against his will;
>
> (e) refused transfer or promotion;
>
> (f) subject to a term or condition of employment or retirement from employment, that is altered to his disadvantage;
>
> (g) provided with an adverse reference;
>
> (h) denied appointment to any employment, profession or office;
>
> (i) threatened with any of the actions specified in paragraphs (a) to (li),
>
> (j) otherwise adversely affected in respect of his employment, profession, office (including employment opportunities and job security); or
>
> (k) otherwise suffering injury, loss or damage in relation to his employment, family life, career, profession, trade or business;

4.19 This definition must be considered along with express protections against criminal and civil liability, provisions relating to anonymity and confidentiality which are dealt with below.

52 See WPL Country Comparison Table – Annexure D

A Note on Burden of Proof

4.20 Notably, there is no provision in the bill addressing the burden of proof (i.e. which party will bear the burden of proving that such detrimental action did in fact take place). Many jurisdictions have reversed the burden of proof. This is seen as a response to the challenges an employee faces in having to prove that the retaliation was a result of the disclosure 'especially as many forms of reprisals may be very subtle and difficult to establish.'[53] The South Africa PDA aggressively addresses this situation by providing that any dismissal in breach of the Act is deemed to be an automatically unfair dismissal.[54] Such regulations are also found in whistleblowing and corruption reporting laws in Croatia, France, Luxembourg, New Zealand, Norway, the Republic of Korea, Slovenia, the United Kingdom and the United States and this approach is recommended by both the Council of Europe[55] and the G20.[56]

4.21 U.S. law applies a burden-shifting scheme pursuant to which a Federal employee who is a purported whistleblower must first establish that he or she: (1). Disclosed conduct that meets a specific category of wrongdoing set forth in the law; (2). Made the disclosure to the "right" type of party (depending on the nature of the disclosure, the employee may be limited regarding to whom the report can be made); (3). Made a report that is either outside of the employee's course of duties or communicated outside of normal channels; (4). Made the report to someone other than the wrongdoer; (5). Had a reasonable belief of wrongdoing (the employee does not have to be correct, but the belief must be reasonable to a disinterested observer); (6). Suffered a personnel action, the agency's failure to take a personnel action, or the threat to take or not to take a personnel action. If the employee establishes each of these elements, the burden shifts to the employer to establish by clear and convincing evidence that it would have taken the same action in absence of the whistleblowing.[57]

4.22 There is considerable case law on the practical application of this scheme and perhaps this type of approach could be considered in this reform effort. It is however important to note that the employer's right should be protected as much as the whistleblower's with regard to the right of the defence and to a fair trial. On the basis of the aforesaid, the Committee is urged to consider a burden shifting regime and/or reducing the burden of proof on whistleblowers.

53 U4 Anti-Corruption Resource Centre, Good Practice in Whistleblowing Protection Legislation 2009, at p.7

54 South Africa PDA(2000), Section 4(2)(a)

55 Parliamentary Assembly, Resolution 1729 (2010), Protection of "Whistleblowers", para. 6.3. Available from http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta10/eres1729.htm

56 See Annexure A

57 See Annexure A

"Public Body"

4.23 4.23 Commendable is the definition of 'public body' which dovetails with the broad definition contained in the Public Procurement & Disposal of Property Act No. 1 of 2015.

Part II (Sections 6-15)
Disclosure Process

Division 1 Protected Disclosures

4.24 The bill provides for employees making disclosures of improper conduct being protected from detrimental action. The framework for the making of Protected Disclosures can be determined in the cooperation of Part II sections 6 – 9 and the definition of 'improper conduct' provided in Part I section 3 and already outlined in the former part. The following are observations and comments made.

4.25 Section 7 outlines the criteria for protected disclosures as follows:

7.(1) A disclosure is a protected disclosure if

(a) it is made in accordance with section 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.

4.26 4.26 The list above is cumulative and so all criteria must be met.

Two Tiered System

4.27 4.27 Firstly, a disclosure is protected if it is made in accordance with section 6. Section 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 organisations etc.

Media, Members of Parliament, Trade Unions & Civil Society

4.28 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,[58] once certain conditions have been met. WPL in South Africa and the U.K. recognise 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."[59] 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 did not recommend any action, or did not notify the whistleblower after six months.[60]

4.29 4.29 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.

4.30 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.

58 Even the UK system which has been criticized as being unduly restrictive allows for wider disclosures once specific criteria have been satisfied. Sections 43G and 43H and the ERA set out the circumstances in which other disclosures, including to the media may be protected.

59 Public Servants Disclosure Protection Act of 2005, c. 46, §16(a)(b).

60 Queensland Public interest Disclosure Act of 2010, part 4

4.31 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.[61]

4.32 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.[62] The Committee is strongly urged to consider including this 'third tier' external disclosure in the proposed WPL.

Distinguishing Motive

4.33 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.[63]

4.34 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

61 Lewis, Brown & Moberly, International Handbook on Whistleblowing Research, 2014, Chapter 1. (Vandekerckhove 2010; Brown 2011b)

62 U4 Anti-Corruption Resource, Good Practice in WPL 2009 at p. 5-6

63 The Council of Europe states that the term "good faith" was not included in the Recommendation for the Protection of Whistleblowers "in order to preclude either the motive of the whistleblower in making the report or disclosure or of his or her good faith in so doing as being relevant to the question of whether or not the whistleblower is to be protected" (Explanatory Memorandum, paragraph 85). See Recommendation, Principle 22: "Protection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialised, provided he or she had reasonable grounds to believe in its accuracy."

reimbursement.[64]

4.35 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.

4.36 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".

4.37 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 there in are substantially true.

4.38 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."[65] In the bill section 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.[66]

4.39 The adoption of criminal sanctions for false reporting is controversial; some argue that it may deter whistleblowing and have a chilling effect.[67] Here the drafters have sought to strike a balance between ensuring responsible whistleblowing and having chilling effect.

64 United Kingdom (2013). Enterprise and Regulatory Reform Act (ERRA), which changes the provisions of the Public Interest Disclosure Act (1998) and Employment Rights Act (1996).

65 Korea ACRC Act (2009), Chapter V, Article 57

66 India's Bill on Public Interest Disclosure and Protection to Persons Making the Disclosure (PID Bill), (2010), Chapter VI., Section 16 for example, punishes "any person who makes any disclosure mala fide and knowingly that it was incorrect or false or misleading"

67 See: D. Banisar, Whistleblowing: International Standards and Developments, (2009), p. 24.

4.40 However, there is still a requirement that the "disclosure is not made for the purpose of personal gain" (section 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.

4.41 4.41 Notably, while the UK WPL framework prohibits "disclosures for purposes of personal gain" this stipulation applies only to "wider" or "third tier" disclosures.[68] 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.[69] 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.

4.42 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. Section 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.

4.43 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

4.44 Section 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 section 14(5).

4.45 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 section 7. Given the lack of statutory oversight of the WRUs this power presents a serious risk *of*

68 Sections 43G and 43H set out the circumstances in which "other" disclosures including to the media may be protected.

69 Bowers, Fodder, Lewis & Mitchell, Whistleblowing Law & Practice, 2nd Ed. Chapter 5 at page 99

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.

4.46 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 section 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.

4.47 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.

Legal Professional Privilege

4.48 Section 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 section is too broad to address the objective of preserving attorney client privilege. The UK U.K. Public Interest Disclosure Act of 1998, Part IVA section 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].*

4.49 The Committee is urged to consider the wording of the UK Public Interest Disclosure Act 1998, Part IVA section 43A(4) for the protection of legal professional privilege.

Division 2 Internal Disclosures – The First Tier (Sections 10 – 12)

4.50 The Bill establishes an internal reporting channel as the first avenue to be used by a potential whistleblower. It is mandatory unless certain conditions are met[70]. The Employer is under an obligation to appoint and keep in his employ "whistleblowing reporting officers as are required" for the purposes of the Act[71]. A Whistleblowing Reporting Officer (WRO) shall be responsible for "(a) receiving and processing internal disclosures of information about improper conduct committed within or by his employer's organization; and (b) determining whether an internal disclosure should be

70 See section 14. However note, that this is in itself problematic. Many jurisdictions do not mandate that the internal reporting be undertaken first. It is merely expressed as being preferable. For example, there is no such requirement to first report internally in the United Kingdom, nor in many other jurisdictions that have adopted specific whistleblower protection laws.

71 Section 10 (1)

referred for further investigation to a designated authority through its Whistleblowing Reports Unit (WRU) and the conditions under which such referral should take place".[72] The Employer is also under a mandatory obligation to establish internal procedures for receiving and dealing with disclosures relating to his organization. The procedures must identify the WRO and the Employer must "publish and republish" widely in his organization and at regular intervals information about the external procedures and how to use them.[73]

4.51 There are several pragmatic weaknesses in the internal procedures process as outlined in the Bill. It may be that it is intended that the gaps are filled by virtue of the regulations (section 26). However, given our historical lack of expediency in promulgating regulations, which then serves to stymie reform efforts, it is suggested that these draft regulations be published now also for public comment.

4.52 Section 12 purports to addresses the need for the provision of information advice, and feedback to the whistleblower and as currently expressed falls below the international standard. Section 12 reads as follows:

> (1) 12(1) Subject to subsection (2), a whistleblowing reporting officer shall, within a reasonable time after receiving an internal disclosure, notify the whistleblower of the status of the disclosure or such matters as may be prescribed.
> (2) Where it is apparent from external action that action has been taken to rectify or deal with the improper conduct disclosed in an internal disclosure, it shall not be necessary for the whistleblowing reporting officer to comply with subsection (1).
> (3) Where an internal disclosure is a protected disclosure and leads to the detection of improper conduct which constitutes a offence or the breach of a law, the whistleblowing reporting officer may refer the internal disclosure to a designated authority, through its Whistleblowing Reports Unit, for investigation.
> (4) Where a whistle blowing reporting officer refers an internal disclosure under subsection (3), the whistleblowing reporting officer shall not disclose the identity of the whistleblower except with his prior consent in writing.
> (5) A protected disclosure does not, by reason of its referral to Whistleblowing Reports Unit, cease to be a protected disclosure.

4.53 There is much ambiguity in section 12 (1) and (2) and one can readily envisage such flexibility as has been given, frustrating and causing the whistleblower to lose confidence in the process. Firstly, there is no defined period of time within which the WRO must respond and provide a status update to the whistleblower. The WRO is left to determine what is a reasonable. Moreover, even that stipulation for notification is eroded "if it is apparent from external action that action has been taken to rectify or deal with the improper conduct". The WRO is also left to determine what is apparent and what is not and what external action suffices to relieve him/her of the duty to notify and keep the whistleblower updated.

72 Section 10 (2)

73 Section 11

4.54 Section 12 (1) and (2) is to be contrasted with the procedure in Jamaica WPL. The Protected Disclosures Act (2011) of Jamaica requires recipients of disclosures to determine whether an investigation is needed and, if so, to investigate the disclosure. The recipient is required to investigate the matter fairly, provide updates to the whistle- blower at least every 30 days, report findings to the whistleblower and to other people and organizations as appropriate, recommend corrective actions, take steps to remedy improper conduct, provide redress, take disciplinary actions and reduce the opportunity for the misconduct to reoccur. Similar procedures and requirements are, for instance, written into the Public Interest Disclosure Act (2013) of Australia, the Protection of Public Interest Whistleblowers Act (2011) of the Republic of Korea and the Whistleblower Protection Act (2010) of Malaysia.

4.55 Section 12 (3) is crafted in curious terms. Where an internal disclosure is a protected disclosure and leads to the detection of improper conduct which constitutes (1) a criminal offence or the breach of a law (2), the WRO "may" refer the internal disclosure to a designated authority through its WRU for investigation. The grave weaknesses here are startling. Firstly, only two of the nine categories of improper conduct as outlined in section 3 are referable to a designated authority. Secondly, even in those two categories, there is no mandatory obligation to refer the report to the WRU. The WRO seems to be given an unfettered discretion to refuse to refer a report. One wonders, what is the legislative intent with respect to reports of improper conduct which, WROs choose not to refer, particularly where there is no centralized authority with monitoring or oversight responsibility for the conduct of WROs. Finally, with such a restrictive approach to internal reporting[74] and no robust mechanism for investigating of reports and/or for follow up and follow through, it would appear that this process has no useful foundation with which to meet the objectives of the legislation.

4.56 The following further issues are here flagged, to be addressed in the regulations. Firstly, in respect of the WRO it is paramount that such officers have not only the "competency" to receive such reports, but are also empowered to act in response and are held accountable for their action or inaction. (a) there are no qualification criteria and (b) no provision for training and ongoing capacity building to ensure that the WRO understands how to treat with reports. (c) There is also no stipulation on whether the WRO is to be appointed as a public officer with security of tenure or whether a contract officer can fill this position. (d) There is also no monitoring or data collection responsibility on the WRO to submit reports on the number of reports received and the actions taken; nor is there any oversight agency to which such reports can be received and analysed and even published to Parliament in an anonymized manner. This is a critical gap and will result in an inability to measure the effectiveness of the systems being implemented thereby losing opportunities for much needed course correction. Secondly, with no overarching framework from which these internal procedures would emanate, there is the risk of vastly different processes being implemented across

74 There is only one designated officer to whom reports can be made internally and that is the WRO. This is different from WPL provisions in many other jurisdictions, including Jamaica, which allow for reports to be made to several persons within an organization.

the public sector, with consequential lack of public confidence in the proposed WPL. In short there is no accountability built into the system as currently represented in the Bill.

4.57 The Committee is strongly urged to revisit Division 2 with a view to substantially revamping the internal reporting procedures to provide for accountability in the handling of internal disclosures.

4.58 The Committee is strongly urged to consider the establishment of a Centralized Whistleblower Complaints authority to investigate, provide monitoring and oversight of WROs and to collect, analyse and if required disseminate statistics so as to inform the maintenance of a responsible, and effective whistleblower protection system which inspires trust and confidence.

Division 3 – External Disclosures

4.59 Sections 13 – 15 establish the second tier of the whistleblowing protection system in the Bill. Sixteen (16) designated authorities have been identified in the Schedule to the Bill. By virtue of section 13 each designated authority shall have a Whistleblowing Reports Unit (WRU) consisting of a director and such other officers as are required for the efficient performance of the functions of the unit. These WRUs are responsible for receiving and processing external disclosures pertaining to matters which fall under the responsibility of the designated authority.

4.60 Provision is made for an 'employee' to by pass the internal reporting process to the WRO under carefully circumscribed conditions (see section 14) and the WRU has the power to determine if the conditions have been met. Where a person makes an external disclosure the WRU has forty-five (45) days after receiving the disclosure to consider and reach a conclusion as to whether it is appropriate for the disclosure to be made externally. After the conclusion has been reached that a disclosure should not have been made externally the WRU has another forty-five (45) days to notify the whistleblower in writing that an internal disclosure should be made and no further action will be taken by the WRU.

4.61 Notably in determining whether a report has been properly made directly to the WRU, the WRU may have regard to, inter alia, "whether the disclosure is made in breach of a duty of confidentiality owed by the employer or any other person."[75] If the traditional approach of public agencies to commercial confidentiality norms in respect of freedom of information applications is a guide, it would not be unreasonable to form the view that this power can be used and/or misused to stymie the progress of disclosures relating to financial transactions of public agencies, and third party contractors, consultants and suppliers.

75 Section 14 (2) (c)

4.62 Where the WRU determines that the external disclosure is properly made, then "within a reasonable time" the whistleblower must be notified in writing the status of the disclosure. WRUs have the power to transfer reports between each other if they form the view that the report can be better processed by another unit.

4.63 It should be made clear that the WRUs have no investigatory power. Their statutory remit extends to "receiving and processing" reports and referring them "for further investigation to a designated authority".[76] This is very important to note and thoughtful consideration of this fact reveals important omissions for any legislative effort intent on establishing a whistleblower protection framework which has at the heart of its objectives (a) combatting corruption and other wrongdoings, (b) protecting persons making those disclosures (c) regulating the receiving, investigating or otherwise dealing with disclosures and (d) to provide for other matters connected therewith.

4.64 With those express objectives it is difficult to appreciate how neither the WROs nor the WRUs have been given any investigatory power in respect of the reports. No new or augmented power to investigate has been provided to any existing agency or designated authority and neither is any such power given to these newly established officers and units.

4.65 Taking this one step further the only new framework established in respect of the dealing with disclosures is that there are now to be legislated mandatory formal internal and external reporting processes. These processes will be subject to no oversight, reporting or monitoring mechanism. These processes have one primary objective and that is to filter reports to designated authorities, on the assumption that they already have the statutory power and systems to investigate whistleblower reports. These powers and systems that historically, have not resulted in the charge or conviction of any individual and in which public trust and confidence has been significantly eroded.

4.66 The importance of this observation cannot be over-scored and a point made above must be repeated here for emphasis. This bill purports to create a mandatory two-tier system for whistleblowing. As indicated above, this is inconsistent with the guidance emanating from international instruments and legislative efforts in other jurisdictions. There will be no protection for any individual who chooses to provide information to the media, a civil society organization, a trade union, a police officer or other entity. Marry this to the fact that the two-tier system is merely a data processing and filtering system with no investigatory powers and no mandatory obligations to the whistleblower save some weak notification requirements, and broad discretion not to treat with disclosures, the picture painted is quite concerning. The question is raised as to whether this Bill is merely a system for "domesticating dissent rather than acting against wrongdoers."

76 Section 13

4.67 That is not to say, that the Bill does not provide for new employee rights in respect of whistleblowing. These will be dealt with below. However it would appear that the Bill is, as or more concerned with protecting public agencies from external public disclosures.

4.68 The Committee is strongly urged to revisit Division 3 with a view to substantially revamping the external reporting procedures to provide for accountability and to strengthen the anti-corruption component of the proposed WPL.

4.69 The recommendation for the Committee to consider the establishment of a Centralized Whistleblower Complaints authority with robust investigatory powers and to provide monitoring and oversight of WROs and to collect, analyse and if required disseminate statistics so as to inform the maintenance of a responsible, and effective whistleblower protection system which inspires public trust and confidence.

Part III (Sections 16 – 20)
Protection of Whistleblower

4.70 The Whistleblower protection provisions in the Bill do meet WPL good practice standards for the protection of employee rights. WPL good practice standards indicate that protections should be broad enough to cover any retaliation means, including more subtle forms of discriminations and petty harassment. As in some cases of retaliation, the only safe option maybe relocation and WPL best practice should include entitlement to relocate. The law should also provide effective avenues for restitution and legal redress for any detriment suffered as a result of the disclosure. Whistleblowers should be entitled to sue the person or body responsible for detriment. Legal remedies can include injunctions to return to employment or transfer to comparable jobs. If the whistleblower suffered harms that can not be remedied by injunctions, the law should also provide for adequate compensation, covering all losses.

4.71 Section 16 prohibits any 'detrimental action' against a whistleblower on account of his/her having made a protected disclosure. Section 17 provides immunity from both civil and criminal suit to any whistleblower who was not a participator in the improper conduct.

4.72 Section 18 provides that there will be no immunity to a whistleblower who was a perpetrator or an accomplice in the improper conduct but that based on the disclosure the whistleblower the court had the power to mitigate or remit any judgment in both civil, criminal and disciplinary proceedings. Note previous reference to the anomaly or corrupt whistleblowers receiving personal gain while non-corrupt whistleblowers do not.

4.73 Section 19 provides for the protection of the confidentiality of the identity of a whistleblower by a WRO and WRU.

4.74 Section 20 (1) provides for a right of action in the High Court in pursuit of civil remedies inclusive of injunctions, compensation for damages and any other relief deemed suitable.

4.75 These protections and new rights theoretically are a step forward, however, given the cost of litigation, for practical purposes it may be difficult for an employee who has suffered reprisal on his workplace and may have even lost his job, to access the funding to pursue this type of litigation.

4.76 The Committee is urged to consider the establishment of a Whistleblower Complaints Authority with the power to expeditiously and expertly deal with redress for whistleblower retaliation.

A Note on Financial Incentives

4.77 Despite reluctance on the part of many to accept the impact of pecuniary awards on incentivizing persons to come forward with information on 'improper conduct' there are a growing number of countries beginning to follow in the pioneering footsteps of the US.[77] The United States False Claims Act has been said to be one of the most successful whistleblowing laws in the world.

4.78 The 2015 UNCAC Resource Guide posits that "Qui tam" legislation represents a distinct and separate branch of whistleblower law, which, in the United States in particular, has enabled policing of government expenditures that involve the private sector. This regulatory model is different from bounty or reward systems which offer monetary compensation for information, but which tend to leave the reporting person in the role of a passive observer in the process.

4.79 While the scope of the US FCA is limited to fraud and corruption in relation to government contracts, it is one of the rare examples of a law that puts resources directly in the hands of individuals, who can then take the initiative to bring a civil action against powerful wrongdoers. In this type of action, a private party, called a "relator", brings an action on the Government's behalf. If the Government takes control of the action, the relator receives 15-20 per cent of any award imposed; if the relator proceeds alone, the percentage increases to 25-30 per cent. In either instance, the relator is responsible for his or her own legal fees, although the Government, not the relator, is considered the real plaintiff.

4.80 In 1986, before the law was modernized, the United States Department of Justice collected US$ 26 million in civil fraud recoveries. In the 25 years since, some US$ 45 billion has been recovered.129 Observers have pointed out that the False Claims Act also levels the playing field to some degree by providing an incentive for skilled

77 This is also the case in South Korea, where its Anti-Corruption Act allows whistleblowers to recover up to 20% of the recovered amount. The success of this practice has encouraged countries such as Canada to also consider its implementation.

lawyers to take on whistleblower cases, as they can be highly lucrative if successful.

4.81 Given the cultural, social and political makeup of Trinidad and Tobago, this type of legislative intervention could catalyse a radical anti-corruption effort bringing corrupt actors to justice. Further, for whistleblowers who have suffered financially, qui tam rights of action would provide much needed leverage in obtaining legal representation. However, it is accepted that this is a reform that may attract widely differing views. Some are skeptical with regard to providing monetary incentives to whistleblowers, arguing that such provisions may detract from the public interest principles of the legislation and pervert the whistleblower's motives to report. There is need for comprehensive stakeholder consultation to see whether the population shares this view.

4.81 The Committee is urged to establish mechanisms for robust stakeholder consultation on remedies for whistleblowers including in particular the consideration of financial incentives.

Part IV (Sections 21 -26)
Miscellaneous Liabilities

4.82 Several criminal offences and civil liabilities have been created in sections 21 -26. At section 21 retaliation against a whistleblower in a plethora of forms is criminalized and serves as a progressive step in the context of employee rights. However, penalties for infringement are quite low[78] and may not necessarily serve the objective of deterrence.

4.83 Section 22 creates a criminal offence for breach of the whistleblower confidentiality; section23 prescribes against obstructing whistleblowing reporting personnel and section 24 prescribes a penalty for destroying, falsifying, concealing any document or thing relevant to a disclosure or the processing of a disclosure under the Act. However, section 24 carries a penalty that is also very low.[79]

4.84 Section 25 is a welcome intervention rendering void any WP ouster clauses contained in employment contracts.

4.85 The Committee is urged to consider increasing the penalties for criminal offences in particular at for offences created by sections 21 and 24.

5.0 Summary of Recommendations & Final Observations

10.1 There are two primary philosophical underpinnings for WPL. (i) The safeguarding of the rights of the whistleblower, balanced against the rights of the individual or

78 On summary conviction 15,000TTD fine and maximum of two years imprisonment; on conviction on indictment a fine of 50,000TTD and maximum of 10 years imprisonment.

79 30,000TTD and to imprisonment for five years

entity against which a report is made and (ii) fostering a more transparent, open and accountable public governance system.

10.2 All WPL seek to balance these of-times opposing interests and rights.

10.3 Despite express objectives to combat corruption after consideration, the WP Bill No. 15 of 2015 falls squarely on the side of balancing the rights of individuals in society and is less robust on the anti-corruption elements of an effective whistleblower protection framework.

10.4 Moreover, even in respect of the protection of whistleblower rights against retaliation and providing redress, there are significant weaknesses and gaps which would serve to undermine the practical effectiveness of the proposed reforms. Arguably, the reforms could even have a 'chilling effect' and reverse the clock on our anti-corruption reform efforts to date. This view is posited in particular because of the express exclusion of protection for disclosures made directly to the media and other members of civil society and the public.

10.5 Our final recommendations are synopsized below.

15. The Committee is urged to consider how to harmonize the different provisions. Failing to take into account how different duties and obligations apply to reporting persons risks may undermine the effectiveness of the proposed WPL. If individuals are uncertain as to what protective measures are available to them and in what circumstances, they are more likely to remain silent. Experience shows that even very good reporting systems will not be used if they conflict with existing rules and obligations.
16. The Committee is strongly urged to establish a 'third tier' in the proposed WP system which allows for wider disclosures to the media, trade unions, civil society organization and other members of society if the public interest so demands.
17. 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.
18. The Committee is urged to consider a burden shifting regime to the employers and/or reducing the burden of proof on whistleblowers.
19. The Committee should give consideration to whether more defined criteria for "gross mismanagement" should be given or whether this will be addressed in the regulations. Further in respect of (f) the reference to 'public funds' as opposed to the more robust statutory concept of 'public money' as defined in the Public Procurement & Disposal of Property Act No. 1 of 2015 should be rationalized so as

to bring alignment between the two pieces of legislation both with the aim, inter alia, of combatting corruption. (See Para. 4.5.6)

20. It is recommended that the requirement that a WRU must deter protected disclosure t 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.

21. The Committee is urged to consider the wording of the UK Public Interest Disclosure Act 1998, Part IVA section 43A(4) for the amendment of the section on protection of legal professional privilege.

22. The Committee is strongly urged to revisit Part II Division 2 with a view to substantially revamping the internal reporting procedures to provide for accountability in the handling of internal disclosures.

23. The Committee is strongly urged to consider the establishment of a Centralized Whistleblower Complaints authority to provide monitoring, investigation and oversight of WROs and to collect, analyse and if required disseminate statistics so as to inform the maintenance of a responsible, and effective whistleblower protection system which inspires trust and confidence.

24. The Committee is strongly urged to revisit Part II Division 3 with a view to substantially revamping the external reporting procedures to provide for accountability and to strengthen the anti-corruption component of the proposed WPL.

25. The recommendation for the Committee to consider the establishment of a Centralized Whistleblower Complaints authority with robust investigatory powers and to provide monitoring and oversight of WROs and to collect, analyse and if required disseminate statistics so as to inform the maintenance of a responsible, and effective whistleblower protection system which inspires public trust and confidence.

26. The Committee is urged to establish mechanisms for robust stakeholder consultation on remedies for whistleblowers including in particular the consideration of financial incentives.

27. The Committee is urged to consider strengthening the anti-corruption component of the proposed reforms by taking a NO LOOPHOLES APPROACH –In this regard it is specifically recommended that a more expansive protection be provided to different categories of whistleblowers consistent with Article 33 of the UNCAC.

28. The Committee is urged to consider increasing the penalties for criminal offences

in particular for offences created by sections 21 and 24.

6.0 Conclusion

'The Culture Dilemma
and the Need for Informed Decision-Making'

6.1 Given the relative infancy of the cross-cultural literature and the paucity of data driving the current reform effort it would be premature, without more, to anticipate a significant positive impact on public confidence and trust or levels of corruption by virtue of the passage of proposed WPL in its current form. There is a real demand from institutions and regulators for better, more reliable evidence regarding the value of whistleblowing, and the options for recognizing and maximizing that value.

6.2 A major disappointment in this legislative effort from an anti-corruption perspective must be that there are really no new powers and systems for investigating whistleblower reports. There is also no centralized unit or any unit charged with the responsibility for monitoring, reporting, collation of data and/or oversight. The changes being advanced are primarily administrative with respect to receiving, processing and filtering reports and not substantive changes.

6.3 For any reform effort to be successful, three criteria must be satisfied. (1) There must be a clear, written policy underpinning the reform effort (2) There must be robust institutional arrangements to implement, monitor and enforce the reforms and (3) There must be a sophisticated cadre of personnel acting with knowledge, competence and integrity in the daily implementation of the reforms.

6.4 It is our view that none of the three criteria has been satisfied in the WP Bill 2015 bearing in mind the four (4) express objectives of the reform effort. Whilst there have been statutory improvements to employee rights and remedies from a theoretical standpoint, given the substantial weaknesses pointed out it may be that the more likely outcome of the proposed reform would be to stymie rather than facilitate and encourage reporting of improper conduct.

6.5 In addition to the legislative and practical weaknesses identified herein it would be important for local researchers and policymakers to examine critically the propositions driving the exportation of Western whistleblower concepts into the policy frameworks in the developing world. Specifically questionable is the prevailing view that public interest disclosure is somehow a culture-free, or at least a culture-muted phenomenon, governed by a set of

rules and conventions detached from local histories and practices. Uncritical exportation without addressing the relationship between perspectives on loyalty and culture, may further compromise the effectiveness of the proposed WPL.

6.6 The 2015 UNCAC Resource Guide provides a useful starting point for WPL reform and reference has been made to it throughout this paper[80]. The Guide posits that when seeking to establish an effective WPL to facilitate reporting and protect reporting persons, it is important to identify the factors that work for and against public engagement with the current system. This includes, for example, assessing what is working well, the strength of the rule of law in the country (e.g. access to an impartial, fair and efficient legal process) and the existing institutional capacity to deliver investigations, corrective action and protective measures. A comprehensive review of existing reporting mechanisms will help determine the ways in which they can be improved.

6.7 Experience shows that laws developed through consultation with relevant stakeholders are more likely to be effective. Proper consultation is a vital step in creating legitimacy for any programme of reform and is essential when seeking to support public engagement with the system. This is all the more important in cases where the social and cultural environment is particularly hostile, for historical or other reasons, to the idea of someone alerting the authorities about a problem that does not directly affect them.

6.8 Whistleblowers are not "traitors", but people with courage who prefer to take action against abuses they come across rather than taking the easy route and remaining silent. It requires tackling deeply engrained cultural attitudes dating back to social and political circumstances such as dictatorship and/or foreign domination under which distrust towards "informers" of the despised authorities was only normal.

6.9 That this warning is not too far fetched can be evidenced from a historical analysis of how we as a people react to public allegations of corrupt activities. This analysis would easily demonstrate that in Trinidad and Tobago the mere supposition of a culture-free transposition of whistleblowing norms may be more problematic than we anticipate. Most cultural studies of whistleblowing use a single framework, developed by Hofstede[81], to examine cultural dimensions. However, recent research suggests that by itself, Hofstede's framework is too limited to give a powerful explanation of the interaction between culture and whistleblowing, because it focuses on a mythical, omnipresent national culture that either does or does not lead to whistleblowing behavior.[82]

6.10 The issue of culture and whistleblowing in Trinidad and Tobago is a complicated and vexing one, which can only be meaningfully addressed by first defining the phenomenon on the basis of the systematic collation and analysis of local data and then utilizing this research to inform policy positions. The lack of a central monitoring and oversight agency responsible for collating, analyzing and disseminating whistleblowing statistics as the proposed WPL

80 Paras 6.3 to 6.5 adapted from the 2015 UNCAC Resource Guide at page 12.

81 Hofstede, G., *Culture's Consequences: International Differences in Work-Related Values* (Cross Cultural Research and Methodology),1984

82 Wim Vandekerckhove, Tina Uys, Michael T. Rehg and A.J. Brown *Understandings of Whistleblowing: Dilemmas of Societal Culture,* International Handbook on Whistleblowing Research 2014

is implemented, squanders a critical opportunity to advance our understanding of the effectiveness of the proposed regime and the impact of culture on whistleblowing. Of all the recommendations provided herein, we single this one out as primary in closing. If we desire to move past our cycle of reactive, scandal driven reform to which we have grown accustomed, it begins with setting the foundation for robust, evidence-based, informed policy-making.

ANNEXURES

Annexure A G20 Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation

Annexure B Draft Model Law To Facilitate and Encourage The Reporting of Acts of Corruption and To Protect Whistleblowers and Witnesses

Annexure C The United Nations Convention against Corruption Resource Guide on Good Practices in the Protection of Reporting Persons 2015

Annexure D WPL Country Comparison Table

Annexure E Sectoral WP Provisions