ARTHUR LOK JACK
GLOBAL SCHOOL OF BUSINESS

MODULE 5

BOARD DISCLOSURE & TRANSPARENCY

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WHISTLEBLOWING – WHAT'S YOUR ROLE?

A WHISTLEBLOWER PROTOCOL FOR COMPANIES – PREPARATION AND IMPLEMENTATION

A. **<u>Overview</u>**

1. There is now legislation in Trinidad and Tobago which encourages whistleblowing and protects the whistleblower.

2. Whistleblowing is defined as:-

   "The reporting by employees or former employees of illegal, irregular, dangerous and unethical practices by employers" [1]

3. Whistleblowers, because they expose illegal or fraudulent practices in the workplace, are required to be protected because the fear of reprisal from the employer or persons exposed is a powerful deterrent to whistleblowing.

4. Accordingly, it is absolutely necessary for the State to intervene to protect genuine whistleblowers from threats to their personal safety, reprisals, harassment in the workplace and victimisation; moreover, employers are also required to be protected from malicious reports so that a proper balance must be achieved to ensure that reports are *bona fide* while providing the necessary comfort to the whistleblower that his anonymity will be protected and that he is insulated from reprisals. This is in the context that from a governance point of view, genuine whistleblowing should be encouraged and facilitated in the workplace in an effort to reduce corruption.

5. In Trinidad and Tobago there is already protection given to whistleblowers:-

   (1) <u>Article 33 of the United Nations Convention against Corruption (2004)</u> (of which Trinidad and Tobago is a signatory) requires us to incorporate into our municipal law *appropriate measures to protect against any unjustified*

[1] Definition of the International Labour Organisation (ILO) (2005)

treatment for any person who reports in good faith and on reasonable grounds…any facts concerning [corruption]".

(2) In 2010, consistent with our international obligation to protect whistleblowers, a new section 42A was inserted into the Integrity in Public Life Act Chapter 22:01 by which employees of the state or a public authority shall not be *dismissed, suspended, demoted, disciplined, harassed, denied a benefit or otherwise negatively affected because, in good faith and on the basis of reasonable belief, he has notified the Integrity Commission that his employer or other person has contravened the Integrity in Public Life Act.*

(3) Significantly, section 42A protects whistleblowers but only in relation to unlawful activities of persons in *public life* which includes state directors, members of the House of Representatives, senators, judges and permanent secretaries; and

(4) Section 40 of the Public Procurement and Disposal of Public Property Act (No. 1/2015) ("*the PPDPA*") protects whistleblowers who report unlawful procurement activities to the DPP, Police, Integrity Commission or the Procurement Regulator; on 29th July 2015 various sections of the PPDPA were proclaimed but not section 40; on 17th June 2016 the PPDPA was amended principally to provide for the establishment of a Public Procurement Review Board to review decisions of the Procurement Regulator. The PPDPA however, while welcomed, only protects persons who have reported prohibited conduct in relation to procurement; it does not have a wider application; moreover, section 40 remains unproclaimed.

6. On 09th December 2014 Professor of Employer Law David Lewis (who is a world renowned expert in whistleblowing legislation) in a local address noted:-

> *"It seems clear to me that one of the main reasons corruption is so prevalent in Trinidad and Tobago is that there is no political will to take effective action to combat it.*
>
> *Procurement and general integrity statutes have been approved by Parliament but there is no effective whistleblowing legislation. Since Trinidad is no longer regarded as an under-developed nation, in my opinion, there is no good reason for it to lag behind Jamaica in respect of whistleblowing measures".*

7. Professor Lewis' complaint underscored a later complaint made on 09th February 2015 by the President of the Trinidad and Tobago Transparency Institute Mr. Deryck Murray [2]:-

> "*Where that usually falls down is at the point where you are going to pass it on to the investigative body and the individual says, 'I don't think I want my name to go forward, I am not prepared to go further.' So we have the information (about corruption), but then we can't go to the next step*."

8. It is significant that following these complaints, the provisions for the appointment of the Procurement Regulator were proclaimed and there were utterances by the then Prime Minister which suggested that section 40 of the PPDPA would be proclaimed.

9. The optimism thereby engendered is tempered only by the fact that section 42A of the Integrity in Public Life Act Chapter 22:01 which protects whistleblowers who report illegal activities of persons in public life has been in force for over six (6) years but has not led to a single reported prosecution for criminal conduct.

10. Happily, we now have the Whistleblower Protection Bill[3] whose *mischief* is to combat corruption by creating an environment that will facilitate *bona fide* disclosure of improper conduct in both the public and private sectors and will protect whistleblowers from reprisals. The Bill has not yet been proclaimed nor has the regulations, which underpins its operations, been received for public comment.

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[2] As reported in the Express Newspaper of 10th February 2015
[3] *Gazetted* on 26th November 2015

B. **The Whistleblower Protection Bill**

11. There are significant features of the Bill which must be highlighted from the point of preparing and implementing a Whistleblower Protocol ("*WP*"):-

    (i) the Bill applies to disclosures made after the legislation comes into force; it has not yet been proclaimed but when it is, it will not have retroactive force, that is to say, it will only relate to disclosures made after proclamation. Significantly, however, these disclosures may relate to unlawful conduct which occurred prior to proclamation and there is no limitation period in respect of the *impugned* conduct. This means that the day after the Bill is proclaimed, an employee is entitled to make a protected disclosure complaining of the improper conduct of his employer or anyone within the organisation notwithstanding that the *impugned* conduct occurred ten (10) or even fifteen (15) or twenty (20) years ago.

    (ii) The Bill applies to both the private and public sector; in relation to the public sector it duplicates much of section 40 of the PPDPA but is wider in that it relates not just to procurement; unlike section 42A of the Integrity in Public Life Act, however, it also includes improper conduct of persons who are not in public life. Indeed, by clause 5, the Bill binds the State; moreover, the requirements of the Bill are mandatory and an employer cannot contract out of or delegate its responsibilities under the Bill.

    (iii) The Bill provides for two (2) categories of reporting. The first is in relation to reports of improper conduct in relation to ordinary employers. The second is in the relation to reports of improper conduct made to any of the sixteen (16) designated authorities identified in the schedule to the Bill which includes the Board of Inland Revenue, the Central Bank of Trinidad and Tobago, the Police, the Auditor General, the Children's Authority, the Customs and Excise Division, the Environmental Management Authority, the Integrity Commission, the Director of Public Prosecution, the Procurement Regulator and the Elections and Boundaries Commission.

(iv) In relation to ordinary employers, what triggers action is a report or a disclosure of improper conduct to the employer's Whistleblowing Reporting Officer ("*WRO*") who is responsible for receiving and processing internal disclosures of improper conduct; the WRO is also responsible for determining whether an internal disclosure should be referred for further investigation to a designated authority through its Whistleblowing Reports Unit ("*WRU*").

(v) The effect therefore is that for ordinary employers, they are required to retain only a WRO; for each of the sixteen (16) designated authorities however, they are required to establish a WRU staffed by a director and WROs; significantly, what is contemplated in the Bill is that these WRUs, particularly those established by the Police, the Director of Public Prosecutions, the Board of Inland Revenue and the Procurement Regulator, will speak to and liaise with each other through a series of linkages that are both formal and informal with code sharing and sharing of information.

(vi) Moreover, the WROs of individual employers are authorised to report improper conduct to any of these WRUs so that, for instance, if a WRO of a construction company receives a disclosure of improper conduct by its directors in obtaining certification from the EMA, the WRO is statutorily required, once he is satisfied about the *bona fides* and reasonableness of the complaint, to refer it to the EMA's WRU for investigation; and

(vii) Clauses 16, 17 and 18 of the Bill protect the whistleblower giving him immunity from criminal, civil and disciplinary action although this immunity will not apply if the whistleblower was the perpetrator of, or an accomplice to the improper conduct complained about; moreover, clause 19 protects the anonymity of the whistleblower and clause 20 provides for civil remedies by an employee challenging *detrimental action* taken against him as a result of his complaint.

C. **The Principal Elements of a Whistleblowing Protocol**

12. By clause 10(1) of the Bill an employer is required to retain a WRO and by clause 11(3) an employer is required not only to devise a WP but also to publish its contents and to sensitise its employees to its whistleblowing policies and for these purposes there are two (2) types of WP's:-

    (i) those designed for ordinary employers; and

    (ii) those designed for the sixteen (16) designated authorities which are required to establish WRUs.

13. This paper deals principally with the WP's for ordinary employers and not those for designated authorities and for these purposes the following represents the principal elements of any WP for an ordinary employer:-

    (i) the documentation of the employer's internal procedures for receiving and processing disclosures in a document to be styled *XYZ Ltd's Whistleblower's Protocol* which will be freely available to and accessible by employees and members of the public from the employer's website and in hard copy format from its WRO;

    (ii) the establishment of a Whistleblowing Unit ("*WU*") comprising one (1) or more WRO's in a secure and self-contained office or department with its own secured computer network, filing cabinets, word processing facilities and interview rooms; the WP will be available at the WU;

    (iii) the provision of standard forms and notices by which a disclosure is made by an employee to the WRO and a system for notices to be issued to the whistleblower notifying him of the status of the disclosure; these standard forms should be kept at the WU and a system of appointments can be devised for the WRO to update the whistleblower in an interview room on the status of the disclosure;

(iv) prescribing the conditions by which the WRO, if he is of the view that the improper conduct constitutes a criminal offence or breach of the law, to refer the disclosure to a WRU of a designated authority for investigation while protecting the identity of the whistleblower;

(v) to create and maintain a repository of disclosures in a log which can be reconciled on a date/time/numerical sequencing order and matched to an accompanying secured file in which all documents relating to the disclosure are maintained under lock and key kept by the WRO; this repository and the maintenance of records will permit statistical reporting by the WRO in an annual report sent to the employer's CEO and board of directors highlighting all protected disclosures and the status of the complaint;

(vi) in respect of the sixteen (16) designated authorities they are each required to have a WRU headed by a director with WRO's to staff it; it is contemplated that the director should be a senior operational officer perhaps at the same level as a legal or compliance officer and this position may be facilitated by the same person.

(vii) This therefore means, with the designated authorities, that they are required, prior to the proclamation of the Act, to establish, retain and maintain:-

(a) a whistleblowing protocol

(b) a WRU;

(c) a director of the WRU with an appropriate job description;

(d) a WRO with an appropriate job description; and

(e) a system of reporting by the director to the employer's board of directors as to the status of disclosures.

(viii) in preparing a *draft* WP, from an operational and reporting point of view, it is necessary for the employer's organisational structure to be reviewed to identify where precisely the director and WRO will be placed; it may be

feasible for the reporting to be directly to the Corporate Secretary or Legal Advisor (assuming that the director is not in fact either of these persons); the WRO may be regarded as of the same authority and standing as a regulatory and compliance officer;

(ix) the WP must expressly recite the protection given to an employee by clause 16 which prohibits an employer from taking *detrimental action* against a whistleblower who has made a protected disclosure; the latter is a disclosure which is *bona fide* and reasonable and by clause 17 there is immunity from criminal, civil and disciplinary proceedings. The expression *detrimental action* is defined at clause 3 (the definition section) as including disciplinary action, harassment, threats or intimidation; and

(x) the WP must also, in balancing the competing interests, warn employees about their liability in the event that they make disclosures which are speculative, defamatory or plainly false; this is the effect of clause 8 of the Bill and the WP must explain what is *legal professional privilege* (correspondence between attorneys in relation to a claim or complaint) and that disclosing such privileged correspondence or communication is not a protected disclosure; it should also state that by clause 9(3) of the Bill, a WRO or WRU is required to discard information from an anonymous disclosure which is likely to be defamatory.

D. <u>The Whistleblowing Protocol in the context of Corporate Governance</u>

14. Improper conduct is common in the workplace and is usually driven by variances between businesses and stakeholders' interests. A WP should be regarded not merely as a response to a statutory, compliance or regulatory requirement but as an integral part of the employer's corporate governance.

15. The WP is an effective tool since it provides a forum for an aggrieved employee to ventilate an issue which may well constitute improper conduct so that the employee is not driven to go to the police or to the press. This process therefore ensures that the employer can

minimise the potentially adverse consequences from public disclosure while demonstrating that it is a progressive and disciplined organisation by encouraging whistleblowing. Moreover, an effective WP has the potential to reduce losses and protect an employer's income and assets from immoral conduct as well as sensitising employees on the need to be vigilant to protect their employer from corrupt activity on the basis that a grateful employer will protect the identity of the whistleblower and insulate him from reprisal.

16. While the Bill has not yet been proclaimed and the regulations have not been tabled by the Minister of National Security, a prudent employer, in anticipation of its proclamation, will prepare the WP and make it part of the employees employment practices; it will also establish a WU's and generally sensitise its employees not only to the legislation but how it can work for the employee by protecting and insulating him from reprisals, victimisation and workplace harassment and, for the employer, by reducing the potential for corruption.

17. This means that chairs, directors, CEO's and senior officers including CFO's, corporate secretaries and legal advisors should prepare Notes to their boards of directors requesting that the whole issue of whistleblowing be placed on the agenda on the basis that a Whistleblower Protocol should be devised and implemented with the roll out of a Whistleblower Unit and the corresponding retention of a Whistleblowing Reporting Officer.

18. For these purposes the following should be highlighted in a *draft* but dedicated WP:-

(i) the provisions in the legislation are mandatory and applies to all employees not just State agencies and includes persons in *public life*;

(ii) the Act binds the State so all state agencies and, in particular, the sixteen (16) designated authorities are required to have WRU's established as at the date of proclamation of the Act;

(iii) physical plant must be allocated to the WU and directors of WRU's and WRO's must be assigned a place in the employer's organisational structure perhaps best as a unit of or part of the Legal Department or Finance

Department; moreover, its plant must be secured and insulated from the employer's other operations with its own room(s), IT and word processing facilities, filing cabinets, interview rooms and mail sorting;

(iv) the appointment of a dedicated WRO whose duties include (but are not limited to) the compliance and regulatory requirements of the Bill but whose temperament, experience and demeanour makes him approachable to (yet insulated from) the general workforce; the office clown or party boy is not your ideal candidate but, then again, the standoffish office manager is also unsuitable;

(v) the position of WRO may be regarded as commensurate with the *designated officer* who deals with requests under the Freedom of Information Act ("*FOIA*") but equally, the corporate secretary or legal advisor may be suitable; the secretary to the board is not an ideal candidate because he is regarded less as an operational officer than as a handmaiden of the board;

(vi) the publication of the WP in the employer's website and as part of its employment terms and conditions together with the standard forms/notices by which the disclosure is made; these forms/notices underscores the secrecy and confidentiality of the process (clause 22); moreover, by clause 11 not only the identity of the WRO but also the content of the WP is required to be published. In this context it is likely that all sixteen (16) designated authorities and some of the larger employers may elect to publicly disclose their WP in summary form in the national press as presently occurs with their FOIA protocols;

(vii) training to managers in dealing with whistleblowers notwithstanding the manager's own views about the merits and *bona fides* of the disclosure; this is because by clause 20(1) of the Bill, a whistleblower may apply to the court for protection if he feels he is targeted or the subject of reprisals and the likelihood is that an order for damages and costs will be made against

the employer rather than the individual manager/officer who took the detrimental action;

(viii) moreover, both the employer and the individual manager/officer are criminally liable if it/he intimidates or harasses or threatens or otherwise subjects the whistleblower to detrimental action and by clause 21(2), upon summary conviction, such a person may be liable to two (2) years imprisonment and a fine of $15,000.00; when the matter proceeds indictably in the Assizes, upon conviction on indictment, the term is ten (10) years and the fine is $50,000.00;

(ix) along with education and training (both to employees and managers), it is necessary to consider indemnity insurance coverage for the employer to insure against the prohibitive legal costs to defend claims brought by aggrieved whistleblowers. Further, an employer who breaches the strict secrecy requirements can be imprisoned for up to two (2) years and fined $600,000.00. This applies to an employer who knowingly damages, destroys or mutilates disclosure or supporting documents and it is for this reason that the employer must ensure the security of the Whistleblowing Unit; and

(x) the employee should review all of its employees' service or employment contracts to remove those secrecy or confidentiality provisions which conflicts with the Bill; this is the effect of clause 25 and, significantly, these provisions do not protect an employee or employer.

E. **Model Whistleblowing Protocols**

19. Several local organisations have prepared WP's but their protocols, so far, are not based on the provisions of the Bill and appear to have been a response for greater transparency and openness in relation to employee's complaints of corruption:-

(1) the Energy Chamber has a *draft* albeit generic WP on its website which was prepared on 11th October 2012 so that it does not take the Bill into account. Their WP relate to reports which are (like the Bill) delivered with *bona fides* and reasonableness (*"genuine concerns about malpractices")* and the employer is reminded to take steps to protect the whistleblower from victimisation and reprisals;

(2) the TCL Group on 03rd November 2008 published a Code of Ethics and Business Conduct which, at clause 6, deals with whistleblowing making it mandatory for employees to report violations of the law with a first report and, if that is ignored, a second report to the general manager; it also protects the whistleblower from reprisals but warns that malicious complaints may lead to disciplinary action against the employee; and

(3) TOSL Engineering Limited on 17th December 2014 published its Code of Business and Ethical Conduct which encourages whistleblowing to the employee's direct report or anonymously using a third party whistleblowing programme called *Report It (USA)*; it appears to operate very much like the Crime Stoppers programme locally as the services can be utilised by calling a hotline or using the company's website.

Conclusion

20. In reviewing the Bill it appears to achieve a balance between encouraging *bona fide* complaints of improper conduct and punishing whistleblowers who make speculative or malicious complaints.

21. The effectiveness of the system of reporting in the Bill, however, relies on the *bona fides* not only of the employee but also the WRO who receives the complaint on the basis that he is dispassionate and impartial; this is in the context that the complaint may be against the employer who pays the WRO's salary so that there is a potential for employers to retain WROs *purportedly* in compliance with the Bill but then starving the WROs of resources or autonomy so that they are unable to act dispassionately or impartially.

22. The Bill in its present form does not require the disclosure to be sent to an official agency so that there is no formal tracking process or any means, from a national statistical perspective, to discern trends including successful prosecutions. Further, in order to make the legislation meaningful, the government should sensitize the general public to the *mischief* of the Bill and the need for employers to devise and publish a Whistleblowing Protocol, establish a Whistleblowing Unit and retain a Whistleblowing Reporting Officer.

23. Accordingly, a progressive and diligent employer, in anticipation of the proclamation of the Bill, will also encourage employee feedback to improve the system of whistleblowing reporting and, through surveys, seminars, workshops and suggestion boxes, receive comments from its employees not only as part of the sensitization process but also to achieve *buy in* from the employees.

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