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By email only

**Submission to the Joint Select Committee of Parliament
on
The Whistleblower Protection Bill, 2015**

My name is Afra Martin Raymond and I am a Chartered Surveyor, being a Fellow of the Royal Institution of Chartered Surveyors. I am Managing Director of Raymond & Pierre Limited – Chartered Valuation Surveyors, Real Estate Agents and Property Consultants. I am past President of the Institute of Surveyors of Trinidad & Tobago (2009-2010) and the Immediate past-President of the Joint Consultative Council for the Construction Industry (2010-2015).

This submission is being made in my personal capacity and does not represent the position of Raymond & Pierre Limited, the ISTT or the JCC.

This JSC was established on 13th November 2015 to obtain and consider views on The Whistleblower Protection Bill, 2015 (The Bill).

Given the levels of improper and illegal conduct with which our society is beset, these proposals are long overdue and I welcome them. That said, it is important to examine the detailed provisions and exemptions, together with the introductory statement made by Attorney General, Faris Al Rawi.

The Explanatory Note describes the purpose of the proposed law as -

"...The purpose of this Bill is 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..."

The main provisions which drew my attention were -

Improper Conduct - This is widely defined to include criminal acts; failure to comply with legal obligations; conduct which threatens health & safety or the environment; reprisals against whistleblowers and concealment of improper acts. The act of discrimination is listed at (h) with the qualifier of '*unfair*' discrimination and I do wonder if the inclusion of that one word will open up a zone of uncertainty and even suggest that certain acts of discrimination are in fact 'fair'.

The most interesting item was -

"...(f) conduct that shows gross mismanagement, impropriety or misconduct in the carrying out of any activity that involves the use of public funds;..."

An issue here is the use of the phrase 'public funds', which differs from the key phrase 'public money' used in the Public Procurement and Disposal of Public Property Act 2015. The phrase in this law should be 'public money', so as to avoid confusion.

Public Body – is defined as per the Public Procurement and Disposal of Public Property Act 2015, so that is acceptable.

Detrimental Action – is now prohibited and the definition includes dismissal; disciplinary action; demotion; transfers; refusal of transfers; detrimental alteration of employment terms; denial of appointments and a wide scope of injury, loss or damage. It seems that there is a significant gap here, since lawsuits are not mentioned in the definitions section, yet S.17 (1) states -

"...a whistleblower who makes a protected disclosure is not liable to any criminal, civil or disciplinary proceedings for having made such a disclosure..."

Legal Professional Privilege – is another aspect which concerns me since S.8 protects documents which have that privilege -

"...8. Nothing in this Act authorises a person to disclose information protected by legal professional privilege and a disclosure of such information is not a protected disclosure..."

This is unsatisfactory in my view since it is precisely in such documents that evidence of a wrongdoer having been advised of the illegality of their improper and illegal actions can be found. This was the issue in the Invader's Bay case which the JCC brought to seek publication (under the Freedom of Information Act) of certain legal advice which the then Minister of Planning & Sustainable Development was trying to suppress. That legal advice was on the specific issue of whether the State was in breach of the law in relation to the development process for valuable State lands. In July 2014, the JCC won that case in the High Court and that ruling effectively elevated the public interest above any legal professional privilege those documents might have had. The State appealed that ruling and the judgment is now reserved, but it seems to me that S.8 is a significantly retrograde step on this important issue.

The Doctrine of Implied Repeal is relevant here, since the passage of The Bill would raise the prospect of effectively threatening the provisions of S.35 of the Freedom of Information Act which make all requests subject to the 'Public Interest Test'.

Rewards – There seems to be a contradictory approach to the important question of if and how whistleblowers are to be rewarded. There are whistleblowers who were participating in the crimes and there are those who were merely observing. How do these proposals deal with those different species of whistleblowers?

The Hansard for 13th December 2015 records Al Rawi's only statement on rewards at pg 30 -

"...this Government believes that the Bill will seek to encourage whistle-blowers who commit crimes to come forward by encouraging a system of mitigation and reward..."

That is set out in S.18 (3) which proposes that the Court would have discretion in the case of a whistleblower who was participating in the crime to have the sentence reduced to reflect the assistance given to the law enforcement authorities.

But in the case of 'Protected Disclosures' as defined in S.7 (1), there is a specific prohibition -

"...(d) the disclosure is not made for purposes of personal gain;..."

One can agree that reduced sentences for active cooperation is a good step to tackle corruption, but it seems contradictory to only reward participants in the crimes, yet prohibit those observers who might want to make a report for a reward. Serious consideration should be given to a reward fund to encourage reports.

Designated Authorities – these are key Public Institutions which will be required to establish Whistleblowing Reporting Units to receive and investigate reports within 45 days.

The proposed law stipulates these as -

1. Auditor General's Department
2. Board of Inland Revenue
3. Bureau of Standards of Trinidad and Tobago
4. Central Bank of Trinidad and Tobago
5. Children's Authority of Trinidad and Tobago
6. Customs and Excise Division
7. Elections and Boundaries Commission
8. Environmental Management Authority
9. Fair Trading Commission
10. Financial Intelligence Unit of Trinidad and Tobago
11. Integrity Commission of Trinidad and Tobago
12. National Physical Planning Authority of Trinidad and Tobago
13. Office of Procurement Regulation
14. Office of the Director of Public Prosecutions
15. Office of the Ombudsman of Trinidad and Tobago

16. Trinidad and Tobago Police Service

It is not at all clear what was the method used to select these 16 'Designated Authorities', so there is a need for some explanation of the approach, in my respectful view.

Two further proposals which I would like to make on this aspect of The Bill are -

Firstly, the major Statutory Corporations have long been the scene of major concern in terms of improper behaviour, so it is my view that TSTT, WASA and TTEC should be included, if the approach is to focus limited resources on high-risk agencies.

Secondly, in terms of using the limited resources now available to us, it seems best to consider clustering the State Agencies so that several of them could share a Whistleblowing Report Unit.

I trust that these comments and proposals will receive due consideration. Please note that if requested, I am willing to give oral evidence before the Joint Select Committee (JSC).

I believe all the items in this submission to be true and correct.



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