Combating Corruption in JAMAICA

A Citizen's Guide

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FOREWORD

By Dr. Jennifer McCoy

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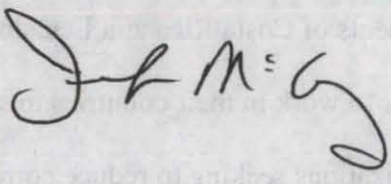
In recent years, empirical studies have shown that corruption is sharply inhibiting investment, growth and development. Public corruption can also erode confidence in democratic institutions, established and consolidating democracies, and has the potential to spread rapidly and touch the daily lives of every citizen.

Fortunately, corruption can be reduced through a combination of local commitment and international support. Around the globe, civil society organizations and governments are developing new strategies to reduce corruption by making public and private transactions more transparent and accountable. The international community has allied to fight corruption through covenants such as the Organization of American States' Inter-American Convention Against Corruption, and countries such as Jamaica have recognized corruption as a priority issue and sought to remedy it through better laws. In May of 1999, The Carter Center convened a conference where government and civil society leaders shared their strategies for combating corruption. It was that event that precipitated the publication of this volume.

In the following pages, Dr. the Hon. Lloyd Barnett, O.J. examines the existing legal framework for fighting corruption in Jamaica and the procedures used to investigate and prosecute acts of corruption. Dr. Trevor Munroe, also an independent Senator, analyzes two proposed bills with the goal of improving the mechanisms to address corruption through: 1) the reform of the Corruption Prevention Act, and 2) the Freedom of Information Act.

It is our hope that their reports will encourage Jamaican citizens to engage in public discussion on how best to curb corruption through legal measures, to participate in the process and to make their views known to their parliamentary representatives as debate on the proposed legislation proceeds.



INTRODUCTION

By Dr. Shelley McConnell

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Corruption is a global problem affecting both industrialized and developing countries. In past decades it was often met with resignation and considered an inevitable result of ethical weakness, but in the 1990s, emerging research suggested corruption's effects were too pernicious to be ignored. Corruption inhibits private investment, distorts public investment, slows growth and worsens poverty. Public sector corruption erodes citizen confidence in democratic institutions by decreasing government effectiveness and deepening inequalities in access to public goods and services.

In response to a growing body of evidence about such damage, multilateral organizations, international financial institutions, governments, the private sector and citizens groups joined forces to combat corruption. Concerned organizations include the World Bank, the Organization of American States and the United Nations, as well as non-governmental organizations such as The Carter Center and Transparency International. Their efforts have been matched by governments and civil society organizations in countries such as Jamaica. Through practice, these groups have begun to develop sound strategies for measuring corruption and remedying it with increased transparency and accountability.

In 1998, at the urging of its Council of Presidents and Prime Ministers of the Americas, The Carter Center launched a project to improve transparency in the Western Hemisphere. The presidents of Costa Rica and Ecuador, and Jamaica's Prime Minister P.J. Patterson, invited the Center to work in their countries to support both the government and non-governmental organizations seeking to reduce corruption. The Jamaican invitation came at a moment when two

laws were being drafted to increase transparency – the Corruption (Prevention) Act and the Freedom of Information Act --leading the Center to focus its anticorruption work around these legal improvements.

As an initial step, the Carter Center asked decorated barrister Dr. the Hon. Lloyd Barnett, O.J. to write a study of the legal framework for combating corruption in Jamaica. Later the Center collaborated with Dr. Trevor Munroe, an independent Senator and Professor of Government and Politics, UWI, Mona, to explore how Jamaica's proposed Corruption (Prevention) Act, and particularly its creation of a new anticorruption commission, could help reduce corruption. Finally, Dr. Munroe conducted a study of Jamaica's proposed Freedom of Information Act, since a free flow of information is vital for transparency and a strong democracy. When the authors met with Jamaican Ambassador Bernal, The Gleaner's publisher Hon. Oliver F. Clarke, O.J. and others in Atlanta at The Carter Center's Transparency for Growth conference May 3-5, 1999, they decided to make their analyses public and include some recommendations concerning how Jamaica's proposed laws could be strengthened. Through the present publication, these independent voices seek to inform Jamaicans about the legal initiatives that are expected to go before parliament in the fall of 1999.

The Jamaican government has demonstrated its commitment to fighting corruption by laying the legal groundwork for transparency. The proposed legislation seeks to balance values such as honesty, privacy and security, and to do so in ways that will meet Jamaica's international obligations and provide citizens with a strong measure of protection against corruption in government. This report invites Jamaicans to consider what sorts of laws best meet their needs, and provides them with information they can use to open conversations with their parliamentary representatives about how best to fight corruption in Jamaica.

The Analyses and Recommendations

Dr. the Hon. Lloyd Barnett's study *Proscribing Corruption Under Jamaican Law* describes Jamaica's institutional and legal infrastructure for fighting corruption. The analysis reveals that there is a considerable body of common law and statutory rules prohibiting corruption and illicit enrichment of government officials, including not only the Corruption Prevention Act but also elements of the Constitution and a variety of laws governing elections, taxes, customs etc. Numerous government bodies are charged with preventing and detecting corruption, including the Auditor General, Contractor General, Division of Revenue Protection and the police. Despite this, there remains a public perception that corruption persists, as illustrated by a Gleaner poll conducted in 1999.

Corruption comes in many forms, and they are not all dealt with equally under current law. The Corruption Prevention Act of 1931 criminalized bribery of public servants, and provisions were laid down for the prescribed punishment and penalty for offenders. Influence peddling is less clearly curbed, as Barnett notes that there are no statutory rules or conventional guidelines relating to ministerial business and commercial activities or undertakings, though there are Staff Orders governing public officers' conduct in respect to their business activities. The Constitution of Jamaica does prohibit persons from serving in posts where they may have a conflict of interest.

The institutions for investigation of corruption have some powers that aid them in demanding horizontal accountability across government bodies. The Auditor-General can, for example, access all relevant accounting records of government Ministries, departments and agencies, and both the Contractor-General and the House of Representatives may summon and

question witnesses. Yet, Barnett finds that for these powers to operate successfully there is a need to strengthen investigative and prosecutorial mechanisms through provision of personnel, expertise and necessary facilities.

Dr. Munroe also addresses the need for institutional strengthening in his analysis of the new Corruption (Prevention) Act that has been introduced in Parliament. The bill is designed to bring Jamaican law into compliance with the OAS Convention Against Corruption, and in large measure it mirrors the definitions of corruption in that Convention. The proposed Jamaican bill's central concern is declaration of assets, and here it broadens the scope by covering certain private companies and requiring that public servants declare the assets of their spouses and children.

Yet, as Dr. Barnett has implied with respect to other elements of law, implementation of these good provisions depends on the existence of a capable and well-empowered administrative body, in this case a Commission created by the Act to collect and review declarations of assets. The Commission's powers are not detailed in the bill, and Dr. Munroe hypothesizes that anticorruption commissions that are formed "top-down", rather than in response to public demand, tend to be weak and dependent on the Executive. Lest that occur in Jamaica, Dr. Munroe reviews the array of powers held by anticorruption commissions in other countries in order to develop options for empowering Jamaica's commission.

Comparing the proposed Jamaican commission to those in Trinidad, Hong Kong, Ecuador and Botswana, Dr. Munroe notes that while all the commissions are small, the stronger ones have complex administrative structures with substantial staff. Those with larger staff rosters and more specialized structures are able to carry out their functions more extensively, conducting thorough investigations and taking on additional tasks such as public education to prevent

corruption. The commissions have varying oversight and reporting mechanisms, the best of which allow the commission independence while preventing it from abusing its investigative powers. One critical factor for assuring independence is careful construction of procedures for appointment and removal of commissioners. Dr. Munroe also contrasts the commissions in terms of whether they may initiative an investigation or only pursue issues brought before them, and whether they may examine systems in government agencies in order to reduce opportunities for corruption or are confined to investigating individuals who may have responded to those opportunities. Where commissions favor a preventative over a curative approach, they generally engage in public education.

Freely flowing information has far-reaching benefits that extend well beyond combating corruption to improving education, deepening democracy and stimulating the economy. In his second paper, Dr. Munroe reviews Jamaica's proposed Freedom of Information Act, making reference to the legislation in Canada, Australia, the United States and Belize. He begins by noting the continuing tension between "the public's right to information and the government's legitimate concern that such a law would become an administrative and economic burden and may infringe on the rights of privacy and right to confidentiality in business." He proceeds to consider how Jamaica's law might resolve such tensions, emphasizing the democratic principles of accountability, openness and public participation.

Lauding the unambiguous articulation of the Jamaican bill's purpose, he urges that it be incorporated in the body of the text. He also praises the bill for bringing certain private sector bodies within the purview of the legislation. Yet through reference to other countries' laws, Dr. Munroe finds room for improvement in the Jamaican draft. He argues that it is inconsistent to deny non-citizens the right to access information, and urges that time restrictions on filing be

softened and that exemptions be more narrowly constructed. Munroe also emphasizes practical considerations, such as affordable fees. He, further, suggests that without annual publication of guides to each Ministry indicating their areas of competence, methods of decision-making, operational procedures and types of documents they collect, the average citizen may be at a loss regarding the likely location of the document he is seeking.

Together these three studies of Jamaica's existing and proposed transparency laws provide citizens with a point of departure for discussion of how to fight corruption in their country. While the content is the sole responsibility of the authors, The Carter Center's Latin American and Caribbean Program (LACP) has aided their publication in an effort to support thoughtful deliberation of these promising government initiatives. The LACP's Senior Program Associate, Attorney Laura Neuman, worked closely with the authors to help edit the text for publication. Without her dedication, this report would not have gone to print. She was supported by the Latin American and Caribbean Program's autumn 1999 interns and technical assistant. The Carter Center also gratefully acknowledges the publication support provided by The Gleaner Company Ltd. and Sangster's Bookstores Ltd. whose staff made possible the timely release of this volume.

PROSCRIBING CORRUPTION UNDER JAMAICAN LAW

A LEGAL ROADMAP

By Dr. the Hon. Lloyd Barnett, O.J.

I. EXECUTIVE SUMMARY

The following is a synopsis of the present Jamaican laws and regulations that address corruption, such as laws on procurement, privatization, and illicit enrichment. In addition, I have provided an outline of the institutional structures in place for investigating and prosecuting corruption and a description of the procedures utilized by the government in determining whether to prosecute an individual for corrupt practices.[1]

On the basis of the material compiled, I have prepared a general commentary and analysis of the Jamaican Law and practices in relation to preventing and proscribing corruption. The study reveals that there is in existence a considerable body of common law and statutory rules, which prohibit corruption and unjust enrichment, but that there is need for the strengthening of the investigative and prosecuting mechanisms.

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[1] In preparing this report I was assisted in my research by Mr. Laurence Jones, a law student. With Mr. Jones' enthusiastic assistance statutory provisions and cases were identified and compiled. We also interviewed Mr. Glen Andrade, Q.C., Director of Public Prosecutions, Mr. Kent Pantry, Q.C., Senior Deputy Director of Public Prosecutions, Mr. Mike Surridge, Head of the Revenue Protection Division of the Ministry of Finance and Mr. R.N.A. Henriques, Q.C., former Chairman of the now defunct Divestment Committee. I wish to thank all of the above.

II. INTRODUCTION

The Jamaican proverb "Yu nebba see sumoke widout fiyah", (You never see smoke without fire) which implies that there is some truth underlying a rumour, typifies the national attitude towards corruption. Over the 50 years of representative government in Jamaica, it has been generally alleged and often assumed, without the substantiation of specific allegations and proven cases, that a considerable amount of corruption exists in national affairs. The political experience is that the parties in opposition have usually accused the party in power of conducting a corrupt administration. Historically, when the accusing party has gained power and established Commissions of Inquiry to conduct a widespread investigation of the previous administration very little has been unearthed to substantiate the allegations.

Probably the most comprehensive investigation so far conducted was that of the DaCosta Commission of Inquiry, which was established in 1972, and reported in 1973. That Commission had the following wide terms of reference:

"To enquire into and report on the system and practices relating to:

(i) the award of contracts, whether for the construction of buildings, the execution of works, the supply of equipment, goods or materials, or the provision of services (including sub-contracts for the supply of equipment, goods or materials or the provision of services or any sub-contract in connection with such contracts) for or on behalf of any department of Government;

(ii) the distribution of houses and/or lots in Government housing or land settlement schemes;

(iii) the granting of or refusal to grant licenses under the Trade Law, 1955, whether for the importation or exportation of goods;

(iv) the granting of or refusal to grant work permits under the Foreign Nationals and Commonwealth Citizens (Employment) Act, 1964 and the exemption of persons from the provisions of that Act;

(v) the distribution of jobs in public projects;

(vi) the provision, by or through any department or agency of Government, of labour or other personnel for work on projects undertaken for or on behalf of the private sector;

(vii) the sale, purchase, rental or hireage of real or personal property, by or on behalf of, or from the Government of Jamaica; and the disbursement of public funds in connection with any of the foregoing and all matters relating to or incidental to the foregoing."

This broad mandate allowed the Commission to investigate a wide range of suspected corrupt practices. While the Commission found that there were many irregularities and inadequacies in the procedures for the award of contracts and distribution of public benefits very few instances of corruption or fraud emerged during the inquiry and its recommendations were largely directed to improvements in regulations and procedures. The reality may therefore imply the relevance of another Jamaican verse regarding the veracity of the allegations:

"Hear so, hear-seh-susu,

All dem rumour weh dah fly

Spring from grudgefulness an malice

Ten to one chance dem is lie" (Louise Bennett)

The rumours are, however, too persistent and the statements made in private by reliable persons too frequent to ignore the allegations. The partisan type of corruption which manifests itself in the award of contracts and the employment of persons on the basis of their political affiliations to the governing Party are generally accepted as part of the political system. Financial contributions and the political support of political parties often come from persons who expect most favoured treatment in the distribution of the scarce benefits dispensed by the government. In many areas of public administration it is well known that gifts to public officials

are the only means of obtaining expedition in the handling of the citizen's applications to government departments. An even more unsavoury corollary is that failure to pay may result in the retardation of the processing of one's matter.

Indices of the national perception and probably also of the reality can be found in a number of situations. In 1997, the Jamaica Baptist Union which represents a considerable denominational sector of the Jamaican society passed a resolution at its General Assembly calling for the establishment of a national commission on corruption. In 1998, a prominent religious leader at a National ceremony called for a Commission on Truth and Reconciliation. More recently the Leader of the Opposition has made a similar appeal. Also in 1998, the non-governmental organisation, Transparency International, after conducting a survey attributed to Jamaica a score of 3.8 out of 10 in respect to its measuring up to satisfactory standards of freedom from corruption. This survey was confined to the use of public office for private gain and did not extend to bribery within the private sector. Following on the report on this survey the President of the Jamaica Chamber of Commerce announced that the Chamber had decided to terminate the membership in that organisation of those who failed to conform with its code of business ethics. The reports implied that the officers of the Jamaica Chamber of Commerce shared the perception that the level of corruption in Jamaica is at an undesirably high level. Finally, a recent publication entitled "How Businesses see Government" states that the results of a survey conducted among private sector enterprises indicated that there is an international perception that there is a problem of corruption in Jamaica.

III. DEFINING CORRUPTION

The relevant definition of "corruption" in the Shorter Oxford Dictionary is "perversion of integrity by bribery or favour". This concept is quite straightforward and comprehensive, but the statutory definition presently in force in Jamaica is more complicated. It is to be found by inference only in the Corruption Prevention Act of 1931.[2]

The intention of the Corruption Prevention Act is to put in place provisions that will prevent and punish corruption among members of society and members of public bodies. To this end, the Act makes it a misdemeanour for a person by himself or in conjunction with any other person to corruptly solicit, receive or offer for himself or another person any gift, loan, fee, reward or advantage as an inducement to or reward for providing or receiving a benefit in which a public body is concerned. Thus, any person who takes gratification by corrupt or illegal means to influence a public servant shall be guilty of a misdemeanour.

Further, the Act made it a criminal offence for a public servant to accept or agree to accept or attempt to accept for himself or any other person any gratification whatever other than his proper and legal remuneration for carrying out his official functions. Gratification is not limited to pecuniary reward. The Act also makes it a criminal offence to take or agree to take any gratification by corrupt or illegal means to influence a public servant or to exercise personal influence with a public servant. See, Corruption Prevention Act of 1931, sections 4 – 6. Unfortunately, however, the Act does not define "corruption", "corrupt" or "corruptly" and the meaning has to be inferred from the general scheme of the statute.

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[2] Please note that the Corruption Prevention Act is the now existing law in Jamaica. This Act will be repealed with the passage of a new Corruption Prevention Act. All references in this section are to the existing statute, rather than the proposed bill.

The Act extends to the private sector by proscribing corruption by agents. section 13 provides:

> If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or for forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business.

Similarly, if any person corruptly gives or agrees to give any gift or consideration to an agent for the same purpose it is made a criminal offence and if any person uses any document which contains a false or erroneous statement to mislead his principal it is an offence. Id. The Act, thus includes private actors in the scope of its prohibitions and enforcement.

Under the Corruption Prevention Act of 1931, provisions are laid down for the prescribed punishment and penalty. Any person convicted of a misdemeanour will be liable to be imprisoned with or without hard labour for a maximum of two years and/or a fine not to exceed one thousand dollars. Further, the convicted must pay the amount or value of any gift, loan, fee or reward received by him. Finally, the convicted corrupt actor is prevented from being elected or appointed to any public office for seven years and is barred from voting for seven years. If there is a second conviction, the person will be prohibited from ever holding a public office. Id. at ss. 7 – 8.

The institutional structure for prosecuting corruption under this Act is restricted to those cases approved by the Director of Public Prosecutions (hereinafter DPP). Id. at Section 10. Once the DPP has decided to prosecute, a Resident Magistrate's Court has the jurisdiction to try the case, in accordance with the provisions regulating procedures before the Resident Magistrate.

The Government has tabled in Parliament a new Bill which, when passed, is intended to replace the existing Act. This new bill does not define "corruption" but prohibits "acts of corruption" which it describes by reference to specified conduct.[3]

Although Ministers of Government occupy a position of considerable influence and power, which may be easily abused for personal gain or advantage, there are no statutory rules or conventional guidelines relating to ministerial business and commercial activities and undertakings. There have been cases in which officials have benefited from the nature of the policy decisions made by Government or the manner of the distribution of public benefits but which could not be prosecuted as existing law did not cover this conduct. By contrast there are Staff Orders which govern public officers with respect to their business activities. Public officers are generally prohibited from retaining business or commercial interests or entering into transactions which cause any real or apparent conflict of interest and duties. They are expressly forbidden to solicit, accept or give presents other than ordinary gifts to personal friends. See, Staff Orders for Public Service, Conduct of Public Officers, 3.17.

IV. PREVENTATIVE AND MONITORING MECHANISMS

A. Prevention of Conflict of Interest and Misuse of Public Funds

The Constitution of Jamaica incorporates significant provisions to prevent a conflict of interest for persons who may acquire more than one post within the public authorities and bodies and for persons who may become a party to a contract with the Jamaican Government. More specifically, the Jamaican Constitution provides that no person is qualified to become a Member

[3] See, *The Jamaican Corruption Prevention Act of 1997 and How Our Anti-Corruption Commission Compares*, Dr. Trevor Munroe.

of Parliament or Senator if he is a party or becomes a party to, or a firm of which he is a partner or company of which he is a director or manager is a party or becomes a party to any contract with the Government for or on account of the public service. See, Constitution of Jamaica, s. 41(1)(f)i, 44(1)(f)i. Section 43(2)(c) provides that where a person is interested in such a contract, they must at their time of election or nomination for public office publish a notice in the *Gazette* within one month before the date of election. In the case of appointment as a Senator, the candidate must inform the Governor-General before his appointment of any possible conflicts. Failure to do so by a Member of Parliament will be grounds for disqualification from election.

The purpose of these provisions is to prevent conflicts of interest between a parliamentarian's personal business interest and his public duty to monitor and criticise government contracts as well as to prevent the use of his official influence or power to obtain the award of such contracts or appointments or to protect himself against legislative scrutiny of the contract terms and performance.

Additionally, the Jamaican Constitution provides safeguards for the management of public finances through a consolidated fund, into which all revenues of Jamaica shall be paid, and annual reporting requirements of the estimates of revenues and expenditures by the Minister of Finance to insure integrity. Id. at ss. 114, 115. Whenever any monies are expended or likely to be expended which are in excess of the sum provided for that service by the Appropriations Act or are a new service not provided for in the Appropriations Act, statements must be prepared by the Minister of Finance and laid before the House of Representative for a vote. Id. These measures are to guarantee transparency and accountability in the discharge of the public funds.

Further, the Governor-General must appoint an Auditor-General, who may not hold any other office. The functions of the Auditor-General include auditing the accounts of the judiciary,

the Senate, the House of Representatives and all departments of the Government of Jamaica. Id. at s. 122. So as to ensure completeness in accounting the Auditor-General shall also be audited and reported on by the Minister of Finance. The Auditor-General may be removed from office only for cause, such as an inability to discharge his functions or for misbehaviour, and shall not be removed except for in accordance with a tribunal consisting of past and present judges appointed by the Governor-General. Id. at s. 121(3).

B. Prevention of Corruption in Elections

In seeking to ensure free and fair elections, the Representation of the Peoples Act prohibits corrupt and illegal conduct and practices in the conduct of elections and election campaigns. These relate, *inter alia*, to excessive or unauthorised election expenditure, the transportation of non-voters into a constituency, the use of unregistered vehicles, intimidation or undue influence, bribery and corruption. Persons who would act improperly to influence the election to the detriment of one candidate or the benefit of another would be subject to fines and/or imprisonment.

Under section 70 of the Representation of the Peoples Act, any person who "knowingly provides money for any payment" contrary to the Act, or for "expenses incurred in excess" of the maximum allowed by the Act "shall be guilty of illegal payments." Essentially, this section of the Act attempts to control the use of funds, such as campaign financing.

From a historical perspective it has been said that the political candidate who is able to transport his supporters to the polling station will usually defeat an opponent who relies on his supporters to find their own way. To this end, the Act regulates the use of motor vehicles for conveying voters to the polls and as electoral vehicles. See, Representation of the Peoples Act,

ss. 71, 72. Furthermore, where there is evidence of an offense the authorities will presume that an offense has been committed until the contrary has been proven. Id.

The Act offers protections for electors arriving at the polling station. As, in the past, candidates and their supporters have tried to influence the decision of the electorate as they queue to vote or have tried to ascertain which candidate an elector was planning to vote for, the Act makes this conduct an offence punishable by fine and/or imprisonment. Id. at s. 78.

Additional election safeguards delineated in the Representation of the People Act include a prohibition on congregating within 100 yards of any polling station, corruptly inducing a person to withdraw from being a candidate, using a premises which serves alcoholic beverages for promoting or procuring the election of a candidate, falsifying statements in registration of voters, and general prohibition on bribery or threats.

Similar provisions are made in the Kingston and St. Andrew Corporation Act and the Parish Councils Act in relation to local government elections. The Kingston and Saint Andrew Act provides for the constitution and government of Municipalities, the extent and division of the corporate area, rules governing elections, operation of municipal goods and services, and the terms and conditions of office. Section 94 of the Act deals specifically with election related bribery on the municipal level, for which on conviction an individual will be guilty of a misdemeanour and liable to imprisonment, with or without hard labour, and/or a fine.

C. Prevention of Corruption by Members of Parliament

The Parliament (Integrity of Members) Act[4] provides for the establishment of an Integrity Commission to investigate the assets, liabilities and income of parliamentarians.

[4] Members of Parliament are covered exclusively by the Parliament (Integrity of Member) Act and are, thus, not

Parliamentarians are required to file annual declaration of assets, including those of his/her spouse and children. The reports are intended to provide a basis for determining whether the member is enjoying any unexplained inflow of wealth, which may result from corrupt conduct. Offences under the Act include failing without reasonable cause to furnish the statutory declaration, knowingly making a false statement in the statutory declaration, knowingly failing to give the information required, or failing without reasonable cause to attend an enquiry being conducted by the Commission.

If, on the basis of a report, the Commission determines that there is a defect, they are vested with the power to summon witnesses, require production of documents and take all steps necessary to expedite its investigations. Further, the Commission is bound to confidentiality and secrecy relating to all statutory declarations.

Where a parliamentarian fails to furnish the report to the Commission or it is deficient or suspicious, the Commission will make a report to the Prime Minister, Leader of the Opposition, Speaker of the House and the President of the Senate. Any of these Parliamentary leaders may then publish the Commissions report regarding the default or relay it to the Director of Public Prosecution. See, Parliamentary (Integrity of Members) Act, s. 12. Under this Act, all prosecutions require the prior consent of the Director of Public Prosecutions. Id. at 16.

D. Prevention of Corruption in Government Contracting

The Contractor-General's Act created the Office of Contractor-General, with the purpose and functions of monitoring the award and implementation of government contracts so as to ensure that there is no corruption or favouritism, to see that where contracts and awards are

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under the jurisdiction of the Corruption Prevention Act.

terminated there is no impropriety or irregularity, and to verify that the implementation of each contract conforms to the terms of the contract. The intention of the Jamaican Legislature was to create an impartial investigatory office administered by a person appointed by the Governor-General after consultation with the Prime Minister and the Leader of the Opposition.

The Contractor-General has substantial powers in the exercise of his functions. Under section 4(2)(f) he is entitled to "enter any premises occupied by any person in order to make such enquiries or to inspect such document, record or property as he considers necessary to the matter being investigated by him." Moreover, the Act provides extensive monitoring and investigative capabilities. Thus, the Contractor-General has the same powers as a Judge of the Supreme Court in respect to attendance and examination of witnesses and the production of documents. Id. at s. 18. Section 17 of the Contractor-General Act gives the Contractor-General powers which can be described as extraordinary in nature, such as the right to "adopt whatever procedure he considers appropriate to the circumstances . . . and may obtain information . . . in such a manner and make such enquiries as he sees fit."

Moreover, the scope of the Contractor-General is not limited to government actors alone. In *Wright v. Telecommunications of Jamaica Ltd. (1989) 26 J.L.R. 411* the Supreme Court held that, where the government was the largest shareholder in a registered company, the Contractor-General had the jurisdiction to monitor that company's contracts.

The Contractor-General enjoys an independence rarely found in other parts of Jamaican legislation. For example, the Contractor-General is exempt from any proceedings whatsoever in respect to what he may do, report, or state in the performance of his functions, except that he is prohibited from revealing secret and confidential documents.

E. Prevention of Corruption in Finances

The Finance Administration and Audit Act places certain responsibilities on the Financial Secretary, the Auditor-General and Accounting Officers in government departments to protect public funds from irregular, improper and illegal expenditure or use. The Act creates a Consolidated Fund into which public monies must be paid. The Financial Secretary is the trustee of the fund and the responsibilities for protecting the fund account from corrupt practices initially rests with him. The Finance Secretary reports to the Auditor-General.

The Financial Secretary is empowered to require a satisfactory explanation from any public officer who fails to collect moneys owing to the government or who was responsible for improper or unsubstantiated disbursements of public funds. If there is any deficiency in or loss of public funds, securities or amounts may be charged to the culpable officer.

The Financial Administration and Audit Act, further provides for the keeping of "government accounts". It is the duty of every accounting officer to keep and present "accurate accounts of all transactions entered into by him and all public moneys or other property held by him". See, Financial Administration and Audit Act, s. 24. The Act provides immense powers to the Minister to issue directions and make regulations to guide the content and collection of the reports.

The Constitution, as discussed above, requires the appointment of an Auditor-General and imposes on him the duty to audit and report on the accounts of all Ministries and Departments of the Government. His duties involve bringing to the attention of Parliament any extravagant or unauthorised expenditure, any irregularities in official accounts and improper variations from approved expenditures and any illegal or improper transactions.

Under the Standing Orders of the House of Representatives of Jamaica, 1964 a standing committee known as the Public Accounts Committee is established with the function of scrutinising the accounts relating to the appropriation and expenditure of public revenue. Its work is facilitated by the provision of reports on the government departments and agencies by the Auditor-General. This Committee consists of Members of both the Government and the Opposition in the House and is usually chaired by a leading Opposition Member.

V. INVESTIGATIVE INSTITUTIONS AND PROCEDURES

A. The Integrity Commission

The role of the Integrity Commission, the Auditor-General and the Contractor-General have already been mentioned. In order to carry out its functions, the Integrity Commission is empowered not only to examine and analyse the declaration of assets, liabilities and income furnished by parliamentarians but also to make such independent enquiries and investigations relating to the declarations as they think necessary. This Commission has the power to summon witnesses, require the production of documents and to do all such things as it considers necessary or expedient for the purpose of carrying out its functions. The Auditor-General and his staff have a legal right of access to all relevant accounting records of the government Ministries, departments and agencies. Under the Senate and House of Representatives (Power and Privileges) Act, the House or its Standing Committee, including the Public Accounts Committee, have the power to order the attendance of witnesses before them to give evidence or to produce any paper, book, record or document in the possession of or under the control of such person. It is an offence to refuse without good cause to answer a question when summoned by the

Committee or to give a false answer to any question material to its inquiry. See, Senate and House of Representatives (Powers and Privileges), ss. 16 – 18.

B. The Contractor-General

In addition to the Commission and the House of Representative, the Contractor-General has a wide range of matters relating to government contracts and pre-contracts[5] which he is empowered to investigate. These include:

a. the registration of contractors;
b. tender procedures of the terms of any government contract;
c. the award of any government contract;
d. the implementation of the terms of any government contract;
e. the circumstances of the grant, issue, use, suspension or revocation of any prescribed license;
f. the practice and procedures relating to the grant, issue, suspension or revocation of prescribed licenses.

Although the Contractor-General has a wide canvass relating to investigations, he must have the prior approval of the Secretary to the Cabinet in order to investigate the following government contracts: those entered into for purposes of defence or for the supply of equipment to the Security Forces; the grant or issue of any prescribed license for the purposes of defence; the grant of license for the supply of equipment to the Security Forces.

In carrying out his investigations, the Contractor-General may adopt whatever procedure he considers appropriate to the circumstances of a particular case, and may obtain information from such person and in such manner, as he thinks fit. He is given similar powers as is

[5] In *Lawrence v. Ministry of Construction (Works) and Attorney-General (1991) 28 J.L.R. 265* the Supreme Court held that the monitoring function of the Contractor-General included the pre-contract stages of government contracts and he was entitled to receive information with respect to that process prior to the actual awards of the contracts.

possessed by a Judge of the Supreme Court to summon and examine witnesses and to order the production of documents.

C. Commission of Enquiry

The purpose of the Commissions of Enquiry Act 1873 is to provide a legal framework for investigations into public affairs, ultra vires and corrupt acts by public servants, which are injurious to the public welfare. Under the Commissions of Inquiry Act, the Governor-General, whenever he shall deem it advisable, may appoint a Commission of Inquiry to enquire into the conduct or management of any department of the public service, or any local or public institution or the conduct of any public or local officer where such an enquiry would in his opinion be for the public welfare. See, Commissions of Enquiry, s. 2.

The Commissioner(s) are appointed by the Governor-General and may for cause be revoked by him, but their status is not affected by any change in Governor-General. In a recent incident, the Governor-General took the position that he could not appoint such a Commission unless he was advised to do so by the Prime Minister or the Cabinet.

Moreover, the Commission has the power to promulgate regulations governing the conduct and management of the proceedings to investigate the allegation of the corruption that is before them. Id. at s. 9. Such Commissions have the same powers as a Judge of the Supreme Court to summon and examine witnesses and to order the production of documents. In *Bethel v. Douglas [1995] 1 W.L.R. 794; Douglas v. Pindling [1996] 3 W.L.R. 242* the Judicial Committee of the Privy Council upheld the powers of such a Commission to compel witnesses and the production of documents and to issue summonses for the production of banking records.

D. Director of Public Prosecution and Police Force

The usual machinery of the administration of justice has also been used for investigating corruption. However, under the current Corruption Prevention Act the consent of the Director of Public Prosecutions must be obtained for prosecutions brought for acts in contravention of its provisions. Under the Constitution, the Director of Public Prosecutions is an independent functionary with the power to institute and discontinue criminal prosecutions, free of the control or direction of any other person or authority. However, he is not given any specific powers or machinery for the conduct of investigations and has to rely on the investigations of the police or other authorised persons or reports from members of the public. The DPP, generally, works in close collaboration with the police to whom he gives directives from time to time.

The Police Forces have the duty to detect, investigate and prevent crime and to apprehend offenders and charge them with breaches of the law. In some cases the underlying criminal law can, in addition to the Corruption (Prevention) Act, be invoked. For example, section 46(4) of the Larceny Act provides that it is a criminal offence to receive property knowing it to be stolen. This section was invoked in the prosecution of a former Cabinet Minister who conspired to defraud by receiving moneys held in trust by the Government. *R. v. James Smith (1990) 27 J.L.R. 469.*[6] Such offences as obtaining money by fraudulent pretences, larceny as a servant and embezzlement may sometimes cover acts of corruption.

Evidence against high-ranking politicians or officials has not always been produced. A large percentage of the reports of corruption relate to the police themselves. These reports may arise from a variety of cases such as a drug offences where the temptations are reported to be

[6] The prosecution's case at trial was that the appellant, during his tenure in office as Minister, induced his permanent secretary to steal and embezzle monies from the farm-worker's accounts being operated by the Jamaican Government, and to divert the monies for his personal use.

strong to traffic offences where the ticketing system facilitates corrupt conduct to civil disputes where there is intervention at the instance of one party. Many complaints concern the attempts to pervert the course of justice and the solicitation of bribes. This necessarily poses a serious problem in the effective investigation of corruption.

The Office of Professional Responsibility, which is a special department in the Constabulary Force, has the responsibility for investigating misdeeds, including corruption by police officers. Although this department probably lacks the expertise and personnel to investigate the more complex and clever cases of corruption, it has so far made substantial progress in improving the effectiveness and integrity of the system used to investigate the police. In relation to other public officials, there is no separate department that has the specific function to investigate corruption.

The existing Orders governing public service require cases of corruption to be reported to the D.P.P., but there are many cases in which the matter is not so reported but is dealt with departmentally or by resort to disciplinary procedures before the Public Service Commission.

E. Revenue Protection Division

In revenue matters, there are many provisions that make the defrauding of the revenue and schemes for tax evasion criminal offences. See, The Customs Act, The Excise Duty Act, The General Consumption Tax Act and The Income Tax Act. The Customs Act dictates the procedures and measures that must be complied with in the importation of goods into Jamaica. The Customs Act provides a range of penalties, provisions for forfeiture and seizure of goods, inspection provisions, and powers of arrest. The Excise Duty Act establishes a commissioner to

receive accounts from manufacturers relating to all excisable goods. Moreover, it envisions a large role for officers in determining offences and makes illegal obstruction and impersonation of officers. On the other hand, any officer that colludes with or conspires with any person relating to excisable goods, shall also be guilty of an offence against this Act and could face a fine. Under the General Consumption Tax Act, section 56(4), it is an offence for any person, with the intent to defraud the revenue, to enter into any arrangement or agreement for the purpose of evading tax or to deliver prescribed goods without paying the special consumption tax. Public Officers who are implicated in an offence can be prosecuted in the criminal courts as well as be subjected to disciplinary investigations and sanctions. *R. v. Smith & Wynter (1969) 11 J.L.R. 347.*

The Revenue Protection Division (R.P.D.) is a specialty unit of the Ministry of Finance which is mandated to investigate corruption and illicit enrichment relating to government customs and general consumption tax revenues. The agency's investigative powers extend to the operations of the Civil Service and its officers. As such any form of revenue collection carried out by a Civil Servant is within the scope of the R.P.D.'s investigative powers. They may apply to the Courts for warrants to seize documents and goods believed to be obtained as a result of some fraud against the government. The agency can question any Civil Servant who, after investigation, is believed to have misused the powers associated with their job. As well, the R.P.D. may question any individual they believe has given or promised to give money or a job to a Civil Servant in exchange for some illegal service.

The R.P.D.'s procedure for investigating alleged corruption in respect to Government revenue is somewhat simplistic. The process begins with a complaint from an individual. The agency will then assign officers to investigate the claim and build a dossier. If after the

investigations, the claims are substantiated, an application will be made to the courts for a warrant to search and seize any documentation or good, which might relate to the alleged offense. The R.P.D. will invite the accused to attend their offices where he and his attorney-at-law may answer any questions pertaining to the matter. Where the accused has for the first time committed an offense he will be given an opportunity to settle the matter by paying the outstanding duties or tax owed with or without interest. Where no settlement can be reached the R.P.D. will apply to the Courts for an arrest warrant; this begins the judicial process. At the judicial level, the Courts have the authority to impose a penalty of up to three times the value of the goods seized.

F. Divestment of Public Assets

There have been two periods of considerable divestment of public assets by the government. Previously the government was in ownership of a great amount of property, including a number of hotels. In the 1980's as the economic policies of the government changed to privatisation in preference to public ownership, it became necessary to dispose of a considerable amount of public assets. A defined procedure was promulgated by the government, including the government appointment of an independent Divestment Committee. The Committee advertised for offers or tenders, obtained independent valuations of the asset, prepared a prospectus and accounts, where needed, as in the case of companies or hotels being sold. The Committee then invited sealed bids which were evaluated before a decision was made based on the price offered and, where possible, the ability of the bidder to operate the service.

In the second period, the problems in the financial sector led to the government assuming control or ownership of large numbers of properties previously owned or mortgaged to the

failing financial institution. In this period, there has been no clear divestment policy in relation to these cases and, thus, the procedure lacks transparency.

VI. CONSTITUTIONAL AND PENAL SANCTIONS

As discussed in detail above, the Constitution disqualifies persons from election to the House of Representatives or appointment to the Senate who are in a position of actual or potential conflicts of interest. It provides that a person who is the holder of a public or judicial office or who becomes, or any firm of which he is a partner or company of which he is a director or manager, becomes a party to any contract with the Government for or on account of the public service is disqualified if he is not exempted by the House or by the Court. The Constitution also disqualifies a person from membership of Parliament if he is convicted of an electoral offence. See, The Representation of the Peoples Act.

Many corrupt actions and practices, as indicated above, constitute criminal offences and are punishable on conviction by sentences of varying degrees of severity. Thus, in a customs case a charge of conspiracy to defraud the revenue or in a drugs case a charge of conspiracy to export prohibited drugs may encompass circumstances in which customs or police officers are implicated by reason of fraudulent or corrupt conduct and are jointly indicted with others. These common law offences extend to corruption and fraudulent conduct with respect to the performance of public and private duties. See, *R. v. Dorrel Rhoden & Stanley Thomas (1953) 6 J.L.R. 29; R. v. Malek & Royes (1966) 9 J.L.R. 553.*

VII. REFORM PROPOSALS

As is apparent from the above discussion, there are a wide variety of laws and regulations that proscribe corruption in Jamaica. Many of these laws are old or no longer as effective. For those reasons, there is presently a reform movement for three of these acts. The first proposed legislation, which is presently before the Parliament, is a revocation of the Corruption Prevention Act and enactment of a new bill, the Corruption (Prevention) Act of 1997.[7] The proposed legislative changes with regard to corruption appear to have three main weaknesses. The new bill is erected on its definition of acts of corruption. The offer, granting, soliciting or accepting of any benefit or promise or advantage **for doing any act or omitting to do any act** in the performance of the public servant's function is the offence that is defined. The definition does not seem to incorporate cases in which the benefit is given without any clear understanding that the function will or will not be performed in a certain way but on the **belief that whatever the public servant does would probably be primarily in return for the conferring of the advantage whoever obtains it and whenever it is obtained**.

Secondly, the definition if literally applied may criminalise or expose to prosecution conduct which is innocuous by reason of the fact that the bill does not take into account benefits which are minuscule, e.g. giving a lift in one's motor car, or that what was given in accordance with the normal and open practice.

Thirdly, the proposed legislation, unlike the current law, does not extend the scope of criminal corruption to include acts of corruption in the private sector. This would be an unfortunate development in view of the proliferation of privatisation and the rational relationship between efforts to suppress corruption in the private as well as the public sector.

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[7] For a more detailed discussion on the proposed bill, please see *The Jamaican Corruption Prevention Act of 1997*

The second proposed reform is an amendment to the Revenue Administration Act. This recommendation provides for the creation of new Revenue Departments, namely the Revenue Protection Department, the Tax Administration Service Department, the Taxpayer Appeals Department and the Taxpayer Audit and Assessment Department. This development is aimed at rationalizing the revenue departments based on the theory that if a more efficient system materializes, the opportunities for corruption would be reduced.

Finally, it was recently announced that a Procurement Policy Implementation Unit would be established in the Ministry of Finance and Planning and that new regulations will be developed to govern the manner in which goods, supplies, services and works are acquired by public funds. It has also been announced that the functions of the Contractor-General will be expanded so that he will not only monitor and audit the award and performance of public contracts but will also be involved in the evaluation and award of contracts. The details of these proposals and regulations have not yet been published.

In conclusion, it is my belief that although strengthening the legislation is a necessary step to fight corruption, significant improvements in transparency of government and reduction of corrupt acts can only come from the provision of the personnel, the expertise and the facilities necessary for investigations and prosecutions in an area which has become increasingly complex and which takes on widening transnational proportions. The recruitment of persons with specialist skills and the training and exposure of existing personnel in advanced investigative methodologies are essential in the endeavours to control and suppress corruption.

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and How Our Anti-Corruption Commission Compares, Dr. Trevor Munroe, located in this volume.

THE PROPOSED JAMAICAN CORRUPTION PREVENTION ACT AND HOW OUR ANTI-CORRUPTION COMMISSION COMPARES

By Dr. Trevor Munroe [8]

Independent Senator and Professor of Government and Politics UWI, Mona

I. INTRODUCTION

On the 29th March, 1996 in Caracas, Venezuela, the Inter-American Convention Against Corruption was adopted by the Organization of American States (hereinafter OAS Convention). The OAS Convention called for all member states to promulgate, in accordance with this treaty, the necessary legislative or other measures to establish acts of corruption as a criminal offense. The OAS Convention detailed, in its preamble, the reasons for adopting measures against corruption including the fact that corruption undermines the legitimacy of public institutions, adversely effects the economy, and is often used as a tool for organized crime. The stated purposes of the OAS Convention are to develop mechanisms to detect and eradicate corruption and to promote cooperation among the member states to ensure the effectiveness of a response against corruption.

With this impetus, Jamaica's anti-corruption bill, the Corruption (Prevention) Act of 1997 (hereinafter Jamaican bill) was introduced into the Parliament by The Minister of National Security and Justice, in early 1998 to replace the presently existing anti-corruption law. Subsequently the bill was referred for consideration to a Joint Select Committee of Parliament, comprised of members of the House of Representatives and the Senate. The Committee invited public comments on the bill and received ideas and proposals from four Jamaican Organizations:

[8] The substantial research assistance of Mr. Livingston Smith for this report is gratefully acknowledged by the Author.

the Institute of Chartered Accountants, the Integrity Commission, the Jamaican Bar Council, and the National Democratic Movement.[9] The Committee completed its deliberations and submitted a report to Parliament in January, 1999. Also in early 1999, the Honorable Minister of National Security and Justice submitted amendments to the Jamaican bill to the House of Representatives. It is likely that this bill will be debated by the House of Representatives and the Senate, with the possibility of further amendments, and passed into law before the end of the year.

The Jamaican bill arose out of particular requirements of Jamaican membership in the OAS and, as such, the Jamaican bill closely mirrors the OAS Convention. In fact, in the "Memorandum of Objects and Reasons" appended to the Jamaican bill, the Minister of National Security articulates this underlying purpose stating that "through this bill Jamaica now seeks to enact a law reflecting the relevant provisions of the OAS Convention". It was felt that a revised Jamaican anti-corruption law was needed as the present Jamaican Prevention of Corruption Act of 1931 inadequately met the requirements of the OAS Convention and was insufficiently utilized, thus creating the need for new legislation.

The proposed Jamaican anti-corruption bill consists of provisions that define the acts of corruption and those persons who shall be covered, including non-parliamentary public servants[10], their spouses and minor children and certain persons who provide public services. Additionally, the proposed bill creates an anti-corruption commission, with 5 members, that is empowered to receive annual declarations of assets from non-elected public officials and to investigate any discrepancies relating specifically to the statutory asset declarations. Included in

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[9] The limited number of responses may not demonstrate the public's lack of concern regarding the issue of corruption. Rather, it may indicate a deeply felt skepticism concerning the government's willingness to seriously tackle what the public regards as widespread corruption in the Jamaican state and private sector.

[10] Members of Parliamentary are covered by the Integrity in Parliament Act. Rather than submitting an asset

the Commissions functions is the authority to "receive and investigate any complaint regarding an act of corruption". See, Corruption (Prevention) Act of 1997, (5)(d). This broad power of investigation is limited as the Commission may not independently begin an examination, but rather must wait for a complaint and can not independently enforce any remedy or penalty. Nonetheless, this function remains undefined.

II. COMPLIANCE WITH THE OAS CONVENTION

Toward this end, the Jamaican bill complies with the OAS Convention in a number of fundamental respects. The OAS Convention leaves open the question of how to administer the anti-corruption programme. In this regard, the Jamaica bill is very promising in its creation of an anti-corruption commission. However, the proposed legislation does not create a broadly functioning anti-corruption commission, as are some of the others examined in this report. Rather, the Commission, for the most part, is narrowly defined and limited in its scope.

The Jamaican bill, as is intended by the OAS convention, applies not to all forms of corruption in general but more specifically to "corruption in the performance of public functions". The definition of "public function" and "public servant" in the Jamaican bill is consistent with the OAS Convention and, arguably, even broader as the Jamaican bill includes those companies, public or private, that provide public services such as electricity, water and communication. To the extent that the provisions of such public services, traditionally performed by state owned or public utility companies, are now widely privatized, but nevertheless still fertile arenas for acts of corruption, it is essential to include them under the anti-corruption act.

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declaration form to the Anti-Corruption Commission, MP's present a similar asset declaration form to the Integrity Commission.

The Jamaican bill also broadens the scope beyond the OAS Convention by not only stating that public servants must submit annual asset declarations, but also their spouses and children.

Additionally, the Jamaican bill includes all specifications of the OAS convention relating to "acts of corruption". Clause 14 (1)-(3) of the Jamaican bill in substance replicates Article VI of the OAS convention in proposing a rather wide definition of acts of corruption, incorporating not only those illicitly receiving bribes but also those offering bribes, benefits or advantages of whatever description. Corruption includes any commission, or omission, of an act for the purpose of obtaining a benefit personally or for someone else. Further, "where there is a significant increase in the assets of a public servant which cannot be reasonably explained", that person shall be deemed to have committed an act of corruption. Jamaican bill, Clause 14 (5). Moreover, the improper use of classified or confidential information or government property is an act of corruption. Finally, "a person commits an act of corruption if he instigates, aids, abets, or is an accessory after the fact or participates in whatsoever manner in the commission or attempted commission" of an act of corruption. Jamaican Act, Clause (3).

III. AREAS OF WEAK COMPLIANCE

Although as indicated above, there are many areas in which the Jamaican act is in substantial compliance, there are likewise many key areas in which the Act fails. There are a number of requirements of the OAS convention which are not met in the Jamaican bill but which, in some extent may be addressed by other elements of Jamaican law.[11] Unfortunately, the Jamaican Act does not reference these additional pieces of legislation and, thus, creates a situation whereby these laws may be inconsistent or clearly contradictory. It is unclear if this

[11] Please see Dr. the Hon. Lloyd Barnett's report in this volume for more details.

new act is meant to supercede or simply supplement those laws that came before it. This lack of clarity should be corrected or, at a minimum, clarified in the statement of objects and reasons.

In some cases, such as regarding the Prime Ministers and Members of Parliament, the Jamaican bill explicitly states that these persons are not covered. Here the Act is unambiguous but seriously flawed. The above persons are, in theory, covered under the Parliamentary Integrity of Member Acts but by constructing separate tracks for various government officials, Jamaican law has established unequal treatment and has failed to address the very raison d'être for the act. The Parliamentary Integrity of Members Act has proven to be inadequate, and yet, rather than address this inadequacy by including all public servants under the new regime, we allow the most powerful to remain removed from risk whilst the non-elected officials are closely scrutinized. Moreover, the proposed legislation does not even cover all non-elected public servants. Those public servants that are "in receipt of total emoluments less than the prescribed amount" are exempt from the requirement of furnishing a statutory asset declaration. The law does not indicate at what that level of income or assets must be to include the public servant in the reporting requirements.

Another area of likely confusion is jurisdiction and the right to extradition. The OAS convention is "to promote, facilitate and regulate cooperation" amongst member states in the prevention, detection, punishment, and eradication of corruption in the performance of public functions. The extent to which some of the more important provisions of the OAS convention, which facilitate Inter-American cooperation amongst member states, is met by the new Jamaican bill is unclear. For example, the OAS Convention provides that "each of the offenses to which this article applies shall be deemed to be included as an extraditable offense in any extradition

treaty existing between or among State parties". See, OAS Convention, Article XIII (2). However, "state parties that do not make extradition conditional on the existence of a treaty shall recognize offenses to which this article applies as extraditable offenses between themselves." Id. at 5. Although existing Jamaican bilateral treaties or other agreements may cover extradition for acts of corruption, the Jamaican act itself is silent, thus raising questions of jurisdiction and applicability of varying laws. Similarly, the OAS convention stipulates that a state receiving a request for support in relation to investigation or litigation of acts of corruption "shall not invoke bank secrecy as a basis for refusal to provide assistance". OAS convention, Article XVI. The Jamaican bill is, again, mute on this point. Though there is an argument that as a member of the Caribbean Financial Action Task Force, established in 1992, Jamaica is already specifically dealing with money-laundering crimes by agreeing not to invoke bank secrecy, our bill would be much stronger if it included explicit language.

Two further serious deficiencies of the Jamaican bill are the failure to provide for "mechanisms to encourage participation by civil society and non-governmental associations in efforts to prevent corruption" and the weakness of "oversight bodies". OAS Convention, Article III(2),(9). Although as indicated above, there are many areas in which the Jamaican bill is in substantial compliance, the relative weakness of the anti-corruption commission, as discussed below, and lack of public involvement is a fundamental flaw of the Jamaican bill.

IV. ANTI-CORRUPTION COMMISSIONS

The remainder of this report compares the proposed Jamaican anti-corruption commission with those agencies already established in Trinidad and Tobago, New South Wales

(Australia), Hong Kong, Ecuador and Botswana.[12] In general, anti-corruption commissions are those bodies established by law to, at a minimum, identify acts of corruption and address them either within the purview of the commission or through referral to other agencies. In the Jamaican bill, the anti-corruption commission's main responsibility is to be a repository for the annual asset declarations submitted by non-elected public servants. This primary role, as simply a repository, is significantly different from most other commissions and contributes to the commission's weakness. Against this backdrop, the following comparative analysis is carried out in relation to four aspects of these commissions, viz:

a. Legal basis and socio-historical origins;

b. Internal administrative structure, staffing and funding;

c. Relationship to government, civil society and oversight mechanisms;

d. Powers and functions

A. Legal basis and socio-historical origins

Each anti-corruption agency derives its legal basis from specific legislation. In Jamaica, The Corruption (Prevention) Act 1997, which is still presently only a bill before the Jamaican Parliament; in Trinidad, & Tobago, the Integrity in Public Life Act, 1987; in New South Wales (Australia), the Independent Commission Against Corruption Act, 1988; in Hong Kong, the Prevention of Bribery Ordinance, the Independent Commission against Corruption Ordinance and the Corruption and Illegal Practices Ordinance all of 1974; in Ecuador, the 1998 Constitution and the Civic Anti-Corruption Bill of 1999; and in Botswana, The Corruption & Economic Crime Act, 1994. It is apparent that the Hong Kong and Australian legislation were earliest on

[12] It is worthy to note that four of the five case studies are drawn from political systems with British Parliamentary

the statute books and have subsequently served, to one degree or another, as benchmarks for similar laws in other states in contemplation of implementing anti-corruption measures.

In terms of their socio-historical origins, the agencies and the anti-corruption law which establish them came into being under two broadly differing sets of historical circumstances. One set of circumstances is best reflected in the Jamaican situation. Here the Jamaican Prevention of Corruption Commission is being established without any significant popular pressure - whether spontaneous or organised - toward that end. Trinidad's Integrity Commission was set up under similar conditions, mainly as a "top down" initiative from the government of the day. Indeed, the Jamaican bill states among its primary objectives and reasons the need to bring Jamaica's anti-corruption regime into compliance with the OAS Convention against Corruption signed by the country. Thus, the immediate occasion for the establishment of the new agency in Jamaica is not from public pressure, but rather from external considerations viz: the need to bring Jamaica into conformity with its hemispheric obligations.

At the other end of the spectrum are the historical circumstances giving rise to the anti-corruption agencies in Hong Kong, Ecuador and, to a lesser extent, New South Wales (Australia). In Hong Kong during the 1960s and 1970s widespread public concern with corruption grew as bribery, extortion and other forms of corruption became institutionalized in the political system. This concern developed into public revulsion and a popular demand for effective action when, in 1973, a police superintendent under investigation for corruption fled to the United Kingdom. Similarly, in New South Wales (Australia) during the 1980s public concern about the integrity of public officials developed as a Cabinet Minister was imprisoned for selling early releases from prison and a chief magistrate and several senior officials were

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traditions, similar to our own. The fifth, Ecuador, is modeled after the U.S. Presidential system.

incarcerated for corruption. More dramatically, in Ecuador in February 1997 popular discontent mainly caused by disaffection with the corruption in President Abdala Bucaram's administration, boiled over into mass demonstrations calling for an end to corruption. The new constitution formulated in 1998 gave constitutional authority to the newly created Commission. Clearly, "bottom up" pressures derived from broad and active public discontent played a more critical role in the establishment of these anti-corruption agencies than in the Jamaican case.

This is not to suggest that the popular factor is totally absent in the "top-down" situations. On the contrary in Jamaica, as well as in Trinidad and Botswana, the establishment of the commissions has been preceded by widespread alienation from politics, not least of all because significant sections of the public at large are convinced of the prevalence of high levels of corruption in both the public and private sectors. The fact is, however, that this generalized alienation has not translated into mass action, and therefore cannot be regarded as a driving force for anti-corruption reforms.

Conversely, at the other end of the scale, popular upsurge was complemented by a certain degree of responsiveness amongst state elites in the processes that ultimately established anti-corruption agencies in the "bottom up" cases. The range of socio-historical circumstances very often reflects differences in the degree to which the top and the bottom are involved, rather than the total absence of either in any particular case. The question of whether anti-corruption agency formation is driven primarily from below or from above, from outside or inside, is significant as the formative circumstances undoubtedly impact on the character and capacity of the agency.

In this regard two related hypotheses may merit further investigation, viz;

1. Anti-corruption agencies formed mainly in response to active mass discontent tend to preserve greater independence from the Executive, are

likely to facilitate a more effective role for civil society and have broader powers.

2. Anti-corruption agencies formed mainly on the basis of the initiative of the Executive tend to be subordinate to the Executive, have little or no real role for civil society and be more limited in scope.

B. Internal administrative structure, staffing and funding

A common feature of the Commissions under review is their relatively small size. The Ecuadorian and Botswana agencies, the two largest, have seven members each; Trinidad and Jamaica's commissions are comprised of five members each and Hong Kong and Australia four and three respectively.

In terms of administrative structure, however, there appears to be some significant variation. At one end, the Jamaican Commission for the Prevention of Corruption and the Trinidadian Integrity Commission are simple in structure and small in administrative staff. This, as we shall see, is not unexpected given the relatively limited nature of the powers and functions of these bodies.

By way of contrast, the anti-corruption agencies elsewhere are more complex and well staffed. The Independent Commission Against Corruption in Hong Kong, for example, is divided for administrative purposes into three different departments: Operations; Corruption Prevention; and Community Relations. Each of these departments is headed by a Director and combined they have a staff off over 1300 persons. In Botswana, the Directorate on Corruption and Economic Crime is also departmentalized into five branches: Training and Prosecutions, Investigation, Intelligence, Administration and Special Programs, Corruption Prevention and Public Education. Each of these branches is headed by an Assistant Director and, already, the

Directorate has a staff of over 100 members. The New South Wales agency is also departmentalized whilst Ecuador's civic Anti-Corruption Commission is still in the process of being established. The size and complexity of administrative structure of the commissions appears to affect their ability to carry out their functions, to investigate thoroughly and to provide additional mechanisms to combat corruption, such as public education. Jamaica's anti-corruption commission size and simplicity may prove to be a further barrier to accomplishing its goal of reducing corruption.

In relation to funding, Jamaica appears to be the only commission, among the agencies with which we are concerned, that has a significant difference. It is proposed in the Jamaican bill that the Commission for the Prevention of Corruption shall finance itself from funds that are "from time to time placed at the Commission's disposition by Parliament." See, Corruption (Prevention) Act of 1997, First Schedule, Clause 10. The amount of their funds will be determined from "estimates of revenue and expenditure" which the Commission shall be required "to submit to the Prime Minister for approval" by 31st October each year for the next budgetary year beginning April 1st. Id. at Clause 12. Unlike Jamaica, Trinidad, Ecuador and Australia finance their anti-corruption bodies from the consolidated fund or general state budget and from foreign aid. This established pool of resources in other countries provides their anti-corruption commissions with more consistent, secure and sufficient funding as well as significantly less dependency on the Executive branch.

C. Relationship to government, civil society and oversight mechanisms

The agencies vary in important respects in their relationship to different branches of the state government and to civil society in general. While each aspire to independence and

autonomy, explicit affirmations are to be found in the Trinidad and Ecuadorian anti-corruption law that are not found in the Jamaican bill. In Trinidad's Integrity in Public Life Act it is stated that the Integrity Commission is "not subject to the control or direction of any person or authority." Similarly, Title 1, Article 1 of the Ecuadorian Bill establishes the Commission for Civic Control of Corruption as "created by constitutional mandate" and as a legal public entity "with autonomy and economical, political and administrative independence." No comparable declaration appears in the Jamaican Bill.

Related, the composition of the commissions themselves suggests a continuum on the question of state-civil society relations. At one pole is the Jamaican Bill which mandates that four of the five members of the Commission for the Prevention of Corruption are either serving or former public servants. The sole exception is the category for "the president or any past president of the Institute of Chartered Accountants of Jamaica." See, Corruption (Prevention) Act of 1997, First Schedule, Clause 1. However, the statute is ambiguous as to whether it is a requirement to include the president or past president of the institute or simply permissible. In the same vein as Jamaica, Botswana's anti-corruption commission is comprised of public servants, as three of the seven members of Botswana's Directorate are to be serving or former police officers. By contrast, at the other extreme, Ecuador's law stipulates that their commission shall be constituted solely of members drawn from specified organizations of civil society (though the members are to have the standing of Supreme Court judges). These include the professional associations, universities, trade unions, media, women's organizations, "national indigenous Afro-Ecuadorian and farmer associations" and human rights and consumer groups.

Moreover, interesting variations appear in our case studies in relation to provisions for the appointment and removal of commission members, with implications for the independence of

the commissions. As we have indicated, in Ecuador the appointment is exclusively the preserve of civil society. A member of the Ecuadorian Commission for Civic Control of Corruption may only be removed for cause, and it must be one of the reasons specifically articulated in the Act, and then only through a vote by the Commission itself in a plenary session.

In all other cases one or another organ of the state (or combination of organs) play an important role in the appointment and removal of commissioners. Here as well, however, there are significant differences in the relative responsibilities of the Executive and the Legislature. In Jamaica and Trinidad, the Head of State, the Head of Government and the leader of the opposition are involved in the appointment and removal process with no role for the Legislature. In these two cases, the final authority for the appointments resides with the ceremonial head of state[13] but "after consultation with the Prime Minister and the Leader of the Opposition". In Hong Kong, the Governor appoints the Commissioner of the Independent Commission Against Corruption, but all other officers are appointed by the Commissioner himself. The Commissioner, by statute, is not "subject to the direction or control of any person other than the Governor".

A similar procedure governs removal from office, save that in Trinidad the authority to dismiss a member of the Integrity Commission is more circumscribed than in Jamaica. In Trinidad "a member of the commission may be removed from office by the President acting in his discretion for the ability to discharge the functions of his office, whether arising from infirmity of mind or body or any other cause, or for misbehaviour." The Jamaican law does not require "cause" for removal and simply states that "the Governor-General after consultation with the Prime Minister and the Leader of the Opposition may at any time revoke the membership of

[13] The exception in Jamaica to this manner of appointment is the Auditor General. Under the proposed bill, the

an appointed member". In other words, the Executive branch has the ability to remove 4 of the 5 members of the commission. As the Auditor General is not an appointed member, he is secure from arbitrary removal.

In comparison, New South Wales is particularly noteworthy in the extent of responsibility it reposes in the Parliament and the degree of autonomy secured in the law. For example, the appointment of the Anti-Corruption Commissioner and Assistant Commissioners is initiated by the governor but subject to veto by a special Parliamentary Joint Committee on Corruption. Consistent with this approach, the New South Wales Commissioner may only by removed from office "by the governor on an address of both Houses of Parliament". Moreover, the Commissioners are not "responsible to and cannot be directed by an individual minister." This security from removal allows the New South Wales commission a measure of independence not contemplated in the proposed Jamaican bill. Among these cases, therefore, the Jamaican Act seems to create the least autonomy for the commission.

In terms of the normal tenure of commission members, more often than not this is specified in the law establishing the Commission and appears to be consistent among our case studies. In Jamaica, the appointment is for not "less than two years nor more than five years as the Governor-General may direct in the instrument of appointment." Id. at First Schedule, Clause 2. In Ecuador, the members are appointed for a term of four years and in New South Wales (Australia) for a term not exceeding five years. In Trinidad, the law does not indicate any time frame for the appointment but states that the appointment shall be for the "period specified in the instrument of appointment." In no case does it seem that there is a requirement that the period of appointment be longer than the normal life of the Executive or the Legislature (4 or 5 years).

Auditor general will hold a position on the Commission by virtue of his post and not by appointment.

The reporting arrangements imposed on the Commissions also reflect their distinct relations to various state organs and to civil society. In Jamaica, it is proposed that reports from the anti-corruption commission be directly submitted to the Prime Minister who then tables the report to Parliament. The Ecuadorian law does not require the Civic Anti-Corruption Commission to report to any governmental body but that the Commission "presents the citizens with an annual report on its status, operations and activities." This is unique amongst the cases under consideration. All other commissions are required to report to the Legislature and, less uniformly, to the Executive. For example, in Trinidad and New South Wales (Australia) the Commissions report directly to Parliament on an annual basis. In Hong Kong, the Commission submits its annual report to the Legislative Council and also to the Executive Council and in Botswana the Director's report goes to the President and is presumably released to the public. Again, the reporting requirements and, more specifically to whom the reports are submitted may have a direct bearing on the autonomy of the anti-corruption commission. As the Jamaican law contemplates reporting directly to the Prime Minister, it again demonstrates the large role to be played by the Executive branch, thus, possibly compromising the Commission's independence.

Not unlike the reporting arrangements, the oversight mechanisms for the different commissions vary significantly from vague to strong and from the Executive branch alone to extensive civic involvement. In Trinidad and even moreso Jamaica, the provisions for oversight are relatively weak. Indeed, these have to be inferred from the reporting arrangements as there is no specific responsibility of monitor and review reposed on any governmental or non-governmental organisation. Hence oversight in Trinidad derives from Parliament to which the Integrity Commission reports directly. The situation is similar in Jamaica, though the reporting

route to the Parliament passes through the Executive.[14] In neither case is there any special Parliamentary committee to receive and to review the report, much less any citizen involvement in the exercise of oversight responsibility. Moreover, it is being proposed in Jamaica that the regulations governing the operations of the Commission for the Prevention of Corruption be actually drawn up by the affected Minister, subject to affirmative Parliamentary resolution.

In Ecuador, consistent with the composition and civic orientation of their agency, there is no explicit provision for review by any state organ. In all other cases, the work and activity of the anti-corruption commissions are examined by varying combinations of executive, legislative and civic bodies. Both Hong Kong and New South Wales (Australia) provide oversight mechanisms with a strong element of citizen involvement. Hong Kong's relatively large Independent Commission against Corruption (ICAC) has a formal relationship with three advisory committees – viz: on corruption, Operations, Corruption Prevention and Community Relations. The members of each of these committees are prominent citizens appointed by the Chief Executive and their responsibility is to scrutinize every aspect of the Commission's work on an ongoing basis. Moreover, the Chief Executive receives reports each year from each advisory committee and these reports are made public. In addition to the advisory committees, there is an independent ICAC complaints committee chaired by a non-official member, which monitors and reviews ICAC's handling of complaints from anyone against ICAC officers, staff or practices.

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[14] As presently drafted, the commission in Jamaica would submit a report each year to the Prime Minister for approval of their revenue and expenditures. The Joint Select Committee, in its amendments, has recommended that "the Commission shall, in each year and at such time as the Minister shall direct, prepare and forward to the Minister a report of its activities during the preceding financial year, including a statement of its accounts." See, Amendments to the Corruption Prevention Bill to be moved in the House of representatives by the Hon. Minister of National Security and Justice, p. 5.

In the New South Wales (Australian) case, the provision for citizen involvement is somewhat different. Under the law, there is an Operations Review Committee whose purpose is "to advise the commissioner whether the Commission should investigate a complaint, discontinue investigation" etc. This committee which normally meets monthly is composed of the Anti-Corruption Commissioner, an Assistant Commissioner, the Commissioner of Police, a nominee of the Attorney General and four other persons appointed by the Governor on the recommendation of the Premier "to represent community views". There is also a Standing Ethics Committee of Parliament established under the ICAC Act in which three of the eleven members are non-parliamentary, the three being citizens "appointed by at least 5 of the Parliamentary members following public advertisement." See, Section 72 (F). A critical layer of oversight in New South Wales (Australia) is to be found in their Special Joint Committee of Parliament whose purpose is "to monitor and to review the exercise by the Commission of its functions" as well as to exercise the power of veto, already referred to, over the appointment of the ICAC Commissioner and the Assistant Commissioners. By providing for civic involvement within the commissions enabling statute, these countries have legislated the importance of public oversight and institutionalized the significance of transparency in fighting corruption.

D. Powers and Functions of the Commission

Perhaps one of the most significant areas of divergence amongst the anti-corruption agencies under consideration relates to their powers and functions. In general, the Jamaican and Trinidadian agencies are relatively weak compared to those of Hong Kong, New South Wales (Australia), Ecuador and Botswana. An examination of the main functions, the powers of

initiative, the prosecutorial authority and the public education responsibility of the various commissions substantiate this overall judgement.

In terms of their main functions, Jamaica's Commission for the Prevention of Corruption and Trinidad's Integrity Commission are focussed on receiving, recording and reviewing the annual statutory declarations of assets and liabilities which public servants are required to make. The commission accepts, queries, verifies accuracy or rejects these declarations as they see fit. In Jamaica, there is a separation related to those public servants required to submit asset declarations as called for in the anti-corruption bill. Public servants who are parliamentarians make their statutory asset declarations to an Integrity Commission set up under the Parliament (Integrity of Members) Act, 1974. All other public servants are covered under the Commission for the Prevention of Corruption under the Corruption (Prevention) Act 1997 and proffer their declarations to the anti-corruption commission. Outside of the repository function, the Jamaican Commission has power "to investigate any complaint regarding an act of corruption". See, Clause 5, 1(d). There is, however, no elaboration regarding this potentially broad mandate. Similarly, the Trinidad agency is empowered "to perform such other functions it is required by this Act to perform" (Pt. 2 S.8 (c)). Therefore, despite these omnibus clauses, it appears that the expectation is that the statutory declaration of assets will be the main focus of these commissions in their fight against corruption.

This is not so in Hong Kong, New South Wales (Australia), Ecuador, nor Botswana. There is nothing in the relevant law to suggest that the asset declaration by the public servant would constitute the central focus. On the contrary, quite independently of any such declaration, the New South Wales Commission is charged not only with the responsibility of investigating "any allegation or complaint that...corrupt conduct...may have occurred", but it also has as one of

its principal functions to investigate allegations or complaints relating to (legitimate) conduct that may "allow, encourage or cause the occurrence of corrupt conduct." In the same vein, this Commission is empowered to investigate allegations of "conduct connected with corrupt conduct (which) may be about to occur." There is in the New South Wales case a generality of function and an element of proactivity which is not at all present or implied in the Caribbean commissions.

This proactive element is also evident in the Hong Kong Commission, one of whose main functions is to examine systems in government departments and public bodies to identify and reduce corruption opportunities. In Ecuador, the broad sweep of the Commission's functions is implied in the mandate to "receive information, process and investigate claims, persons in authority, officials, public sector employees and any other individuals." Indeed, the Ecuadorian Commission for Civic Control of Corruption is not, at this time, collecting or acting as a repository for the asset declarations. Similarly, the activity of the Botswana Directorate, in the four years of its existence, has not centered on statutory declarations by public servants but rather has been much more far ranging in scope.

The relative feebleness of the Jamaican Commission is also reflected in its lack of authority to initiate, on its own power, investigations into corruption. The Jamaican Commission has a mandate to receive and review the annual statutory asset declarations. Moreover, they must investigate any suspicious or unexplained increases in assets, also called illicit enrichment. However, such investigations either have to be triggered by the public servant's statutory asset declaration or have to be in response to some complaint received. Outside of these two circumstances, the commission is not authorized to take action. This observation would appear to apply to Trinidad as well in so far as the securing of "financial disclosures" by public servants

is its main purpose. Hence, the general issue of corruption is not really dealt with either in the Jamaican bill or in the powers of the Commission. In New South Wales (Australia), by way of contrast, the situation is quite different. The law explicitly states that "the Commission may conduct an investigation on its own initiative" [Div 2, 20(1)]. It, therefore, does not have to wait until a complaint, report or reference is submitted.

In terms of prosecutorial authority, the Jamaican Commission is found wanting in comparison to the other commissions. Expectedly, the Jamaican anti-corruption commission has powers related to its main function, the public servants' statutory declarations. For example, the Jamaican Anti-Corruption Commission is vested with the power to summon witnesses, require the production of documents, and examine witnesses. However, to the extent that there is resistance or non-compliance, the Commission must rely on other state authorities, such as the DPP or the police, to either secure compliance or take effective remedial action.

This is not the case for the Hong Kong and New South Wales (Australian) Commissions. Under the Prevention of Bribery Ordinance, the Hong Kong ICAC has powers to search bank accounts, hold and examine business and private documents. This Commission also has the power to arrest, detain and grant bail in order to secure and retain evidence. Under the New South Wales Act, the Commission is explicitly authorized to "issue warrants for arrest of witnesses... to issue search warrants... to enter premises, search premises, seize documents... [and] use such force as is reasonably necessary for the purpose of entering the premises." In Ecuador, these powers appear exercisable by the commission through the relevant state authorities. For example, it has the power to "directly request any competent penal judge to carry out house raids or entry into offices or private places." The Ecuadorian law further mandates "the members of the Public Force to collaborate timely" and for the authorities, public

officers and middle managers to provide assistance and information. There is no explicit obligation in the provisions of the Jamaican bill that the other state authorities act. This reliance on other, overburdened, state actors may significantly hinder the Commissions ability to effectively investigate suspected acts of corruption.

Finally, there are significant differences between the Jamaican commission and the others in respect to their relations with the public. In Jamaica, if the asset declarations are determined to be deficient, the commission is to report this to other state authorities (i.e. Parliamentary leaders, the DPP, the Service Commissions etc.) rather than make public their findings. Moreover, there is a total absence of any obligation on the part of the Jamaican Commission to engage in a programme of public education or to elicit public support and involvement in the fulfillment of its anti-corruption responsibilities.

On the other extreme, the Hong Kong ICAC is required to educate the public on the consequences of corruption and seek their advice and support in the fight against corruption. The New South Wales (Australian) law is very specific in that a vital part of its ICAC's functions is to "educate and disseminate information to the public on the detrimental effects of corrupt conduct." Additionally, the New South Wales (Australian) ICAC is charged with the added obligation "to enlist and foster public support in combating corrupt conduct." Indeed much of the work of the Hong Kong and New South Wales Commissions derives from reports from the public regarding corrupt conduct and much of their success is attributable to public involvement in the anti-corruption campaign. In Botswana, the Prevention and Public Education Branch, one of the five branches of the Directorate on Corruption and Economic Crime, is charged by the Anti-Corruption Act with the responsibility of enlisting and fostering public support in combating corruption. During the first four years of the Directorate's operation well

over 5,000 reports on corruption and economic crime were received from the public and in 1998, the Public Education Branch averaged well over one talk or presentation per week. In Ecuador, one of the main goals of the Commission is to diffuse information and lead educational campaigns against corruption. Even the Trinidad body, which is closest to the Jamaican in the limited nature of its powers and functions, provides for the Integrity Commission to make public the failures of public officials to adhere "without reasonable cause" to the provisions of financial disclosure required by law.

V. RECOMMENDATIONS

The establishment of the Commission for the Prevention of Corruption in Jamaica and its accompanying legislation are to be welcomed. It is, however, weak and may be strengthened in a number of areas:

1. Civil society involvement is critical in preventing corruption and should be a mainstay within any statutory anti-corruption scheme. Therefore,
    a. the internal administrative structure of the Commission for the Prevention of Corruption should include a Public Education Department with the specific responsibility of enlisting public support for the anti-corruption drive. Public education and collaboration should be included in the law as a main function of the Commission; and
    b. consideration should be given to strengthening the number of members on the Commission who are not currently nor previously served as public officials.
2. With no singularly responsible person, it is more difficult to ensure accountability and responsibility in the Anti-Corruption Commission. Thus, consideration should be given

to amending the bill to provide for the Chief Officer or an Independent Commissioner against corruption whose appointment would be subject to Parliamentary confirmation hearing and whose responsibility would be to chair the Commission and ensure the fulfillment of its responsibilities.

3. The proposed Jamaican commission has more direct executive oversight than other similarly situated anti-corruption commissions. In order to encourage less executive control and more civil society oversight,

    a. the members of the Commission should have tenure in excess of five years and be removable only by a process similar to those required for the removal of a Supreme Court Judge;

    b. the Commission should report directly to Parliament and to the public and should set its own regulations subject to a parliamentary veto; and

    c. a special Joint Select Committee of Parliament on Corruption Prevention should be established and consideration given to the setting up of a Non-Parliamentary Operations Review Committee, including official and civilian members, similar to the New South Wales Committee.

4. The Commission, by having as its main function the collection of asset declarations, is weakened by its limited scope and purview. To provide the Commission with the tools necessary to achieve the stated purpose of corruption prevention,

    a. it should be vested with the power to initiate investigations independently of complaints and independently of the statutory declarations of public servants; and

    b. include a prosecutorial dimension within the commission.

5. In order to ensure that there is consistency and equity in the application of the anti-corruption measures, parliamentary and non-parliamentary public servant should be subject to the same reporting and other corruption prevention requirements, regardless of their income.

With the inclusion of the above provisions in the Jamaican Corruption (Prevention) Act and the vesture of additional powers and independence in the commission itself, Jamaica would be presented with an effective tool in combating both corruption and the perception of corruption.

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses

OAS Articles	Jamaican Clauses	Analytical Comparison
Article I – Definitions (1) ***Public function***: any temporary or permanent, paid or honorary activity, performed by a natural person in the name of the State or in the service of the State or its institutions, at any level of its hierarchy.	**Clause 2** ***Public function***: means any activity performed a single time or continually, whether or not payment is received thereof which is carried out by – (a) a person for, or on behalf of or under the direction of a Ministry, Department of Government, a statutory body or authority, a Parish Council, the Kingston and St. Andrew Corporation or government Company; (b) a body, whether public or private, providing public services; (c) a member of the House of Representatives or of the Senate in that capacity.	Similar definition except that the OAS Convention sees public function as being performed "at any level" of the state hierarchy. The Jamaican Bill provides a wide specification of where public function is performed. The Jamaican definition appears broader in the sense that a person not action "in the name of the state" but in providing public services through a private company e.g. telecommunications, would be performing a ***public function***.
(2) ***Public Official, Government Official, or Public Servant***: any official or employee of the State or its agencies, including those who have been selected, appointed or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy.	***Public Servant*** means any person – (a) Employed- (i) in the public, municipal, or parochial service of Jamaica (ii) in the service of a statutory body or authority or government company; (b) who is an official of the state or any of its agencies; (c) appointed elected, selected or otherwise engaged to perform a public function.	Consistent with 1 above, the definition of ***public servant*** in the Jamaican Bill appears more comprehensive. A person who is an employee or contractor for a private sector fulfilling a public function by providing public services would under the draft bill be a ***public servant***. Under the OAS Convention would not be explicitly covered.
(3) ***Property***: assets of any kind, whether movable or immovable, tangible or intangible, and any document or legal instrument demonstrating, purporting to demonstrate, or relating to ownership or other rights pertaining to such assets."	***Property*** is not defined in the Jamaican Bill.	The lack of definition for ***property*** in the Jamaican proposal has the potential for creating confusion.
	Appointed Day means the date of the commencement of this act. ***Commission*** – means the Commission for the Prevention of Corruption established under section 3. ***Convention*** means the Inter-American convention done on the 29th day of March, 1996. ***Government company*** means any company registered under the Companies Act being a company whose policy the Government or any agency of Government whether by the holding of shares or by financial input, is in a position to influence. ***Public Services*** means providing electricity, water and communication.	These are further definitions in the Jamaican Bill not present in the OAS Convention. The OAS convention was passed as a broader document to allow state actors that signed it the flexibility to promulgate definitions appropriate to their political and judicial system.
Article II – Purposes (1) To promote and strengthen the development by each of the State Parties the mechanisms needed to prevent, detect, punish and eradicate corruption.	The Jamaican proposed bill does not include a purpose statement.	Though not specifically stated, the Jamaican bill aims to promote and strengthen mechanisms to prevent, detect and punish corruption in the performance of public functions. In the memorandum of objects and reasons, the Jamaican Bill does state that its purpose is "to enact a law reflecting the relevant provisions of the (OAS) Convention."
(2) To promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.	**Clause 14** (4) Any citizen or resident of Jamaica or any corporation, either aggregate or sole, any club, society or other body of one or more persons, who offers or grants, directly or indirectly, to a person performing a public function in a foreign state, any article or money or other benefit, being a gift, favour, promise or	The Jamaican Bill does not explicitly detail its intended efforts to promote, facilitate and regulate co-operation with other states. It does not include a specific reference to any domestic law or international agreements. However, these sections and subsections do refer to the prosecution of corrupt Jamaicans in other states and also to the matter of extradition.

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses		
OAS Articles	**Jamaican Clauses**	**Analytical Comparison**
	advantage in connection with any economic or commercial transaction for any act to be performed by or for the omitting to do any act by that person in the performance of that his public functions, commits an act of corruption. (9) "Where a citizen of Jamaica commits in another State, an act of corruption specified in subsections (1-8), he shall be liable to be prosecuted and tried for such act as if he had committed the act in Jamaica." (10) "Where a citizen of Jamaica is liable to be extradited for an act of corruption specified in subsections (1-8) and he is not extradited on the grounds that he is a citizen of Jamaica, the citizen shall be liable to be prosecuted and tried for that act of corruption as if he had committed the act in Jamaica."	
Article III – Preventive Measures (1) "Standards of conduct for the correct, honorable, and proper fulfillment of public functions. These standards shall be intended to prevent conflicts of interest and mandate the proper conservation and use of resources entrusted to government officials in the performance of their functions. These standards shall also establish measures and systems requiring government officials to report to appropriate authorities acts of corruption in the performance of public functions. Such measures should help preserve the public's confidence in the integrity of public servants and government processes."	The Jamaican bill does not include preventive measures.	The Jamaican Bill does not legislate the appropriate standard of conduct and does not define what is considered "honorable conduct". It does, however, discuss negative behaviors and criminalize conduct which deviates from implied standards to such a degree as to fall within the definition of an "act of corruption" (Clause 14). There are other codes, regulations and statutes, "intended to prevent conflicts of interest and mandate the proper conservation and use of resources entrusted to performance of their functions." Moreover, the Jamaican bill does not call for establishing measures and systems of reporting corrupt behaviors.
(2) Mechanisms to enforce these standards of conduct.		The punishment for being found guilty of corrupt actions is either a fine or imprisonment or both.
(3) Instruction to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities.		There are no provisions in the proposed Jamaican law regarding education and training of government or civil society.
(4) Systems for registering the income, assets and liabilities of persons who perform functions in certain posts as specified by law and, where appropriate, for making such registrations public.	**Clause 4** (1) Every person who, on or after the appointed day, is a public servant shall, subject to subsection (2),(3), and (4), furnish to the Commission a statutory declaration of his assets and liabilities and his income in the form set out as Form A in the Second Schedule. (2) A public servant who as a member of the Commission shall furnish a statutory declaration referred under subsection (1) to the speaker of the House. (3) Subsection (1) shall not apply to a public servant – (a) to whom the Parliamentary (Integrity of Members) Act applies; (b) who is a member of the Commission; (c) who is in receipt of total emoluments less than the prescribed amount. (4) A declaration pursuant to subsection (1) shall include such particulars as are known to the declarant of the assets,	1. Note that the Commission for the prevention of corruption performs this function and provides the system, mechanism etc. for registration. 2. However, it should be noted that the Bill exempts Members of Parliament from furnishing the statutory declaration of assets, liabilities, etc. to the Commission. Members of Parliament are required to furnish identical statutory declarations to the Integrity Commission under The Parliamentary (Integrity of Members) Act. In so far as the OAS Convention speaks of "systems for registering the income," etc., having a parallel system for MPs would not in and of itself be inconsistent with the relevant provisions/obligations of the Convention. 3. The OAS Convention provides that there be, "systems where appropriate for making such registrations public." The Convention is silent as to whether what may be made public is the fact that the public servant has made the

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses		
OAS Articles	**Jamaican Clauses**	**Analytical Comparison**
	liabilities and income of the spouse and children where applicable, of the declarant, with certain provisions. (5) A statutory declaration pursuant to subsection (1) shall be furnished within three months after – (a) the appointed day, in the case of a person who is a public servant on that day; or (b) after the date of appointment of a person as a public servant, at any time after that day, and thereafter on the 31st day of December in each year during any part of which he remains a public servant. (6) Where a person ceases to be a public servant, he shall furnish a statutory declaration at the end of twelve months from the date on which he so ceases. (7) A declaration required to be made on the 31st day of December in any year shall be deemed to comply with the requirements of this section if it is made on or before the 31st day of March next following that date. (8) A statutory declaration furnished pursuant to subsection (1) may, if the declarant so desires, be accompanied by a statement of affairs certified by a registered public accountant.	necessary statutory declaration and/or the contents of the declaration. In either event, the Jamaican Bill makes no provision for publication. 4. The Jamaican Bill differs from the OAS convention in that the public servants required to submit statutory declarations are determined on the basis of total emoluments." (Clause 4(3)(c)) and not on the basis of "posts specified."
(5) Systems of government hiring and procurement of goods and services that assure the openness, equity and efficiency of such systems.	The proposed Jamaican still does not include a similar statement.	There is, however, other Jamaican legislation which seeks to achieve this objective. (c.f. for example the Contractor General's Act)
(6) Government revenue collection and control systems that deter corruption.	These provisions are not included in the Jamaican bill.	Other laws seek to achieve this objective, for example, the amendments to the Revenue Administration Act now before Parliament.
(7) Laws that deny favorable tax treatment for any individual or corporation for expenditures made in violation of the anti-corruption laws of the States Parties.	These provisions are not addressed in the Jamaican Bill.	
(8) Systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.	These systems are not provided for in the Jamaican Bill.	Other legislation, for example, The Witness Protection Act, would appear to make provision for this protection.
(9) Oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts.	**Clause 5** (1) The functions of the Commission shall be: (a) to receive and keep or record statutory declarations furnished by public servants pursuant to this Act; (b) to examine such statutory declarations and to request from a public servant any information relevant to a statutory declaration made by him, which in its opinion would assist in its examination; (c) to make such independent inquiries and investigations relating to a statutory declaration as it thinks necessary. (d) to receive and investigate any complaint regarding an	The Commission for the Prevention of Corruption is the main oversight body under the Jamaican Bill. The Jamaican Bill as laid on the Table of Parliament did not make an explicit provision for Parliamentary oversight. The Joint Select Committee of Parliament which reviewed the Bill proposed in its report to the legislature that the Commission be required by the regulations under the proposed law to make an annual report to Parliament.

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses		
OAS Articles	**Jamaican Clauses**	**Analytical Comparison**
	act of corruption. (2) The Commission shall have power to summon witnesses, require the production of documents and to do all such things as it considers necessary or expedient for the purpose of carrying out its functions. Clause 12 (1) (a) Where any person fails to furnish the Commission with a statutory declaration which he is required to furnish in accordance with this Act; or (b) the Commission examines a statutory declaration and any related information or documents, or conducts an enquiry into any such statutory declaration, and is not satisfied with any aspect thereof, the Commission shall report the matter to the appropriate Service Commission, Board, Body or other Authority and the Director of Public Prosecutions, setting out such details and particulars as it thinks fit. (2) The Commission shall report any act of corruption to the appropriate Service Commission Board, body, or other authority and to the Director of Public Prosecutions. (3) The appropriate Service Commission, board or authority may take such disciplinary action in relation to a report made pursuant to subsection (I) as it thinks appropriate in any case.	
	(4) The Director of Public Prosecutions may take such action in relation to report made pursuant to subsection (I) as he thinks appropriate in any particular case without prejudice to the generality of the foregoing, may authorise any person having an official duty under this Act or being employed in the administration of this Act to furnish information to any officer of the court, the police or any other person specified by the Director of Public Prosecutions.	The Commission reports breaches by public servants under the bill to the appropriate service commission, board, body, or authority and the Director of Public Prosecutions. The Commission does not independently bring actions, but instead relies on other state actors.
(10) Deterrents to the bribery of Domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records and have sufficient internal accounting controls to enable their officers to detect corrupt acts.	There is no provision regarding the establishment of deterrents in the Jamaican bill.	The Jamaican bill does not include preventative measures such as deterrents nor a specific system of accounting, other than the asset declarations.
(11) Mechanisms to encourage participation by civil society and non-governmental organizations in efforts to prevent corruption.	There is no provision in the Jamaican bill.	Such mechanisms are absent in the Jamaican Bill. There is, however, provision for one of the five members of the Commission for the Prevention of Corruption to be "the president or any past president of the Institute of Accountants of Jamaica."
(12) The study of further preventive measures that take into account the relationship between equitable compensation and probity in public service.	There are no such provisions in the Jamaican bill.	These studies were not considered in the Jamaican Bill. There are, however, studies relating to equitable compensation in public service.

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses		
OAS Articles	**Jamaican Clauses**	**Analytical Comparison**
Article IV Scope This convention is applicable provided that the alleged act of corruption has been committed or has effects in a State Party.	Same as Clause 14 (4,9,10) as already quoted in relation to Article III (10).	These subsections seem to cover at least four of the OAS Articles: III (10); IV;VIII; and XIII.
Article VI – Acts of Corruption (1) This Convention is applicable to the following acts of corruption: (a) The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person, or entity, in exchange, for any act or omission in the performance of his public functions;	**Clause 14** (1) A public servant commits an act of corruption if he, (a) Solicits or accepts, whether directly or indirectly, any article or money or other benefit being a gift, favour, promise or advantage for himself or another person for doing any act or omitting to do any act in the performance of his public functions.	Similar definition
(b) The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;	**Clause 14** (2) A person commits an act of corruption if he offers or grants, directly or indirectly, to a public servant any article, money or other benefit being a gift, favour, promise or advantage to the public servant or another person, for doing any act or omitting to do any act in the performance of the public servant's public function.	Similar definition
(c) Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party;	**Clause 14** (1)(b) In the performance of his public functions does any act or omits to do any act for the purpose of obtaining any illicit benefit for himself or any other person.	Similar definition
(d) The fraudulent use or concealment of property derived form any of the acts referred to in this article;	**Clause 14** (1)(c) Fraudulently uses or conceals any property derived from any such act or omission to act.	Similar definition
(e) Participation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article.	**Clause 14** (3) A person commits an act of corruption if he instigates, aids, abets or is an accessory after the fact or participates whatsoever manner in the commission of or conspires to commit any act of corruption referred to in subsection (1) or (2).	Similar definition
(2) This convention shall also be applicable by mutual agreement between or among two or more States Parties with respect to any other act of corruption not described therein.	The Jamaican Bill is silent on this issue.	

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses

OAS Articles	Jamaican Clauses	Analytical Comparison
Article VII- Domestic Law The State Parties that have not yet done so shall adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law the acts of corruption described in Article VI (1) and to facilitate cooperation among themselves pursuant to this Convention.	**Clause 6** (2) "Shall be guilty of an offence and be liable on conviction in a Resident Magistrate's Court to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment." (3) "A person guilty of an offence under subsection (3) shall be liable on conviction in a Circuit Court – (a) if the information or anything contained in a declaration, letter or other document is published, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment; or (b) in any other case, to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding seven years or to both such fine and imprisonment **Clause 7** (1) Where the Commission, upon examination of a statutory declaration furnished pursuant to section 4, is of the opinion that further investigation is necessary, it may, in writing - (a) request the public servant concerned to furnish such other documents, information or otherwise as may be specified, within such time as may be specified; or (b) require the public servant to attend on the Commission at such time as may be specified to be heard by the Commission on any matter relating to the declaration. (2) A public servant required to attend on the Commission pursuant to subsection (1) may – (a) be accompanied and represented by an attorney-at-law and (b) may require the Commission to summon such witnesses as he thinks necessary. **Clause 8** (1) Any summons to attend, to give evidence or to produce documents before the Commission shall be notified to the person required to attend or to produce the documents and shall be issued under the hand of the secretary of any member of the Commission. (2) A summons under this section shall be in the form set out as Form B in the Second Schedule and may be served on the person mentioned therein either by delivering to him a copy thereof or by leaving a copy thereof at his usual or last known place of abode in Jamaica, with some adult person. (3) A summons under this section may be served by any person deputized by the Commission or by a Constable.	The OAS Convention calls for each state actor to promulgate their own regulations, including enforcement measures and penalties. The Jamaican bill provides for both fines and/or imprisonment. The OAS Convention calls for oversight but does not specify that this must be in the form of a commission. Thus, there are no provisions in the OAS Convention directly related to administration and function of an Anti-Corruption Commission.

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses		
OAS Articles	**Jamaican Clauses**	**Analytical Comparison**
	Clause 9 (1) The Commission may – (a) Require that any facts, matters or things relating to the subject of enquiry be verified or otherwise ascertained by the oral examination of witness; and (c) cause any such witnesses to be examined upon oath which the chairman or the secretary is hereby authorized to administer. **Clause 10** (1) All persons summoned to attend and give evidence or to produce any paper, book, record or document before the Commission: (a) shall be bound to obey the summons served upon them; (b) shall be entitled, in respect of such evidence or the disclosure of any communication, to the same right or privilege as before a court of law; (c) shall be entitled, on attending, to be paid their expenses from public funds, but the commission may disallow the whole or any part of such expenses in any case. (2) Any person who – (a) Without sufficient cause, fails or refuses to attend before the Commission, or fails or refuses to produce any paper, book, record or document which he was required by such summons to produce; (b) being a witness, leaves a meeting of the Commission without the permission of the Commission; or (c) being a witness, refuses without sufficient cause, to answer any question put to him by or with the permission of the Commission; or (d) willfully obstructs or interrupts the proceedings of the Commissions, shall be liable on conviction before a Resident Magistrate to a fine not exceeding one hundred thousand dollars or in default of payment thereof to imprisonment for a term not exceeding six months. **Clause 12** (1) Where – (a) any person fails to furnish the Commission with a statutory declaration which he is required to furnish in accordance with this Act; or (b) the Commission examines a statutory declaration and any related information or documents, or conducts an enquiry into any such statutory declaration, and is not satisfied with any aspect thereof, the Commission shall report the matter to the appropriate Service Commission, board, body, or other authority and the Director of Public Prosecutions, setting out such details	

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses		
OAS Articles	**Jamaican Clauses**	**Analytical Comparison**
	and particulars as it thinks fit. (2) The Commission shall report any act of corruption to the appropriate Service Commission Board, Body, or other Authority and to the Director of Public Prosecutions. (3) The appropriate Service Commission, board or other authority may take such disciplinary action in relation to a report as it thinks appropriate in any particular case. (4) The Director of Prosecutions may take such action in relation to a report as he thinks appropriate and may authorize any person having an official duty under this Act or being employed in the administration of this Act to furnish information to any officer of the court, the police or any other person specified by the Director of Public Prosecutions. **Clause 15** (1) Any person who commits an act of corruption commits an offence and is liable – (a) "on summary conviction in a Resident Magistrate's Court" – (a)(i) 1st offence: fine up to one million dollars and/or up to two years imprisonment. (a)(ii) 2nd offence: fine up to three million and/or up to three years imprisonment. (b) on conviction in a circuit court- (2) commits an offence, and shall on summary conviction in a Resident Magistrate's Court be liable to a fine and/or imprisonment (3) Where the offence involves the deliberate non-disclosure of a public servant's property the Court may, in addition to a fine and/or term of imprisonment (a) Forfeiture of property if it is within the Island (b) if the property involved is off of the island, an amount equivalent to the value of the property is to be paid to the Crown by the public servant involved	
Article VIII – Transnational Bribery Subject to its Constitution and the fundamental principles of its legal system, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions. Among those State Parties that have established transnational bribery as an offense, such offense shall be considered an act of corruption for the purposes of this Convention.	**Clause 14 - Acts of Corruption** (4) Any citizen or resident of Jamaica or any corporation, either aggregate or sole, any club, society, or other body of one or more persons, who offers or grants, directly or indirectly, to a person performing a public function in a foreign state, any article or money or other benefit, being a gift, favour, promise or advantage in connection with any economic or commercial transaction for any act to be performed by or for the omitting to do any act by that person in the performance of his public function, commits an act of corruption. (9) Where a citizen of Jamaica commits in another State, an act of corruption specified in Clause 14, subsections (1-8), he shall be liable to be prosecuted and tried for such act as if he had committed the act in Jamaica.	These sections of the Jamaican Bill in effect provide for the offense of "transnational bribery." This appears to preclude extradition of Jamaican citizens.

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses		
OAS Articles	**Jamaican Clauses**	**Analytical Comparison**
Any State Party that has not established transnational bribery as an offense shall, insofar as its laws permit, provide assistance and cooperation with respect to this offense as provided in this Convention.	(10) Where a citizen of Jamaica is liable to be extradited for an act of corruption specified in subsections (1-8) and he is not extradited on the ground that he is a citizen of Jamaica, the citizen shall be liable to be prosecuted and tried for the act of corruption as if he had committed such act in Jamaica.	However, it does call for the accused to be tried in Jamaica as though corrupt act occurred in Jamaica.

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses

OAS Articles	Jamaican Clauses	Analytical Comparison
Article IX – Illicit Enrichment Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense, a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions. Among those State Parties that have established illicit enrichment as an offense, such offense shall be considered an act of corruption for the purposes of this Convention. Any State Party that has not established illicit enrichment as an offense shall, insofar as its laws permit, provide assistance and cooperation with respect to this offense as provided in this Convention.	**Clause 14 – Acts of Corruption** (5) Where there is a significant increase in the assets of a public servant which cannot be reasonably explained having regard to his lawful earnings, the significant increase shall be deemed to be illicit enrichment that public servant shall be deemed to have committed an act of corruption.	The OAS Convention appears to limit "illicit enrichment" as an act of corruption to "government officials" only. The Jamaican Bill applies more broadly to a "public servant." Moreover, the Jamaican bill does not specifically state what amount is considered a "significant" increase. Finally, in Jamaica, the burden of proof appears to be on the public servant to demonstrate that he did not commit an act of corruption.
Article X – Notification When a State Policy adopts the legislation referred to in paragraph 1 of articles VIII and IX, it shall notify the Secretary General of OAS, who shall in turn notify the other States Parties. For the purposes of this Convention, the crimes of transnational bribery and illicit enrichment shall be considered acts of corruption for that State Party thirty days following the date of such notification.		There is no indication as to whether notification has been given to the OAS to this effect.
Article XI – Progressive Development (1) In order to foster the development and harmonization of their domestic legislation and the attainment of the purposes of this Convention, the State Parties view as desirable, and undertake to consider, establishing as offenses under their laws the following acts: (a) The improper use by a government official or a person who performs public functions, for his own benefit or that of a third party, of any kind of classified or confidential information with the official or person who performs public functions has obtained because of, or in the performance of his functions;	**Clause 14 – Acts of Corruption** (6) Any public servant who improperly uses for his own benefit or that of a third party – (a) Any classified or confidential information that he obtains as a result of or in the course of the performance of his functions; commits an act of corruption.	This is adequately provided for in the Jamaican Bill.
(b) The improper use by a government official or a person who performs public functions, for his own benefit or that of a third party, of any kind of property belonging to the State or to any firm or institution in which the State has a proprietary interest, to which that official or person who performs public functions has access because of, or in the performance of, his functions;	(b) any property belonging to the Government or any statutory body or authority or any government company or any body providing public services to which he has access as a result of or in the course of the performance of his functions: - commits an act of corruption.	This is similar to the OAS provision.
(c) Any act or omission by any person who, personally or through a third party, or acting as an intermediary, seeks to obtain a decision from a public authority whereby he illicitly obtains for himself or for another person any benefit or gain, whether or not such act or omission harms State Property; and	**Clause 14 – Acts of Corruption** (7) Any person who is or is acting as an intermediary or through a third person who seeks to obtain a decision from any Ministry or Department of the Government or any statutory body or authority or any government company or any body providing public services whereby he illicitly obtains for	This is similar to the OAS provision.

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses		
OAS Articles	**Jamaican Clauses**	**Analytical Comparison**
	himself or for another person any benefit or gain (whether or not the act or omission to act from which the benefit or gain is derived is detrimental to the Government) commits an act of corruption.	
(d) The diversion by a government official, for purposes unrelated to those for which they were intended, for his own benefit or that of third party, of any movable or immovable property, monies or securities belonging to the State, to an independent agency, or to an individual, that such official has received by virtue of his position for purposes of administration, custody or for other reasons.	(8) Any public servant who for his own benefit or for that of a third person, diverts any property belonging to the Government or any other person, which is in his custody for due administration of his duties commits an act of corruption.	
(2) Among those State Parties that have established these offenses, such offenses shall be considered acts of corruption for the purposes of this Convention.		These offenses have been designated acts of corruption in the Jamaican Bill.
(3) Any State Party that has not established these offenses shall, insofar as its laws permit, provide assistance and cooperation with respect to these as provided in this Convention.		Would not be applicable for the Jamaican Bill.
Article XII – Effect on State Property For application of this Convention, it shall not be necessary that the acts of corruption harm State Property.	Not specifically stated in the Jamaican Bill.	This provision is implied though not explicitly stated in the Jamaican Bill.
Article XIII – Extradition (1) This article shall apply to the offenses established by the States Parties in accordance with this Convention. (2) Each of the offenses to which this article applies shall be deemed to be included as extraditable offense in any extradition treaty existing between or among the State Parties. The States Parties undertake to include such offenses as extraditable offenses in every extradition treaty to be concluded between or among them.	**Clause 14** (9) Where a citizen of Jamaica commits in another State, an act of corruption specified in subsection (1-8), he shall be liable to be prosecuted and tried for such an act as if he had committed the act in Jamaica.	This subsection is consistent with articles of the OAS convention.
(3) If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any offense to which this article applies.	**Clause 14** (10) Where a citizen of Jamaica is liable to be extradited for an act of corruption specified, he shall be liable to be prosecuted and tried for the act of corruption as if he had committed the act in Jamaica.	Based on the Jamaican clause, does not appear that Jamaica will be using OAS to allow for extradition but rather, will prosecute the accused within Jamaica.
(4) State Parties that do not make extradition conditional on the existence of a treaty shall recognize offenses to which this article applies as extraditable offenses between themselves.		It is not clear as to whether or not in the Jamaican case extradition is made conditional on the existence of a treaty.
(5) Extradition shall be subject to the conditions provided for by the law of the Requested State or by applicable extradition treaties, including the grounds on which the Requested State may refuse extradition.	Not addressed in the Jamaican Bill.	

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses		
OAS Articles	**Jamaican Clauses**	**Analytical Comparison**
(6) If extradition for an offense to which this article applies is refused solely on the basis of the nationality of the person sought, or because the Requested State deems that it has jurisdiction over the offense, the Requested State shall submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the Requested State, and shall report the final outcome to the Requesting State in due course.	Not explicitly outlined in the Jamaican Bill.	
(7) Subject to the provisions of its domestic law and its extradition treaties, the Requested State may, upon being satisfied that the circumstances so warrant are urgent, and at the request of the Requesting State, take into custody a person whose extradition is sought and who is present in its territory, or take other appropriate measures to ensure his presence at extradition proceedings.	Not explicitly outlined in the Jamaican bill.	
Article XIV – Assistance and Cooperation (1) State Parties shall afford one another mutual assistance in investigating and prosecuting acts of corruption. (2) State Parties shall provide mutual technological cooperation in preventing, detecting, investigating and punishing acts of corruption.	Not explicitly outlined in the Jamaican Bill.	The Jamaican Bill does not specify the obligation for mutual technical cooperation with other countries in the fight against corruption.
Article XV – Measures Regarding Property In accordance with their applicable domestic laws and relevant treaties or other agreements… the State Parties shall provide each other the broadest possible measure of assistance in the identification…and forfeiture of property on proceeds obtained… in the commission of offenses established in accordance with this Convention.	Not explicitly outlined in the Jamaican Bill.	The Jamaican Bill does not explicitly provide for measures regarding property. These are partially covered in other legislation e.g. the Money Laundering Act.
Article XVI – Bank Secrecy (1) The Requested State shall not invoke bank secrecy as a basis for refusal to provide assistance. State shall apply this article in accordance with domestic law. (2) Information protected by bank secrecy is not obligated to be used for any other purpose than for the proceeding requested.	The Jamaican Bill does not address Bank Secrecy.	Though not explicitly stated in the anti-corruption bill, there are other laws that cover the issue of bank secrecy.
Article XVII – Nature of the Act The fact that property is obtained through an act of corruption for political purposes does not, in and of itself, qualify the act as a political offense.	Nothing regarding political offence or nature of the act is included in the Jamaican bill.	The Jamaican Bill is silent on acts of corruption for political purposes. The Report of the Joint Select Committee does however, state, "With respect to the matter of declaring political gifts, it was felt that this should be a subsection matter for legislation that should be embarked on as soon as possible."
Article XVIII Central Authorities (1) For the purposes of international assistance and cooperation each State Party may designate a central authority. (2) The central authority is responsible for making and receiving requests for assistance. (3) Central authorities shall communicate with each other directly.	No central authority is provided for in the Jamaican Bill.	However, it is implied the central authority would be the Commission for the Prevention of Corruption or perhaps the Attorney General.

4.1 Chart: Comparison of Organisation of American States (OAS) Convention Articles with Jamaican Bill Clauses		
OAS Articles	**Jamaican Clauses**	**Analytical Comparison**
Article XIX – Temporal Application This Convention shall not be retroactively applied.	The Jamaican Bill becomes effective on a day to be appointed by the Minister by notice published in the Gazette.	
Article XX – Other Agreements or Practices This convention shall not be construed as preventing State Parties from cooperating on the basis of other international agreements.	Not addressed in the Jamaican Bill.	Not addressed in the Jamaican Bill.
Article XXI – Signature This convention is open for signature by the Member States of the Organization of American States.		Convention was signed by Jamaica on 29 March, 1996.
Article XXII – Ratification This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.		The Convention has not yet been ratified by Jamaica.
Article XXV – Entry Into Force This Convention shall enter into force on the thirteenth day following the deposit of the second instrument of ratification.		The Jamaican Bill shall enter into force as soon as it is passed by both Houses of parliament, assented to by the Governor General and published in the official Gazette.

4.2 Comparison Chart of Anti-Corruption Commissions

BASES FOR ANALYSIS	JAMAICA	NEW SOUTH WALES (AUSTRALIA)	ECUADOR	BOTSWANA	HONG KONG	TRINIDAD & TOBAGO
LEGAL BASIS, SOCIO-HISTORIC ORIGINS	**Corruption (Prevention) Act 1997 [still a Bill before Parliament]** The Bill was occasioned by the need to pass legislation giving effect to the OAS Inter-American Convention against Corruption. In addition, there was widespread public alienation from politics regarded as excessively partisan, violent and corrupt.	**Independent Commission Against Corruption Act 1988** The Act grew out of public concern in the 1980s about the integrity of public officials, in a reaction to a general downturn in the credibility of the NSW administration. This was occasioned by a number of events including the imprisonment of a cabinet Minister (for selling early releases from prison), a chief magistrate and several senior officials.	**Civic Anti-Corruption Bill Passed in June, 1999** Popular discontent, leading to mass demonstrations in Feb.1997 against the regime of Pres. Abdala Bucaran, mainly on account of the administration's corruption. Ecuador signed the Inter-American Convention Against Corruption, published 5/23/97. Provided authority through Ecuador Constitution of 1998.	**The Corruption & Economic Crime Unit 1994** Concern in the government over the negative effects of corruption and economic crimes. Followed several major corruption scandals involving very senior and prominent people.	**Prevention of Bribery Ordinance** **Independent Commission against Corruption Ordinance –1974** **Corrupt & Illegal Practices Ordinance - 1974** Widespread public concern with institutionalized bribery, extortion and other forms of corruption in the 1960s and 1970s. The concern grew into rage and a demand for effective action in 1973 when a police superintendent under investigation for corruption fled to the UK. A Commission of Enquiry under a high court judge was set up and one of the principal recommendations in the Commission's report was the necessity to establish an independent, powerful agency to combat widespread corruption.	**Integrity In Public Life Act, 1987** Created as part of the legislative movement to address corruption concerns on a "top-down" basis.
FUNDING SOURCES and BUDGETS	Funds from time to time placed at the Commission's disposition by Parliament; on or before October 31 each year, Commission required to submit to the P.M. for approval estimates of revenue and expenditure for following year (period April 1 to March 31)	The ICAC is funded from the Consolidated Fund. As a body listed under Schedule Three of the Public Finance and Audit Act, the ICAC prepares annual financial statements in accordance with the Annual Reports (Departments) Act.	Financing proposed to come from the General State Budget.	National Development Plan (cf. 1997/1998 Draft 5th Annual Report p.4)		Expenses are a charge on the Consolidated Fund.

BASES FOR ANALYSIS	JAMAICA	NEW SOUTH WALES (AUSTRALIA)	ECUADOR	BOTSWANA	HONG KONG	TRINIDAD & TOBAGO
INTERNAL ADMIN. STRUCTURE, STAFFING	**Commission For Prevention Of Corruption** Consists of 5 members: the auditor general and 4 additional members appointed in writing by the Governor-General (in consultation with the Prime Minister and the opposition leader); Members serve a 2-5 year tenure and are eligible for re-appointment; A Chairman selected by the Governor-General shall preside over the commission. Members may appoint own staff from any section of public service.	**Independent Commission Against Corruption** – Commission consists of: Commissioner and Assistant Commissioner *and their staff, Dir. of Operations and Dir. of Administration holding terms not exceeding 5 years. Commission may arrange for police investigation with the approval of relevant Minister. Legal counsel may assist Commission. * appointed by the Governor w/ review by the Parliamentary Joint Committee	**Civic Anti-Corruption Commission –** 7 members of the commission (and 7 alternates) are appointed by the electoral college for a term of 4 years and can be re-elected once. Organs are: 1. the Plenary Body 2. the President 3. the provincial or district branches 4. the Exec. Director. Members may be dismissed only on very specific grounds as stated in the Act [See Title V.]	**Directorate On Corruption & Economic Crime –** 7 members: Dir., Dep. Director and 5 Asst. Dirs.; 5 branches, viz: 1. Training/Prosecutions 2. Investment 3. Administration & Special Projects 4. Corruption Prevention & Public Education Staff – 100 officers	**Independent Commission Against Corruption (ICAC) –** 3 Depts; Corruption Prevention Dept., Operations Dept, Community Relations Dept. which report to Commissioner and Administrative Branch. 1. Operations Dept – receives, considers & investigates alleged corruption offenses. 2. Corruption Prevention Dept.- examines practices and procedures of government departments and public bodies to reduce corruption opportunities & offers corruption prevention advice to private organizations upon request. 3. Community Relations Dept. – educates the public against evils of corruption. All 3 are serviced by the Administrative Branch, are interdependent, and capitalize and build on efforts of other departments.	**Integrity Commission –** 5 members; tenure specified in appointing instrument; Commission shall be provided with staff/public officers.

BASES FOR ANALYSIS	JAMAICA	NEW SOUTH WALES (AUSTRALIA)	ECUADOR	BOTSWANA	HONG KONG	TRINIDAD & TOBAGO
RELATION TO GOVERN-MENT AND CIVIL SOCIETY	**Composition of Commission –** Members are appointed per the procedure described above. Appointments may be revoked by the Governor-General in consultation with the Opposition Leader at any time. Commissioner may also be removed for cause based on such a showing by a public servant.	**Composition of Commission** Commissioner./Asst. Commissioners appointed by Government subject to veto by Parliamentary Joint Committee. Government makes regulations per political process. Additional aspects of the relationship include: (1) ICAC independent of the government, is not responsible to and cannot be directed by an individual (2) Minister.Links with public authorities as instructor, advisor, educator, and collaborator. (3) Dept. Heads required to report suspect conduct. (4) Annual Report to Parl.; Special Report at any time/Opers. Review Committee advises Commission. (5) 4 of 8 members of Operation Review Committee to "represent community views". (6) Commissioner. May be removed from office by Gov. on address of both Houses of Parl./Asst. Commissioner for incapacity, incompetence or misbehavior.	**Composition of Commission** All 7 members drawn from and chosen by organizations in civil society required not to be politically active… "autonomous, economically, politically and administratively independent & represents citizens" (§1, Art.1) Presents the citizens with annual report on status, operations and activities. Substitute members elected by each of & bodies of civil society National Board of University and Tech. Schools	**Composition of Commission** Directorate on Corruption & Economic. Crime lies with AG's Chambers. Director formally and directly responsible to the President.	**Composition of Commission** ICAC has formal relationship with 3 advisory departments: Operations, Corruption Prevention, & Community Relations ICAC submits annual report to Legislative Council The Corruption Prevention Dept. offers advice to government department and public bodies; also handles private sector request for corruption prevention and assistance. The Corruption Prevention Department's approach is to work closely with the management of organizations/companies to: (1) identify potential corruption problems. (2) devise solutions with a view to minimizing corruption opportunities in polices or procedures.	**Composition of Commission** Unavailable

BASES FOR ANALYSIS	JAMAICA	NEW SOUTH WALES (AUSTRALIA)	ECUADOR	BOTSWANA	HONG KONG	TRINIDAD & TOBAGO
OVERSIGHT	**Oversight:** from the Executive explicit - Minister determines regulations/approves annual budget; implicit in Parliament - regulations subject to affirmative resolution.	**Oversight:** Special Joint Committee of M.P.s - Committee on the Independent Commission Against Corruption – function ,"to monitor and to review the exercise by the Commissioner of its functions…"; can veto appt. of Commissioner; Parliament. Membership of Standing Committee (8) identical with the Standing Ethics Committee of Parliament – function to prepare for the Legislative Assembly; draft code of conduct - legal requirement that public be allowed to make submissions and that these be taken into account before draft completed. Additional oversight information includes: Operations Rev. Committee "to advise Commissioner" (includes 8 members, Commissioner, Asst. Commissioner., Commissioner. of Police, 1 recommended by Attorney General, and 4 others appointed by the Minister) " to represent community views" (60) Standing Ethics Committee of Parliament- 3 community members and 8 parliamentary members being persons appointed by at least 5 of Parliament's Members following public advertisement."	**Oversight:** Executive Director manages the Commission administratively and financially—prepares annual budget and presents it to Commission. The Plenary of the Commission may dismiss Commission members for certain offenses.		**Oversight:** ICAC directly accountable to Chief Exec and ICAC Commissioner reports regularly to Exec. Council on major issues. Legislative Council requires Commissioner and Directorate officers to appear before Legislature to answer questions on policy matters and funding. 4 Advisory Committees—on Corruption, Operations Review, Corruption Prevention, and Citizens Advisory on Community Relations appointed by Chief Exec. Oversees ICAC.	

BASES FOR ANALYSIS	JAMAICA	NEW SOUTH WALES (AUSTRALIA)	ECUADOR	BOTSWANA	HONG KONG	TRINIDAD & TOBAGO
POWERS AND FUNCTIONS	**Principal Functions** 3 of 4 functions relate to "statutory declarations" [Disclosure and monitoring public servant's assets] to receive and keep on record to examine to make such enquiries re. a statutory declaration… [**see Second Schedule**] 4th function is " to receive and investigate any complaint regarding an act of corruption" [**§ 5(1) (a) - (d)**] Powers related to functions regarding statutory declarations include the ability to summon witness, subpoena documents, require public servants' attendance, examine witnesses, etc. When Commission is not satisfied with any aspect of the process [i.e. statutory declarations] the Commission shall report the matter to the appropriate service commissions, board, body, or other authority & the DPP setting out such details and particulars as it thinks fit. **§ 12 (1) (b)** The appropriate service Commissions Board or authority may take such disciplinary action…as it thinks appropriate **§ 12 (3)** The DPP may take such action, as he thinks appropriate. **§ 12 (4)**	**Principal Functions** Principal functions of Commission [**Part 4 Div. I §13)**] investigate any allegation or complaint…or any circumstances which in the Commissioner's opinions imply: corrupt conduct; conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or conduct connected with corruption may have occurred, may be occurring or may be about to occur. **[Div.I §13(1)(a)]** Investigate any matter referred to the Commission, both Houses of Parliament re: public authorities – examine, advise, instruct, cooperate, educate concerning laws, practices, procedures and changes thereto to discover, eliminate corrupt conduct.**[Div. I § 13 (1)]** To educate and disseminate information to the public on the detrimental effects of corrupt conduct… to enlist and foster public support in combating corrupt conduct **[Div. I§ 13 (1)(I)]** Power to make findings, form opinions, formulate recommendations for action **[Div. I § 13(3)]** OTHER FUNCTIONS: Assemble evidence, …admissible in Prosecution - DPP - AG. Cooperate with law enforcement agencies. **PART 4 Div. I (§13) (§14) (§16)**	**Principal Functions:** Attributes of the Plenary of the Commission **Art 7** Formulate programs and lead campaigns against corruption. promote participation and organization of citizens. know & investigate claims of corruption. ask for reports or documents to verify investigations. (1) Prevention, investigation, and individualization of acts of corruption, diffusion & promotion of values, & principles of transparency . (2) Take claims of bribery, extortion, concussion, & fraud in the financial system, which might affect the resources of the state or public sector, including the private sector. (3) Keep confidentiality about investigations or information he obtained through work & excuse himself from investigations that might involve conflict of interest or ones' family. He cannot participate in political activities	**Principal Functions:** Investigation of alleged or suspected offences; prosecution of offences; intelligence gathering; corruption prevention; public education (including the use of toll-free hotlines) or reports, complaints and intelligence… [Over 60 talks and presentations given in 1998.]	**Principal Functions:** Powers and functions of ICAC include: (1) Investigates corruption after receiving complaints; (2) Examines systems in govt. depts. and public bodies to identify and reduce corruption opportunities (3) Educates the public on the consequences of corruption and seeks their advice + support in the fight against corruption. ICAC empowered by three specific laws: Prevention of Bribery Ordinance, the Independent Commission against Corruption Ordinance, the corrupt & Illegal Practices ordinance PBO - ICAC - search bank accounts, hold and examine business and private documents - subjects required to provide details of assets, income and expenditure – Powers of arrest, detention and granting bail, to secure and detain evidence.	**Principal Functions:** 2 of 3 stipulated functions relate to declarations viz 'receive, examine, retain," "verify accuracy"; 3rd is to "perform such other functions as is required by this Act to perform **PartII § 8 (a) – (c)** Powers also relate to functions regarding statutory declarations: "Where a person … fails to file a declaration in accordance with this Act or without reasonable cause fails to furnish particulars … the Commission shall publish the fact in the Gazette not to parliamentary leaders as in Jamaica. **Part IV §22** Where query re accuracy or fullness of declaration, Comm - Pres. – tribunal – enquiry [powers of Commission of Enquiry]…**Part IV (23) (1)** Where the Commission is of the view that a breach of any of the provisions of this Act may have been committed, the commission shall …furnish such info. As it deems fit to the DPP … **Part IV §23 (5)** Penalty for non-compliance with the law "where the offence involves the deliberate non-disclosure of property, the court may, in addition [to the fine & imprisonment] (I) Where the property involved is situated in T & T declare that it be forfeited to the State…" **Part IV (1) (d)**
POWERS AND		May commence, continue,				

BASES FOR ANALYSIS	JAMAICA	NEW SOUTH WALES (AUSTRALIA)	ECUADOR	BOTSWANA	HONG KONG	TRINIDAD & TOBAGO
FUNCTIONS . . .cont'd		discontinue or complete any investigation **Div. I(§18)** Plus "power to do all things necessary to be done for or in connection with or reasonably incidental to the exercise of its functions and any specific powers conferred on the Comm. This Act shall not be taken to limit by implication the generality of this section" **Div. I (§19) (1)** May conduct an investigation on its own initiative. **Div.2 (§20)(1)** Power to obtain info/ documents **(§21)**; to enter public premises **(§22)**; issue warrants for arrest of witnesses **(§23)**; issue search warrants **(§40);** to enter premises, search premises, seize documents **(§41);** use such force as is reasonably necessary for the purpose of entering the premises **(§43);** make such arrangements as are necessary: to protect the safety of any such person [witnesses and persons assisting the Commission] or to protect any such person from intimidation or harassment **(§50).**				

JAMAICA'S PROPOSED FREEDOM OF INFORMATION ACT

APPROACHING OPEN GOVERNMENT

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I. INTRODUCTION

In early 1995, a committee was appointed and charged with the goal of drafting the Jamaican Freedom of Information Act. The "Report on Proposals For a Freedom of Information Act", also known as the Wells Report, was issued and tabled in Parliament on June 14, 1996. A Cabinet Submission was received in October, 1998 and a Ministry Paper, similar to drafting instructions, was issued by Prime Minister Patterson on November 23, 1998. The Freedom of Information proposal remains before Parliament and is expected to come to a vote before the end of this year.

Freedom of Information legislation is intended to allow the public at large access to government documents. The basis for freedom of information is that the public has a right to know what the government is doing, ie transparency in government, and that when armed with more information, there will be increased public participation and decreased government corruption. However, there has been a continuing tension between the public's right to information and the government's legitimate concern that such a law would become an administrative and economic burden and may infringe on the rights of privacy and rights to confidentiality in business. The manner in which the legislation

[15] The substantial research assistance of Ms. Kayanne Taylor for this report is gratefully acknowledged by the Author.

balances these countervailing interests is often a measure of its virtue and versatility. The proposed Jamaican Freedom of Information legislation has some positive attributes. However, as will be demonstrated, this Act is weaker than many of those that we reviewed.[16] The main failings appear to be in the scope of who may receive the documents, the extensive exceptions to documents that can be released to the public and the lack of genuine appeal rights.

II. OBJECT AND PURPOSE

The object and purpose of the proposed Freedom of Information legislation in Jamaica is cast in terms of broad principles of democratic governance. The drafting instructions embodied in the Ministry Paper states that "the proposals ... are intended to reflect three fundamental principles which constitute the basis of democratic government, namely, accountability, openness and public participation." On this basis, their "implementation", in the words of the Prime Minister on introducing the proposals in Parliament, "will signal a decisive break with the culture of secrecy." These principles embodying the purpose of the Jamaican legislation are qualified, however, in so far as the drafting instructions recognize that they "have to be balanced ... against the need to protect other essential public interests".

Nevertheless, the explicit link between the proposed legislation and the general principles of democratic governance serve to clarify the intent of Parliament and are of relevance, not least of all, in judicial interpretation of the meaning of Jamaica's Freedom of Information legislation.

[16] We reviewed The Canadian Access to Information Act of 1982 and the proposed Open Government bill;

In respect to the unambiguous statement of purpose, the Jamaican approach differs in a positive way from the Australian, Belize and American precedents. These Freedom of Information Acts refrain from any explicit linkage of free access to information to general democratic principles. Rather, they confine their statements of purpose to simply indicating the right of public access and the exceptions. The proposed Canadian Open Government Act 1997,[17] in contrast, is similar to the Jamaican proposal in its statement of objective. The purpose of extending public access to information under government control lies in "the government of Canada's duty to ... assist the public in assessing the government's management of the country and in monitoring the government's compliance with the Canadian Charter of Rights and Freedoms". Thus, the purpose of the Act is linked explicitly to the democratic principles of public accountability and participation. It is important that the Jamaican drafters incorporate the broad statement of purpose within the Freedom of Information Act itself and not simply regard this aspect of the instructions as prefatory. Such an assertion of the goals will help guide the Ministers and other public officials, in whom the Act vests wide discretion, in determining whether to provide or deny public access to information.

On the other hand, it may be argued that such a declaration within the law, of the purpose of the legislation, is superfluous as it adds nothing to the rights that the proposed law intends to confer. Moreover, the purposes, as articulated by the Prime Minister, are immediately qualified by the need to uphold the countervailing principles of privacy and confidentiality. Thus, an inclusion of the three principles as part of law may falsely lead

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Australian Freedom of Information Act of 1982; Belize Freedom of Information Act 1994; U.S. FOIA.

[17] The Canadian Open Government Act of 1997 was introduced into Parliament as a private member bill. This proposed law is presently still before the Canadian Parliament.

persons to believe that these are the sole objectives, without consideration as to what extent, in what circumstances, and through what means this balance of opposing interests must to be applied. Hence, there is an argument that nothing is gained by setting out in the proposed law itself the "object and purpose" as this will simply create confusion. While appreciating this perspective, the need to explicitly tie the object of the proposed legislation firmly to the purpose of deepening Jamaica's democracy seems more compelling than the concern over superfluousness.

III. ACCESS

The Jamaican proposals in some respects do not differ significantly from other jurisdictions. As in the Australian, Belize and the United States Freedom of Information Acts, the Jamaican instructions include within the scope of the proposed legislation all government bodies both at the central government and local government levels. There is, however, a positive development in the proposed Jamaican law as it brings certain private sector bodies within the purview of the legislation. These private entities include "companies wholly owned by the government or in which the government has a majority or controlling interest; and particular private sector bodies which provide the public with critical services . . . or which enjoy a monopoly position." See, Recommendations for Proposed Freedom of Information Act, 1(4)(a),(b). Hence, privatized utility companies, providers of telecommunications services, transport, water or light and power would fall within the scope of the law. This provision, which does not appear in this particular form in the other jurisdictions, is valuable given the extent of concern in Jamaica regarding

lack of accountability in various private bodies providing public services.

Despite the fact that these private companies provide public services, there is a hesitation in including them within the scope of this legislation, as they are, nevertheless, private. These companies are properly accountable to their shareholders, and appropriately responsive to the needs of their employees. The public, the argument goes, should have no right of access to private company documents, particularly in an actual or potentially competitive market. The balancing of private companies business concerns with the citizens right to access information relating to public services was reached through the inclusion of broad exceptions in the law, such as that no documents will be disclosed if they would reveal "trade secrets; information of commercial value that would, or could reasonably be expected to be destroyed or diminished if the document is disclosed" and any other documents which would adversely affect the affairs of that person or body. Id. at 3(g). Thus the law still accounts for public access but limits it greatly, as is discussed in detail below, by the broad exceptions to disclosure.

In the Australian Freedom of Information Act of 1982 there is no provision for receipt of documents from private entities, regardless of their connection to the government. See, Australian Freedom of Information Act 1982, (4). Likewise, the Canadian legislation incorporates only documents under the control of "government institutions" which are defined as "any department or ministry of state of the Government of Canada". See, Access to Information Act, (3).

Although there is some broadening of "access", there are also three substantial deficiencies in the Jamaican proposal on access to information. One of the issues relates to the planned restriction of the right of access to only "***Jamaican citizens and persons***

permanently resident in Jamaica." See, Recommendations for Proposed Freedom of Information Act, (2)(1). Thus, journalists, researchers and non-resident individuals, who are not Jamaican or permanent residents, would be barred from accessing documentation under the proposed freedom of information legislation, regardless of the reason for their request. Likewise, non-resident and international businesses that have valid concerns over government procurement policies and decisions would be barred from accessing the relevant information under the current proposal. This provision departs from the Australian, Belizean and American precedents and opts, in this respect, to follow the Canadian legislation. In Belize, "every person shall have a right to obtain access in accordance with this Act to a document of a Ministry or prescribed authority, other than an exempt document." See, Belize Freedom of Information Act, 1994, (9). The right to access of documents in Belize is not limited to only citizens or permanent residents.

The rationale for this restriction in Jamaica, no doubt lies, in part, in the upholding of the demarcation between the rights of citizens and those of non-citizens. The contention would be that the Jamaican citizen or resident properly has a claim to access to government documentation, whilst the non-Jamaican ought not to have such a claim, the latter having no enduring stake in the democratic governance of Jamaica. On the other hand, the Jamaican Constitution acknowledges no such distinction in its recognition of political rights and civil liberties. " ...Every person in Jamaica is entitled to the fundamental rights and freedoms of the individual...whatever his....place of origin" declares Section 13 of the Constitution (emphasis added). To the extent that access to information is acknowledged in the proposed legislation itself as reflective of the fundamental democratic principle of openness and accountability, it would appear

inconsistent to deny this right to non-citizens, whilst conceding them every other right.

Moreover, certain categories of non-citizens, for example a "Commonwealth citizen of the age of twenty-one or upwards" who has been "ordinarily resident in Jamaica for the immediately preceding twelve months" not only enjoy fundamental rights and freedoms, but are in fact even qualified to become members of Parliament. Indeed, under this provision, a Canadian or Australian citizen resident in Jamaica for the year preceding an election could actually become Prime Minister of Jamaica. Thus, the proposed restriction, could conceivably exclude persons who are qualified to be, or are in fact, legislators and members of government, from access to information. Such an anomaly is clearly unacceptable. The moreso in an age of globalization when Jamaicans have an interest in accessing information elsewhere and conversely where non-Jamaicans have an interest in accessing information about and from other countries/jurisdictions. The proposed restriction, as it is arbitrary and harmful to both the Jamaican economy and good governance, should be removed.

Secondly, the drafting instructions, rather than expanding the freedom to information, propose to exclude from the scope of the law documents "already available to the public under other laws or administrative procedures." See, Jamaican Recommendations for Proposed Freedom of Information Act, 2(3). While the intention is to supplement rather than replicate the access provided by existing legislation, to the extent that such pre-existing access has proven ineffective, it is even more critical that the Freedom of Information Act encompasses all such information/documentation within the proposed statute.

The proposed exclusion is similar to that which applies in legislation regarding the Ombudsman in Jamaica. In relation to the Parliamentary Ombudsman or to the Utilities Ombudsman, for example, the law prohibits either officer from making recommendations to redress grievances in cases where remedies are already available from other authorities. Whilst this makes sense, in terms of avoiding over-lapping jurisdiction, the fact is that citizens do by-pass available bodies to seek redress from the office of the Ombudsman. Either out of ignorance or because of the ineffectual nature of available instruments, the new remedial instrument is preferred to the old. In much the same way, existing law and procedures providing for public access to information have clearly not worked. To have existing legislation retain its current jurisdiction to the exclusion of the means provided by the proposed Freedom of Information Act would seem to be self-defeating. Rather, the drafters may consider a provision that allows for concurrent jurisdiction or that states that when there is a conflict between existing legislation and the new Freedom of Information Act, the new Act supercedes.

Thirdly, the Jamaican proposals are silent on an important obligation of the state, without which much of the effectiveness of the new law could be undermined. This is the responsibility of the government, its agencies and officials to indicate their respective areas of competence, their methods of decision-making, operational procedures, types of documents that they possess, etc, such that the public will know to whom to direct their request for information. Without such maps of the jurisdiction of various public bodies, the citizen could well be at a loss regarding the likely location of documentation or information, which he or she may wish to access. Hence, the Canadian Access to Information Act provides that:

> The designated Minister shall cause to be published, on a periodic basis not less frequently than once each year, a publication containing:
>
> (a) a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution;
>
> (b) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act;
>
> (c) a description of all manuals used by employees of each government institution; and
>
> (d) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent.

Even with such a roadmap the citizen is apt to get lost; much moreso in the absence of such provisions. The Jamaican proposals, therefore, need to be amended to explicitly place this responsibility on the Jamaican government and its agencies.

It must be acknowledged that such a requirement will impose an additional obligation on a bureaucracy, which is, in many instances, already overburdened. Moreover, such a publication would have to be accompanied by systematic public education to be meaningful. The absence of both the guide to locating documents and public education in other areas of Jamaica's governance has meant that otherwise potentially significant mechanisms of citizens redress remain relatively distant from the public and highly underutilized, despite the apparent need. Two such examples are the Police Public Complaints Authority and the Office of Utilities Regulation. Each of these, because of insufficient public information, remains inadequately utilized by citizens. Therefore, in order for the Freedom of Information Act to achieve its stated goal of

"public participation", there must be a government mandate to provide a guide to locating documents and public education.

IV. DOCUMENTS EXEMPTED FROM SCOPE OF THE LEGISLATION

Generally, the Jamaican proposals regarding exemptions from access to documents is consistent with comparable legislation elsewhere. Under the proposed law, the Minister responsible for the ministry, department, or agency to which the request for a document is made, is "empowered to certify, if so satisfied" that the document is exempt from access. See, Recommendations for Proposed Freedom of Information Act, (3)(4). Within the legislation, there is a list of broad areas of exceptions to access. For example, documents which "would, or could reasonably be expected to, prejudice Jamaica's security, defence or international relations" are exempt and will not be distributed to the public, even upon request. Id. at (3)(3)(a). Also exempt from public access are cabinet documents; documents relating to law enforcement if their disclosure could reasonably be expected to endanger life or safety of a person or prejudice a case; documents revealing Government's deliberative processes; documents with legal privilege; documents the disclosure of which would reveal trade secrets or commercially valuable information; and documents whose disclosure could reasonably be expected to result in damage or interference with environmental or historic preservation. Id. at (3)(3)(b – j). In the Canadian Access to Information Act and the United States Freedom of Information Act, there are similar matters that are not covered by the statutes, and thus not available to public scrutiny.

However, there are some significant differences in the proposed Jamaican

Freedom of Information legislation. For example, in one important respect there is a peculiar deviation in Jamaica, which limits the scope of this law. "The proposed legislation should be made applicable to documents created by the Government, or which came into the Government's possession, no earlier than seven years before its coming into force." Id. at 14(2) (emphasis added). In other words, any document over seven years old would be automatically exempt from the access provisions of the Freedom of Information law. Clearly, this violation of the principle of open government cannot adequately be justified on grounds of reducing the administrative burdens consequent upon the implementation of the new law.

The proposed law states correctly that access to information is not only a principle, but also rather one of "three fundamental principles which constitute the basis of democratic government". A fundamental principle cannot be justifiably circumscribed on grounds of pragmatism. As such, the principle of accountability could no more be justifiably restricted on the basis of pressure on state agencies, than the right to life could be legitimately violated by lethal use of police force in apprehending criminal suspects on the grounds of coping with an unacceptably high murder rate.

Nevertheless, we must appreciate the potential burden on the state and practical problems should it legislate for access to all documents in perpetuity. Clearly, granting public access in theory, which cannot be expeditiously met in practice, might in and of itself defeat all the proper intentions and imperatives of the legislation. In coping with this challenge, the first requirement is for there to be a real appreciation, in the political directorate and amongst the citizenry, of the fundamental importance of access to

information. This would provide the foundation for a greater allocation of resources to this vital function of a democratic state.

In addition, administrative improvement measures, rather than restriction of lawful access to documents, should be explored. For example, the time limits for retrieval of certain classes of documents could be adjusted depending on the characteristics of the documents, such that documents not related to constitutional issues or documents over thirty years old have longer retrieval periods. It is worthy to note that neither the Belizean nor Australian Acts, the two laws on which the proposed Jamaican legislation was modeled, include a categorical time limit.

Related to the question of overburdening the system, is the issue of appropriate costs/fees for access. One major concern is to establish procedures and provisions that do not in any substantial way hamper the citizen's capacity to exercise his right to access this information. As such, fees should be assigned primarily, if not entirely, only to recover the costs of the processing of the requests, such as the retrieval and copying costs. Fees should not be used as a means to discourage requests nor to ensure that the system does not get clogged.

The provisions of the United States Federal Freedom of Information Act (FOIA) might assist as precedent to the establishment of a trenched/ranking system of applying fees and charges to offset the economic costs of operating such a programme. Under FOIA, there are either no fees or reduced fees when "disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations and activities of government." 5 U.S.C. sec. 522(a)(4)(A). In all other cases, fees are limited to reasonable charges for

documentation search and duplication. Id. Whilst not aimed at reducing frivolous requests, one positive consequence of cost-recovery provisions in Jamaica may well be a reduction in pressure on the bureaucracy, as there would necessarily be less requests and more resources to meet the demand.

Additionally, it is proposed in the Ministry paper that documents should be precluded from access where "other essential public interests ... give rise to legitimate claims for protection". These public interests in the Jamaican proposals, as well as in the laws of Australia, Belize, Canada and the USA, relate to national security, defence, international relations, etc. Whilst these are generally regarded as acceptable bases for restrictions on access, it is essential that the law be so framed as to impose a narrow construction of these exemptions, given the fundamental importance of accessibility of information to democratic accountability. Hence, the drafting instructions should clearly indicate that documents should be exempt from the proposed right of access if their disclosure would be likely to, and not simply could, prejudice or compromise Jamaica's security, defence or international relations. Moreover, there should not be categorical restrictions, such as every document "revealing the Government's deliberative processes" is exempt. Instead the determination should be made on a case-by-case basis whether to exclude the document from public review. Moreover, because the exemptions are potentially subversive to the openness the law is intended to facilitate, a clear and substantial burden of proof needs to be placed upon the authorities to justify denial of access on public interest grounds.

In three other areas, the exemption provisions in the Recommendations need to be modified. First, a document should not be exempt from disclosure on grounds that its

exposure would have "a substantial effect on the ability of the government to manage the economy of Jamaica." See, Recommendations for Proposed Freedom of Information Act, (3)(j). This provision is so broad as to be able to include, and thus exclude from release, almost anything. For example, assessments by international governmental or non-governmental organizations of Jamaica's economy could be excluded under this provision. Denial of early access by the Jamaican public to such assessments could conceivably serve the interests of the government of the day, but not the national interest. The continuing crisis in the Jamaican economy and widespread public concern argues for the greatest possible openness on economic issues and against including an exemption provision which more than most would be open to abuse. Moreover, documents in need of genuine protection could be exempted from disclosure under other provisions in the law, such as the exemption of Cabinet documents. Further, whilst the Australian and Belize Laws include similar provisions, the United States FOIA has no such ground for denial of access. The United States law does contain exemptions for documents "prepared by, on behalf of, or for the use of an agency responsible for the regulation and supervision of financial institutions". 5 U.S.C. sec. 552(b)(8). However, the United States experience in this regard, is that even the exemption for federal banks is restricted as other regulations allow much of this information to become public.

The Jamaican proposals may well, in this context, benefit from amendments along the lines of the Canadian legislation which, rather than having categorical exemptions, couch each exemption with phrases such as "substantial likelihood" and "reasonably likely" to have a "materially injurious or detrimental impact." See, Canadian Access to Information Act.

Secondly, whilst it may be accepted that a document that would compromise the country's defence, national security or international relations should be exempt from disclosure (as is proposed), it is not clear why an agency should be further empowered to refuse to confirm or deny the existence of such a document. See, Recommendations for Proposed Freedom of Information Act, (3)(7). Moreover, there should be some additional oversight of the Minister's decisions. In Canada, for example, it is not the ministers of each individual agency that make the access determinations, but rather one centralized agency lead by a Minister of Information. The overriding necessity to break with the pervasive culture of secrecy would argue strongly against giving an agency and its Minister the power to refuse to acknowledge the existence of a document, in addition to the right of non-disclosure.

Thirdly, the proposed law should require, and not prohibit the disclosure of the factual basis or content of a deliberative process while protecting the source or identity of particular advice. Understandably, there is a national interest in fostering open debate in the Cabinet. However, the contents of the debate should be available so that all Jamaicans may make an informed decision as to their views. Hence, a Cabinet document or submission that identifies or attributes opinions to a specific Minister would, quite appropriately, be secret or confidential, but the data or the facts put forward in support of or in opposition to a Cabinet decision should be accessible.

Finally, whilst expanding access in the above ways is vital to openness and accountability of the government, the proposed Jamaican Freedom of Information Act needs to explicitly outline that nothing in the act is to threaten the citizen's right to privacy. In Jamaica, there is neither a legislative foundation nor an explicit constitutional

right to privacy. Therefore, even though it is implied in the exemption section of the proposed Freedom of Information Act, it should be incorporated more directly or a corresponding Right to Privacy Act should be promulgated. Indeed, both the right to privacy and freedom of information should have equal status in the revised Charter of Rights in the Jamaican Constitution.

V. PROCEDURES FOR REQUESTS

The Jamaican proposals do not significantly differ from the comparable laws under scrutiny in the procedures relating to access, response and review. Although generally similar, there are some variations. For instance, under the proposed Jamaican legislation, request for documents must be made in writing on a prescribed form. No other freedom of information legislation refers to a prescribed form. In the United States for example, a letter to the relevant agency will suffice so long as it is sufficiently detailed as to reasonably describe the records being sought. Note however, that failure to use the prescribed form "should not" invalidate the request.

Whereas the US provision conditions that the request "reasonably describe" the document, the Canadian law requires "sufficient detail to enable an experienced employee of the institution with a reasonable effort to be able to identify the record". The Belize statutory scheme, similar to the Australian law, mandates that the request "provide such information concerning the document as is reasonably necessary to enable a responsible officer of the Ministry or prescribed authority, as the case may be to identify the document". Again, given that in Jamaica the requestor must use a specific form complete with detailed facts, an informational roadmap and public education should

be provided. As well, it is imperative that the forms be available and accessible to the general public.

The proposed Jamaican Freedom of Information legislation imposes a minimal duty on the agency approached to assist the requester/applicant "where necessary, in identifying the documents requested and, generally, in completing the form of request". See, Recommendation for Proposed Freedom of Information Act, (4)(2)(a). Moreover, where the request for information was made to the wrong agency, under the Jamaican legislation, the agency may forward the request to the correct agency. This provision is not mandatory, as it requires "the agreement of the other agency." Id. At (4)(2)(c).

Likewise, the Canadian Act imposes no duties but, as in Jamaica, a request may be transferred if not properly made to the particular agency of "first request". The provisions of the Australian and Belize laws differ as under their statute, it is mandatory that the request be forwarded to the correct agency. This automatic transfer of requests combined with the "roadmap' as to where to submit the request, greatly further the constituencies ability to request and receive information.

In the US, because there is no central government records office that services FOIA requests, the request must be addressed to a specific agency. In view of the current fragmented status of the Jamaican public sector and the use and management of Public Sector records within and between public sector entities, it might be more effective at this time to operate such a programme directly through government agencies, such as the Island Records office and the Registrar General. However, without a guide as to which agency has control over the relevant documents, this may become yet another obstacle to

genuine access to information. In the future the goal may be a single repository for all government documents and records, rather than a fragmented agency model.

Most freedom of information legislation dictate timeframes to the agencies for processing the requests. In Jamaica, the proposed time limits are as soon as practicable but no later than 14 days to acknowledge receipt of requests, 14 days to respond to requests and to make whatever transfer of request as is necessary within 14 days of receipt. Id. at (4)(2)(b), (4)(4). Notice should be given to the applicant, within 30 days of receipt by the agency, as to whether access has been granted or refused. The 30 days shall be calculated from the date the request was originally sent.

In order to reach the goal of "openness" in government, is important to place some reasonable time limits on the processing of FOIA requests. Without such deadlines, there would be no means of knowing whether the request had been denied and agencies could, contrary to the statute, simply never process the requests. But these deadlines must be reasonably based on the Jamaican experience. For example, one might question the processing deadlines of requests which are sent by post, where not all government agencies have local/rural offices close to all regions of the Island, and the postal service takes anywhere from 2 days to 14/21/30 days for delivery. This delay by the post service necessarily effects the agencies ability to acknowledge receipt and deal with requests in a timely manner. The establishment of rural offices/repositories to receive and process the request may facilitate the timely disposal of FOI requests. Though the agency "may extend the thirty (30) day period by a further period of thirty (30) days, if there is reasonable cause to do so", without local access the time

consideration takes on real significance for the operation and validity of the objects of the programme.

VI. REVIEW AND APPEAL MECHANISMS

One of the greatest weaknesses of the proposed Jamaican Freedom of Information legislation is the right to review and appeal. As was discussed earlier, the Jamaican law provides for many categorical exceptions to access to information. This is coupled with an unconditional bar to meaningful appeals of these denials. The Jamaican recommendations relating to appeals grants an applicant, against whom an adverse decision has been issued, a right to challenge the decision, where the decision is:

(a) a refusal to give access to a document;
(b) a decision to give access to some; but not all, documents to which access is requested;
(c) a decision to defer access to a document;
(d) a decision to grant access to a document subject to the deletion of exempt or irrelevant matter;
(e) a decision to charge a fee for action taken or as to the amount of the fee.

A failure to give a decision is also grounds for appeal. Although this list of appealable issues appears to be quite inclusive, the Jamaican statute does not vest the appellate tribunal the independence or capacity to resolve the citizen complaints. For example, the proposed Jamaican law states that the tribunal "should have no power to overturn a decision that a document is exempt, or to nullify a certificate which declares that a document is exempt". Id. at (10)(15) (emphasis added). The tribunal contains the

capacity to overturn an exception to access decision that relate only to "documents revealing the Government's deliberative processes" and documents relating to environmental and wildlife preservation. Id.

Furthermore, the appellate tribunal may, when hearing an appeal, only make recommendations to the agency regarding the issuance of a certificate. The issuance of a certificate has the effect of making a document unavailable under the Act . Thus, regardless of the claimant's rights or the specific factual circumstances, the appellate court only has the jurisdiction to make recommendations on revocation of the certificate, they can not force the agency to do so or independently overturn the agency's decision. Id. at (10)(16).

In the United States FOIA, the appropriate Federal District Court has the jurisdiction to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions, . . . and the burden is on the agency to sustain its action." 5 U.S.C. 552(4)(B). If the agency is determined to have erroneously denied access to the records, the appellant has the right to request reimbursement of their costs and attorneys fees from the agency.

Across the board, the Freedom of Information the Acts we reviewed provide for internal and, to varying degrees, independent review of decisions made by an agency or Ministry on access requests. The onus of proof is generally on the Ministry or prescribed authority to show that an adverse decision, denying access, is warranted. It is mandatory

that the reasons for denial are provided and there are time limits for the agency to inform the applicant of the denial. However, the fact that the burden of proof lies with the agency and that adverse notices must be in writing is meaningless if the judiciary is not provided the tools to make independent and binding decisions.

The right to a meaningful appeal is necessary to ensure that the right to access is protected and not abused. This should include the authority for the tribunal to reverse the decision of a Minister or agency, particularly as to whether a documents warrants the "exception" to access label.

VII. RECOMMENDATIONS

1. As the reasons for this law serve to provide a link between its purpose and those fundamental democratic principles of accountability, openness, and public participation, strengthens the application of the law, and serves as a guide to decision makers, the objectives should be included in the body of the Act.
2. Access to government documents increases public participation, improves government accountability for all interested persons, and enhances the public's confidence in the government. Therefore, the right to access of documents should:
    (a) be extended to all "members of the public", as in Belize law, and not solely Jamaican citizens and permanent residents;
    (b) apply to agencies and bodies of information through which existing legislation already provides access;

(c) impose specific obligations on appropriate Ministries and providers of public services to describe the operations of government in such a way as to effectively guide the public concerning the likely location of documents/information he may wish to access.

3. One of the fundamental objectives of the proposed Jamaican Freedom of Information Act is openness of government. To achieve that goal, limits on the documents that are available should be minimal and closely tied to a legitimate state purpose. Therefore,

(a) Documents over seven years old should not be exempt and should fall within the purview of the law.

(b) "The danger of affecting the government's ability to manage the economy" should not be grounds for exemption from disclosure, except in specific matters of taxation, interest rate, or exchange manipulation where it is unmistakable that prior disclosure would harm the national economy.

(c) The law should not empower an agency to refuse to confirm or to deny the existence of a document exempted from disclosure.

(d) The factual content of a deliberative process exempted from disclosure (e.g. Cabinet documents) should be accessible to the public.

(e) Oral applications for access should be permitted as long as the request is reduced to written form as soon as practicable.

4. The review and appeal mechanisms should be so designed as to maximise public usage, secure their independence of government oversight, and allow for reversal of agency decisions.

5.1 Chart: Comparison of Freedom of Information Act Documents

BASES FOR ANALYSIS	JAMAICA	AUSTRALIA	BELIZE	CANADA
REFUSAL, DEFERMENT OF REQUESTS AND EXEMPT DOCUMENTS	**RE: REFUSAL** **Clause 5** (1) Right to refuse access when despite the combined efforts of the applicant and the agency concerned, the document to which access is desired is so inadequately described that it cannot be identified by the agency. Request is too broadly expressed for documents of a particular class or particular topic, that finding the materials would unreasonably interfere with the agency's operations. **RE: DEFERMENT** **Clause 5** (3) Agency may defer (a) If publication of the document within a particular period is required, until that period has expired. (b) Document was prepared for presentation to Parliament (c) If premature release would harm the public interest (d) If the document is of such public interest that its first release should be in Parliament There should be a right in such cases to defer access and a concomitant duty to inform applicant of reasons for the decision to defer and of the period of operation of the deferment. **RE: EXEMPTIONS** **Clause 3** (4) The following documents should be exempt from disclosure: (a) Documents which could reasonably be expected to prejudice Jamaica's security, defense, or international relations; (b) documents communicated in confidence to the Jamaica government by or behalf of the Government of another country or by an international organization; (c) cabinet documents (d) documents relating to law	**RE: REFUSAL** **Section 24** (1) Agency or Minister may refuse access when work involved in processing request would substantially and unreasonably interfere with the performance of operations and functions (5) It is apparent from the nature of the request that all of the documents are exempt documents The agency or Minister may refuse to grant access to the documents in accordance with the request without having caused those processes to be undertaken. (6) an agency or Minister shall not refuse to grant access to a document in accordance with a request (a) on the ground that the request does not comply with sub-section 15(2)(b)[re: request to provide such information concerning the document as is reasonably necessary to enable a responsible office of he agency or the Minister to identify the document]; or (b) in accordance with subsection 1[above] without first giving the applicant a reasonable opportunity of consultation with a view to making of the request in a form that would remove the ground for refusal. **Section 26** (1) Where access is refused in accordance with the provisions of the Act, in relation to a request, the agency or Minister concerned shall cause the applicant to be given notice in writing of the decision, and the notice shall – (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and (c) give to the applicant appropriate information concerning his rights with respect to review of the decision and the procedure for the exercise of	**RE: REFUSAL** **Section 12** (3) provides that where a request is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject matter, compliance with the request may be refused if it would interfere unreasonably with the operations of the Ministry or prescribed authority, having regard to any difficulty that would exist in identifying, locating or collating documents containing relevant information within the filing system of the Ministry or prescribed authority. No refusal of a request for access duly made, - and based on the ground that the request does not provide sufficient information concerning the document or that compliance with the request of a certain document (s12.3) would interfere unreasonably with the operations of the Ministry or prescribed authority, as the case may be (5) Shall be made without first giving the applicant a reasonable opportunity of consultation with the Ministry or prescribed authority with a view to making the request in a form that would remove the ground for refusal **Section 21** (1) provides that where, in relation to a request for access, a decision is made by the relevant authority that the applicant is not entitled to access to the document in accordance with the request or that provision of access to the document be deferred, the said authority shall give to the applicant written notice of its decision, which notice shall: (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and the reasons for the decision; (b) where the decision related to a document of any Ministry or prescribed authority, state the name and designation of the person giving the decision; and	**RE: REFUSAL** **Section 10** Access of Information Act (ATIA) provides that (1) where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under *Section 7*, (a) that the record does not exist or, (b) the specific provision of the act on which the refusal was based or where the head of the nstitution does not indicate whether a record exists, the provision on which such a refusal could reasonably be expected to be based if the record existed. Notice should state that the requester has a right to make a complaint to the Information Commissioner about the refusal. (2) Existence of a record not required to be disclosed (3) Where the head of a government institution fails to give access to a record requested under this Act or a part thereof, within the time limit set out in the Act, the head of the institution shall be deemed to have refused to give access **Section 26** permits refusal of access under the Act where there are reasonable grounds to believe that the material in the record or part thereof will be published by a government institution, agent of the government of Canada, or Minister of the Crown, within 90 days after the request is made or within such further period of time as may be necessary for printing or translation the material for the purpose of printing it.

5.1 Chart: Comparison of Freedom of Information Act Documents

BASES FOR ANALYSIS	JAMAICA	AUSTRALIA	BELIZE	CANADA
REFUSAL, DEFERMENT OF REQUESTS AND EXEMPT DOCUMENTS ....cont'd	enforcement that could reasonably be expected to endanger life or prejudice the case; (e) documents revealing the Government's deliberative processes; (f) documents which: i. would have legal privilege ii. basis of action for breach of confidence (g) documents that disclose trade secrets or information of commercial business value; (h) documents that could reasonably be expected to damage or interfere with the environment or historical preservation; (i) documents which would disclose information relating to personal affairs of any person, but balance against public interest (j) documents which could reasonably be expected to have a substantial adverse effect on the ability of the Government to manage the Jamaican economy. Note: The Minister makes determination regarding exempt status.	those rights, including the manner in which an application for a review under section 54 may be made. **RE: DEFERMENT** **Section 21** (1) an agency or Minister may defer the provision of access to the document concerned (a) if the publication of the document concerned is required by law – until the expiration of the period within which the document is required to be published (b) if the document concerned has been prepared for presentation to Parliament or for a particular person or body or with the intention that it should be so made available – until the expiration of a reasonable period after its preparation for it to be so presented or made available: (c) if the premature release of the document concerned would be contrary to the public interest until no longer contrary to the public interests, or (d) if a Minister considers that the document concerned is of such general public interest that the Parliament should be informed of the contents of the document before the document is otherwise made public – until the expiration of 5 sitting days of either House of the Parliament. Note: s.55(1) re: Administrative Appeals tribunal review does not apply to denials of 21(1)(d) Further where the provision of access is deferred in accordance with ss.1 above the Minister or agency is mandated to, in informing the applicant of the reasons for the decision, indicate as far as is practicable, the period for which the deferment will operate. **RE: EXEMPTIONS** **Section 33** (1) a document is exempt from disclosure if would or could reasonably be expected to cause damage to security, defence or ionternational relations	(c) inform the applicant of his right to apply for a review of the decision. There is no requirement to include in such notice any matter which is of such a nature that its inclusion in a document would cause that document to be an exempt document. **RE: DEFERMENT** **Section 18** (1) A Ministry or prescribed authority which receives a request may defer the provision of access to the document concerned until the happening of a particular event (including the taking of some action required by law or some administrative action), or until the expiration of a specified time, where it is reasonable to do so in the public interest or having regard to normal and proper administrative practices. (2) Where the provision of access is deferred in accordance with sub-section 1, the Ministry or prescribed authority shall, in informing the applicant of the reasons for the decision, indicate, as far as practicable, the period for which the deferment will operate. **TRANSFER OF REQUEST** **Section 13** Provides for requests to be transferred where the request is made to a Ministry or prescribed authority for access to a document and the document is not in he possession of that Ministry or prescribed authority but is in the possession of another Ministry or prescribed authority or the subject matter of the document is more closely connected with the functions of another Ministry or prescribed authority than with those of the Ministry or prescribed authority to which the request is made, the Ministry to which the transfer is made may transfer the request to the other Ministry or prescribed authority and inform the person making the request accordingly and, if it is necessary to do so in order to enable the other Ministry or pres. authority to deal with the request, send the document to the other Ministry or prescribed authority. (Note, the power/duty conferred by this	**RE: EXEMPTIONS** The head of a government institution may refuse to disclose: (13) information obtained in confidence from domestic and international government (14) information which could reasonably be expected to be injurious to Canada (15)information which could reasonably be expected to be injurious to international affairs (16) information of government institutions regarding law enforcement, crime and investigations (17) any record which could reasonably be expected to threaten the safety of individuals (18) any record that contains trade secrets or financial, commercial, scientific or technical information that belongs to the government and is reasonably likely to have substantial value; information reasonably expected to be materially injurious to the financial interests of the Government of Canada (19) any record that contains personal information as defined in section 3 of the Privacy Act (20) (1) any record that contains trade secrets of a third party; confidential information of the government of a third party; information of which the disclosure could be reasonably expected to interfere with negotiations of a third party (2) a record that contains the results of product or environmental testing carried out by or on behalf of a government institution. (21) any record under this Act that contains: (a) recommendations developed for a gov. institution, (b) account of consultations involving officers of gov., (c) plans for negotiations for behalf of the Government of Canada,

5.1 Chart: Comparison of Freedom of Information Act Documents

BASES FOR ANALYSIS	JAMAICA	AUSTRALIA	BELIZE	CANADA
REFUSAL, DEFERMENT OF REQUESTS AND EXEMPT DOCUMENTS . . . cont'd		(A)(1) document is exempt from disclosure if would or could reasonably be expected to cause damage to relations between Commonwealth and State **Section 34** – Cabinet documents **Section 35** – Executive council documents **Section 36** – Internal working documents exempt for period of time **Section 37** – documents affecting enforcement of law and protection of public safety **Section 38** – documents to which secrecy provisions apply **Section 39** – documents affecting financial or property interests **Section 40** – documents re: certain operations of agencies **Section 41** – documents affecting personal property **Section 42** – document with legal privilege **Section 43** – documents relating to business affairs and research - ie trade secrets **Section 44** – documents if would or could reasonably be expected to affect national economy **Section 45** – documents containing material obtained in confidence **Section 46** – documents disclosure of which would be contempt of Parliament or court **Section 47** – certain documents arising out of companies and securities legislation **Section 47A** – electoral rolls	provision upon the Ministry/authority is discretionary, not mandatory) **Section 13(2)** Where the request is so transferred in accordance with the above it shall be deemed to be a request made to that Ministry or pres. Authority and received at the time at which it was originally received.	if the record came into existence 20 years prior to the request. (22) any record continuing information relating to testing or auditing procedures or techniques fi the disclosure would prejudice the use or results of particular tests. (23) contains information that is subject to solicitor-client privilege.
DELETION OF EXEMPT OR IRRELEVANT MATERIAL	**Clause 6** (1) Agency has power to delete exempt or irrelevant material to a document to which access is sought and grant access to a copy of the document subject to the deletions (2) This should be done only when the applicant desires access even with the deletions or exemptions (3) Applicant should be aware of the existence of the power to make deletions or exemptions. (4) Agency must consider in deciding whether to exercise deletion/exemption power, whether it would be practicable to do so and consider the extent of the work in deciding which deletions should be made (5) When agency grants access to a copy of document in which exempt or irrelevant	**Section 22** (1) Where- (a) a decision is made not to grant a request for access to a document on the ground that it is an exempt document; (b) it is possible for the agency or Minister to make a copy of the document with such deletions that the copy of the document would not be an exempt document and would not, by reason of the deletions, be misleading; and (c) it is reasonably practicable for the agency or Minister to make such a copy, the agency or Minister shall, unless it is apparent from the request or as a result of consultation by the agency or Minister with the applicant, that the applicant would not wish to have access to such a copy, make and grant access to, such a copy.	**Section 19** Permits that where (a) decision is made not to grant a request for access to a document on the ground that it is an exempt document; b) it is practicable for the Ministry or prescribed authority to grant access to a copy of the document with such deletions as to make the copy not an exempt document; and ((c) it appears form the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy, the Ministry or P.A. shall grant access to such a copy of the document. Where access is granted as above the applicant is to be informed that it is such a copy and be informed also of the provisions of the Act by virtue of which any matter deleted is exempt	**Section 25** Notwithstanding any other provision of the Act, where request is made to a government institution for access to a record, that the head of the institution is authorized to refuse to disclose under the Act by reason of information or other material contained in the record. The head of the institution shall disclose any part of the record that does not contain and can reasonably be severed from any part that contains any such information or material. Note: deletion of exempt information does not constitute refusal

5.1 Chart: Comparison of Freedom of Information Act Documents

BASES FOR ANALYSIS	JAMAICA	AUSTRALIA	BELIZE	CANADA
DELETION OF EXEMPT OR IRRELEVANT MATERIAL ....cont'd	manner was deleted, agency must inform the applicant that it is so	(2) Where access is granted to a copy of a document in accordance with subsection 1- (a) the applicant shall be informed that it is such a copy and also informed of the provision of this Act by virtue of which any matter deleted is exempt matter; and (b) section 26 [that reasons and other particulars of decisions be given] does not apply to the decision that the applicant is not entitled to access to the whole document unless the applicant requests the agency or Minister to furnish him a notice in writing in accordance with that section. **Section 23** provides that decisions affecting matters at section 22 be made by authorized persons.	matter. **Section 21** Requires that reasons be given by notice where the decision taken is that the applicant is not entitled to access to the whole of the document unless the applicant requests the Ministry or P.A. to furnish him with a notice in writing in accordance with that section....do not apply here. (See section 19.2.b). All decisions to be made only by authorized persons as outlined in section 20.	
FORMS OF ACCESS	**Clause 7** Recognizing that documents in the broad sense applied above may exist in a variety of forms. The Act permits the grant of access not only by inspection or provision of copies of documents but in other ways suited to the various forms in which documents may exist. Re: specific form in which access should be granted, the wishes of the applicant should be paramount. This general rule to be qualified however, by giving agencies the discretion in certain circumstances as the form in which access should be given. Example: where the form requested by an applicant would unreasonably interfere with the agency's operations; where the physical integrity of the document would be at risk; and where copyright would be infringed.	**Section 20** Access to a document may be given to a person in one or more forms including copies, video or sound, depending on the document. Applicant should have reasonable opportunity to inspect the document Where the applicant has requested access in a particular form, access shall be given in that form unless would unreasonably interfere with agency, detrimental to preservation of document, or infringe copyright. This is subject to the sections re: deletion of exempt matter. In this case and subject to section17.1.[re. Requests involving use of computers] where access is refused in the form of the applicant's request, the applicant is not required to pay a charge for access to the document greater than the charge he would have been required to pay if access had been given in the form requested.	**Section 17** Access to a document may be given to a person in one or more of the following forms (a) a reasonable opportunity to inspect the document; (b) provision by the Ministry or P.A. of a copy of the document; (c) in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, the making of arrangements for the person to hear or view those sounds or visual images; (d) in the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the in the form of shorthand writing or in a codified form, provision by the Ministry or P. A. of a written transcript of the words recorded or contained in the document. Where the applicant has requested access in a particular form, access shall be given in that form. If the form of access requested by the applicant (a) would interfere unreasonably with the operations of the Ministry or P.A;	**Section 12** A person who is given access to a record shall, subject to the regulations, be given an opportunity to examine the record or part thereof or be given a copy thereof. Where the person requests that access be given in a particular official language, a copy of the record or part thereof shall be given in that language (a) forthwith if the record or part thereof already exists under the control of the government institution in that language; or (b) within a reasonable period of time, if the head of the said institution that has control of the record considers it to be in the public interest to cause a translation to be prepared. Where access is given, and the person to whom the access is to be given has a sensory disability and requests that access be given in an alternative format, a copy of the record or part thereof shall be given to the person in an alternative format. (a) Forthwith if the record... already exists under the control of a government

5.1 Chart: Comparison of Freedom of Information Act Documents

BASES FOR ANALYSIS FORMS OF ACCESS . . . cont'd	JAMAICA	AUSTRALIA	BELIZE	CANADA
			(b) would be detrimental to the preservation of the document or, having regard to the physical nature of the document, would not be appropriate; or (c) would involve an infringement of copyright (other than copyright owned by the Government) subsisting in the document, access in that form may be refused and access given in another form.	institution in an alternative format that is acceptable to that person; or (b) a reasonable period of time if the head of the institution that has control of the record considers giving access in an alternative format to be necessary to enable the person to exercise their right of access under this Act and considers it reasonable to cause that record or part thereof to be converted.
AMENDMENT, ANNOTATION OF PERSONAL RECORDS	**Clause 8** (1) Persons whose personal records are maintained for the government's administrative purposes are given a right to ensure that information contained in those records are correct, complete, up to date, and are not misleading. (2) Such persons have the right to have such records appropriately amended or annotated on application, clearly indicating the basis for such action and the matters which require such amendment/annotation. (3) agency empowered to amend personal records if satisfied that will not be misleading (4) if agency does not amend, may allow applicant to attach a statement to the record (8) Agencies should not be obliged to make additions of irrelevant, defamatory or unnecessarily prolix	**Part V sections 48 – 51** deal with the issue of amendment of personal records. **Section 48** provides that where a person (claimant) who is an Australian citizen, or whose continued presence in Australia is not subject to any limitation as to time imposed by law, claims that a document contains information relating to his personal affairs – (a) that is incomplete, incorrect, out of date or misleading; and (b) that has been used, is being used or is available for use by the agency or Minister for an administrative purpose he may request the agency or Minister to amend the record **Section 49** application for amendment (a) in writing (b) shall specify record to be amended and reason (c) include an address in Australia to which a notice may be sent to the claimant; and (d) be sent by post or delivered to the agency or Minister	No specific provisions re: amendment or annotation of personal records.	No specific provisions re: amendment or annotation of personal records.
FEES AND CHARGES	**Clause 9** (1) Application fee should be chargeable on application for access to documents under the Act. Fees would offset the expenses of the agency in providing access. (2) Provision to be made for an agency to waive remit or reduce the application fee where its payment or its payment of its full amount would cause hardship to	**Section 29** There will be no application charge If it determined that the applicant must pay a charge, the agency must provide written notice saying liable for charge, preliminary assessment of amount, amount of deposit, what the charges are for and that must pay within 30 days Agency can not charge for the request	**Section 47** The Minister may make regulations not inconsistent with this Act such as those with regards to fees and charges. All regulations made under this Act shall be laid before the National Assembly in a timely manner.	**Section 11** The requester is required to pay: (a) at the time the request is made such application fee, not exceeding $25. (b) Before copies are made such fee as may be prescribed by regulation reflecting cost of reproduction calculated in the manner prescribed by

5.1 Chart: Comparison of Freedom of Information Act Documents

BASES FOR ANALYSIS	JAMAICA	AUSTRALIA	BELIZE	CANADA
FEES AND CHARGES . . .cont'd	the applicant and in other special circumstances, Power to waive to be given to Minister (3) Applicants should be required however to bear any reproduction costs involved in the grant of access.	Applicant may request reduced rate or charge Has appeal rights		regulation and reflecting the cost of the medium which the format or alternative format is produced. Additional fees may be charged for time spent in searching for record (for every hour in excess of five hours). Where record is produced from a machine-readable record, the head of the institution may require payment of an amount. Deposits in respect of the requests are permitted. Where a requester is required to pay an amount under this act, the head of the institution shall: (a) give written notice to the person of the amount required; and (b) state in the notice that the person has a right to make a complaint to the Information Commissioner about the amount required. Fees may be waived per subsection 11-6 by the head of a government institution
REVIEW AND APPEAL MECHANISMS	**Clause 10** Applicant to be given right to challenge a decision adverse to him and when deadline has passed and agency has failed to respond to request Two methods of challenge: (4) right to internal review by Minister, Permanent Secretary or Principal Officer of the Agency, where decision was made by some other person. Application to be written and filed within a specific period (15) where internal review procedure is not available or if available, has already been utilised. This would involve an appeal to a tribunal established for the purpose. Act to prescribe time for instituting such an appeal, such appeal to be held in camera, in ceratain circumstances to be specifically identified. On any such appeal, onus to be on agency which made the decision appealed against to justify said decision or to justify a decision by the appellant tribunal adverse to the	**Section 54** Provisions for internal review are only applicable to decisions made in relation to a request to an agency and by one other than the responsible Minister or Principal Officer of the Agency. Such a decision must relate to the provision of access to a document subject of the request or fees payable in respect of that request The applicant has 28 days after the day on which that decision is notified to him, or within such further period as allowed by the principal officer of the agency, to request review **Section 55** May appeal to Administrative Appeals Tribunal for review of: (a) decision refusing access or deferring the provision of access; (b) a decision to defer (d) a decision re: charges payable. An applicant may apply to the tribunal against a delayed decision. An applicant may also apply to the Ombudsman as described in section 57. **Section 58**		The Act establishes the office of Information Commissioner (I.C.), to which power is given to review decisions made in respect of requests for access to records. **Section 30** The powers of the Commissioner include receiving and investigating complaints **Section 30(3)** the I.C. may initiate complaints. (see s 29-38 re Information Commissioner) **Section 34** The I.C. may determine the procedure to be followed in any of his duties or functions under the Act **Section 35** Note: every investigation of a complaint under the act by the Information Commissioner is conducted in private **Section 41** Anyone who has been refused access to a

5.1 Chart: Comparison of Freedom of Information Act Documents

BASES FOR ANALYSIS	JAMAICA	AUSTRALIA	BELIZE	CANADA
REVIEW AND APPEAL MECHANISMS .....cont'd	appellant. Proposed limitation on powers of appellant tribunal include (15) no power to overturn an original decision by removing the exempt status of a document; or nullify a certificate declaring a document to be exempt; or a certificate declaring where a document is exempt that the public interest does not require its disclosure, except in the case of exemption of documents revealing Government deliberations or historical/environmental preservation (16) appellate tribunal may consider grounds for appeal but limited to recommendations to the agency, can not compel the agency to reverse decision, but should be given due weight (17) power of the tribunal to be limited to calling for the exempt document, treating it with strictest confidentiality and to recommend only as opposed to ordering that the certificate referred to be revoked.	The tribunal can not reverse a decision re: exempt status. The Tribunal can determine whether a document, which is claimed exempt, under sections 33,33A,34,35, or 36 is correct. **Section 61** The agency or Minister to which or to whom the request was made has the onus of establishing that a decision given in respect of the request was justified or The Tribunal should give a decision adverse to the applicant.		record under the Act may if a complaint has been made to the I.C. in respect of the refusal, apply to the Court for a review of the matter within 45 days of the result of an investigation of the complaint by the I.C. are reported to the complainant, under s 37-2; or within such further time as the Court may fix or allow. **Section 48** Review is only available where there is actual or deemed refusal of access continuing at the time of the hearing. The party opposing disclosure, the government, bears the burden of showing that clear grounds exist to exempting the documents in issue The District Court may reverse

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