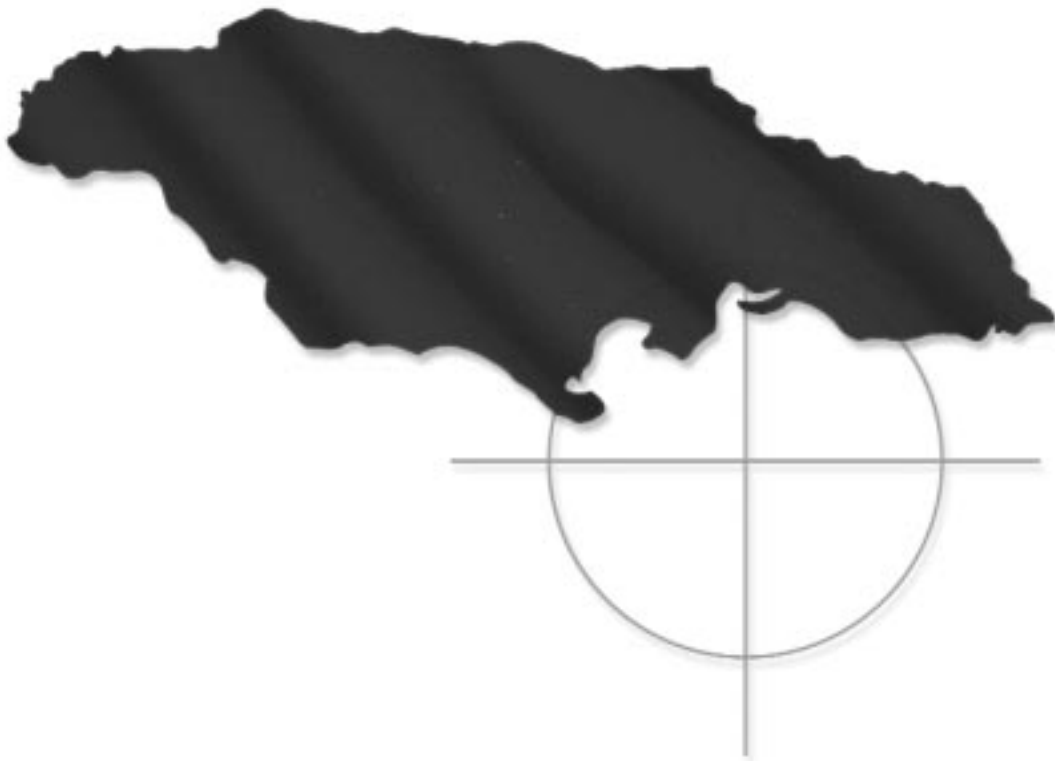


FOSTERING TRANSPARENCY AND PREVENTING CORRUPTION IN JAMAICA



Edited by Laura Neuman
The Carter Center

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FOREWORD

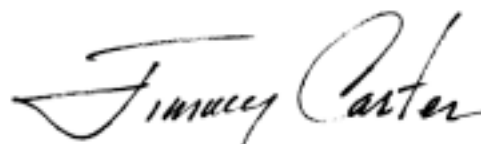
By Jimmy Carter

Times have changed. Public awareness about corruption and its corrosive effects has increased substantially since I signed into law the U.S. Foreign Corrupt Practices Act in 1977. Now many other countries are passing legislation to combat corruption and comply with international agreements such as the Organization of American States' Inter-American Convention Against Corruption.

Jamaica is leading the way with legislation that requires declaration of assets by Members of Parliament and civil servants, with the establishment of an anti-corruption commission, and with proposed legislation to provide citizens with access to information. When The Carter Center initiated a project to foster transparency in the Americas, Prime Minister P. J. Patterson, a member of our Council of Presidents and Prime Ministers of the Americas, was the first leader to step forward by inviting us to work with Jamaicans. We were also privileged to have the support of another Council member, the Hon. Edward Seaga, leader of the loyal opposition.

Two years ago, The Carter Center published *Combating Corruption in Jamaica, A Citizen's Guide*, in which leading Jamaican scholars and legal analysts described and critiqued emerging legislation. The Guide was an instant success, and we ran short of copies within weeks as legislation went to Parliamentary debate and citizens successfully rallied to persuade their representatives to improve the language of the text before passage. It was a stirring demonstration of how the democratic process should work and why Jamaica remains a vibrant polity.

This year The Carter Center has collaborated with experts from Canada, the United Kingdom, South Africa, and the United States as well as our Jamaican colleagues to bring forth an updated *Fostering Transparency and Preventing Corruption in Jamaica* Guide with all new material that can help inform Jamaican citizens about measures to increase transparency and ongoing efforts to reduce corruption in other countries. As in the past, The Carter Center will hold seminars and invite consultants to elaborate on the ideas presented in the Guide, such as the dilemma of the balance between privacy and access to information and the effective role of anti-corruption commissions. Our hope is to stimulate public debate and enable Jamaicans to make informed decisions about how best to proceed in their ongoing efforts to increase transparency. With civil society, the private sector, and government cooperating toward a common goal, I am confident that Jamaica can serve as a model for others.



INTRODUCTION

Laura Neuman

Knowledge is power, and transparency is the remedy to the darkness under which corruption thrives. Jamaica's efforts to approve two new laws to increase public access to information and prevent corruption are, thus, intertwined. Democracy depends on a knowledgeable citizenry whose access to a broad range of information enables them to participate fully in public life, help determine priorities for public spending, receive equal access to justice, and hold their public officials accountable. When the government and quasi-governmental agencies perform under a veil of secrecy, people are denied the right to know about public affairs, and the press is only able to speculate and feed on rumors.

Poor public access to information also feeds corruption. Secrecy allows back-room deals to determine public spending in the interests of the few rather than the many. Lack of information prevents citizens from being able to assess the decisions of their leaders, and even to make informed choices about the individuals they elect to serve as their representatives.

Citizens and their leaders around the world have long recognized the risk of corruption. Corruption diverts scarce resources from necessary public services, and instead puts it in the pockets of politicians, middlemen and shady contractors, while ensuring that the poor do not receive the benefits of this "system." The consequences of corruption globally have been clear: violence, overthrow of governments, reduced investor confidence and continued poverty. A high level of corruption is a singularly pernicious societal problem that also undermines the rule of law and citizen confidence in democratic institutions.

The antidote: appropriate legislation, effective enforcement, public awareness and oversight, and broad access to information.

Recognizing the challenges of corruption, The Carter Center's Council of Presidents and Prime Ministers asked that The Carter Center's Americas Program convene political leaders, civil society organizations, scholars, media and private business representatives to discuss each sectors' role in addressing this multi-faceted problem. The Transparency for Growth in the Americas conference, held at The Carter Center in May 1999, provoked thoughtful discussion regarding an issue that, heretofore, was often considered taboo. Recommendations for increasing transparency and preventing corruption were varied, including dissemination of the basic message that corruption is not only an ethical, but also a policy problem; that hard data to substantiate the extent of corruption, versus the perception, is needed; and that solutions must be grounded in firm, achievable commitments from leaders and citizens.

In addition to the conference, The Carter Center's Americas Program began three transparency projects in our hemisphere. Jamaican Prime Minister P. J. Patterson invited us to include Jamaica as one of our initiatives. At that time, his administration had drafted the Corruption Prevention Act in order to bring Jamaica into compliance with the Organization of American States' Convention Against Corruption, of which Jamaica was a signatory, and a White Paper on Freedom of Information. The Carter Center agreed to help inform the debate regarding these important transparency tools.

Laura Neuman, J.D., is the Senior Program Associate of The Americas Program, The Carter Center.

As a first step, The Carter Center commissioned papers from distinguished Jamaican scholars Dr. Lloyd Barnett and Dr. Trevor Munroe on the existing anti-corruption laws and on the proposed Corruption Prevention Act and Freedom of Information Act. In October 1999, these articles were compiled and edited into *Combating Corruption in Jamaica: A Citizen's Guide* and distributed with the assistance of Sangster's Bookstores. In partnership with the Media Association of Jamaica, the Center held public seminars on the issue and conducted working groups. Jamaicans took the lead in examining the issue and a Parliamentary debate on the tabled Corruption Prevention Act ensued, lasting over eight months and resulting in more than 30 amendments.

Since the publication of our first *Guide*, the Corruption Prevention Act 2000 has been signed into law, a Commission has been named, amendments have been made to the Integrity Act, and the Access to Information Act has been tabled in Parliament. In light of these important developments, The Carter Center has commissioned new papers to comprise this second edition of our guide, *Fostering Transparency and Preventing Corruption in Jamaica*. We hope that this guidebook will serve as a tool for understanding the value of transparency in both the Jamaican and international contexts. Achieving transparency is a complex puzzle, and the following chapters seek to provide the reader with a number of the necessary pieces.

Dr. Trevor Munroe provides the framework for this puzzle, *Transforming Jamaican Democracy Through Transparency: A Framework for Action*. Dr. Munroe discusses the history of democracy in Jamaica, and argues that in designing tools for increased transparency, both

the present context of Jamaica's democratic institutions and the historical roots, must be considered. Dr. Munroe theorizes that with the decline of traditional means of representation and the rise of new forms of citizen participation, such as the media and civil society organizations, transparency initiatives will only succeed with the transformation and strengthening of formal institutions of authority and representation.

The consequences of corruption are often characterized by increased violence and human rights challenges. Dr. Lloyd Barnett, in his chapter *Corruption:*

Challenges to Human Rights, Citizens' Security and Good Governance, discusses the nexus among these societal problems. Dr. Barnett provides sixteen recommendations for stemming corruption and safeguarding democracy and human security, advising, "progress in Jamaica

is dependent on the creation of an atmosphere of transparency, justice and security, as well as urgency."

Mr. Bertrand de Speville, in *A Strategy to Prevent Corruption and the Role of Commissions and Citizens*, establishes a three-pronged approach for the reduction and prevention of corruption. As in many countries, he finds that the Jamaican focus has been unduly placed on an annual asset declaration scheme, which serves to criminalize illicit enrichment and bribery. This is but one use of asset declarations and not, in his view, the most effective. Rather, asset declarations should be utilized in the prevention of corruption via a thorough conflict of interest review. Although prevention must be the goal of any corruption strategy, one must not overlook the need for effective enforcement mechanisms for the times in which corruption does occur. Rapid and professional investigation and response, according

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to Mr. de Speville, is vital. Finally, citizens must be encouraged, through public education, to play a key role. The Corruption Prevention Commission can coordinate and implement this strategy, but only if the necessary authority and resources are made available.

Government ethics laws, including conflict of interest reviews, are vital “in promoting the reality and the perception of integrity in government by preventing unethical conduct before it occurs.” This, according to Mark Davies in his *Ethics in Government and The Issues of Conflicts of Interest*, is the crux of a comprehensive anti-corruption strategy. In establishing anti-corruption legislation, the corrupt official must not be the focus - they will not change. Rather, the motivation for an ethics law should be the official who is uncertain and who, with appropriate guidance, will refuse a gift and be mindful of potential conflicts. Commissions, such as the Jamaican Corruption Prevention and Integrity commissions, can and should review asset declaration for conflicts of interest, while providing public education and advice for more effective prevention.

Access to Information Acts strive to reach the perfect balance between broad access to publicly held documents and privacy protections. Dr. Alasdair Roberts sets out international principles that govern many access to information laws. In *The Right to Information and Jamaica's Access to Information Act*, Dr. Roberts assesses the proposed Jamaican act in light of other Commonwealth jurisdictions, and finds that there are a number of provisions that would benefit from their experiences, such as the breadth of exemptions, lack of public interest test, administrative procedures and enforcement mechanisms. He concludes with a reminder that the effectiveness of the law will only be determined through its use, and encourages education to all sectors so that they may take advantage of this important piece of the transparency puzzle.

Mr. Richard Calland describes the use of access to information acts in Africa, Asia and Eastern European States. *Access to Information: How Is It Useful and How Is It Used?*, provides a narration, through relevant case studies, of examples whereby these laws have been used successfully to fight discrimination, inform democratic debate, influence policy decisions and ensure the proper flow of vital needed resources. By emphasizing the experiences in other parts of the world, Mr. Calland presents a guide to passage, implementation and enforcement of a vigorous Access to Information Act.

Finally, Minister of Information Colin Campbell in his article *The Access to Information Act, 2001*, reminds us of the underlying fundamental principles of the Jamaican Act: accountability, openness and public participation, and the associated objectives. Minister Campbell provides a brief history of the legislation and the government's plans for ensuring successful passage and implementation.

Disraeli stated, “as a rule, he or she who has the most information will have the greatest success in life.” Success, if measured as the increase in transparency in government and thus the decrease of corruption, is achievable, as this Guide demonstrates, through the implementation and enforcement of a strong conflict of interest and ethics law, appropriate and timely investigation and prosecution of bribery and illicit enrichment, and access to information acts. Finally, it is only with citizen education and participation that a truly sustainable transparency program can be achieved. With the skills of its people and their deep respect for democracy, Jamaica will reach its goal of fostering transparency and preventing corruption.

ACKNOWLEDGMENTS

This guidebook would not have been possible without the dedication of many talented persons. I would first like to thank all of the authors for sharing their knowledge, experience and time with us to make this guide both a scholarly and practical resource. My colleagues Dr. Jennifer McCoy and Dr. Shelley McConnell assisted greatly in the conceptualization and implementation of this guidebook. The Carter Center is privileged to have an incredibly committed staff and I would like to especially thank Sarah Fedota, Daniel Gracia, Sara Tindall Ghazal, Ambassador Gordon Streeb and Ashley Barr for their help throughout the editing and publication process. The layout and cover design are the masterpiece of Mary Beth Roberson, who worked many additional hours without complaint.

In Jamaica, we have received incredible support and sage advice from all corners including government representatives, members of the media and the private sector, the international community, and civil society organizations, particularly Jamaicans for Justice and Transparency International.

We also gratefully acknowledge the financial and logistics support of the Media Association of Jamaica, Jamaican National Building Association, The Jamaica Observer, The Gleaner and the Stewart Mott Foundation.

Finally, I want to thank Amy Sterner, The Carter Center's Jamaica Project Assistant. Amy has been a true partner in this project for over a year and her skills, perseverance, hard work and good humor helped make this project a success.

Laura Neuman
Atlanta
February, 2002

TRANSFORMING JAMAICAN DEMOCRACY THROUGH TRANSPARENCY: A FRAMEWORK FOR ACTION

Dr. Trevor Munroe

The Corruption Prevention Act 2000 and the tabling in Parliament of the Access to Information Act 2001 came at the close of a decade of sustained crises in Jamaican democratic governance. In reviewing and assessing these new tools for increased transparency, one must consider the political and institutional framework in which they will be applied. This paper analyzes the decline of traditional mechanisms of representation and the rise of new forms of citizen participation in Jamaica in the context of social, economic and international changes and finds that, for any initiatives to be successful, there must be a transformation and strengthening of relevant government institutions. This paper concludes with an analysis of the Jamaican government response through legislation, to address corruption and increase access to information.

OVERVIEW

The decade of the 1990s opened with considerable public disaffection with the Jamaican government's decision to increase the salaries of parliamentarians. It closed with three days of violent nationwide protests and demonstrations triggered by the government's announcement of increases in fuel taxes. The core of the continuing crises, of which these were but two manifestations, lay in the contradiction between a centralized parliamentary system, an exclusionary social order and a stagnating formal economy on the one hand, and an increasingly democratised and assertive citizenry that has outgrown the limits of the existing system, on the other.

This contradiction has not been lost on the country's political leadership. In the aftermath of April 1999 riots, Prime Minister P. J. Patterson acknowledged the emergence of "the new Jamaican: proud, informed, assertive... shaped and moulded by ... [the] technological, social, political and economic" forces of liberalisation and globalisation. This new Jamaican citizen could no longer be confined within what Patterson himself described as "the old non-inclusive, often undemocratic methods of sharing power and managing power that have evolved in post-independence Jamaica in political parties, the Parliament, the Cabinet, church organisations, the bureaucracy, organs of the state, private sector firms, and community groups." Either "our approach to governance changes" to become more open, inclusive and participatory, the Prime Minister concluded, "or we will become part of the problem to be swept aside by the emerging new social order." Here in lies the essence of the continuing crises - the emerging new and the enduring old (with its positives and negatives) are in constant contention, neither able to overcome the other, and neither able to coexist comfortably with the other.

JAMAICAN DEMOCRACY IN CONTEXT

On any generally accepted measure Jamaica is a 'consolidated democracy.'ⁱ For well over a half a century, governments have been chosen and removed through relatively free and fair elections. No government has ever been overturned by popular uprising, military coup or extra-constitutional means. On the basis of election results, ruling parties have handed over power and opposition politicians have peacefully

Dr. Trevor Munroe is a professor of Government and Politics, University of the West Indies - Mona Campus.

accessed to office in 1955, 1962, 1972 and 1989. By the 1990s two-party competition and electoral participation had become more institutionalized in Jamaica than anywhere else in the Caribbean or, indeed, in other developing nations.ⁱⁱ

Electoral democracy in Jamaica has been reinforced and complemented by high levels of freedom.ⁱⁱⁱ Political rights and civil liberties are constitutionally recognized and effectively utilized. The rule of law has for much of the post-independence period, by and large, been observed despite increasingly high levels of violent crime. The foundation of Jamaican democracy has rested on many pillars: the strong historical commitment of the people to freedom; the weakening of the old plantocracy, along with the conservative anti-democratic oligarchy; a tradition of constitutional rule, welfare statism and liberalism which formed part of the British colonial heritage; government effectiveness during the process of decolonization and the early post-colonial state; clientelistic relationships between competing party elites and rival segments of the public, which provided the major political parties with strong activist cores and significant outreach capability.^{iv}

Nevertheless, despite these deep roots, during the 1990s the gradual weakening of both the foundations and the structures of Jamaican democratic governance became increasingly evident. Jamaica's "freedom rating," according to a Freedom House rating system, slipped both absolutely and relative to the rest of the Caribbean.^v At the end of the 1980s, seven Caribbean territories had a freedom rating superior to Jamaica's. By the second half of the 1990s, Jamaica's slippage and the improvement of other Caribbean states meant that Jamaica had fallen behind ten of fifteen countries rated in the Caribbean.

Its score on the Freedom House democracy index had likewise slipped, as violent crime undermined the rule of law and placed Jamaica among the most murder-prone countries in the world.^{vi} Government effectiveness declined to the point that Jamaica's ranking on the United Nations Development Programme's Human Development Report fell dramatically whilst other Caribbean states remained stable or improved.^{vii}

DEMOCRATIC GOVERNANCE AND CONVENTIONAL PARTICIPATION - DOWN BUT NOT OUT

Dissatisfaction grew in the 1980s and 1990s as traditional channels of representation and articulation of grass roots interests weakened or proved inadequate. One such channel was elected Members of Parliament. With fewer resources, as the configuration of fiscal budgets shifted from service provision or employment generation to debt servicing, MPs had less largess to dispense to party clients. Moreover, MPs were very often drafted into an expanded executive branch and pre-occupied with ministerial responsibilities, spending fewer hours in constituency offices so that fewer citizens were able to see their representatives in action.^{viii} The combination of the deteriorating economic infrastructure, more difficult employment opportunities, widening socio-economic disparities, and ineffective local government provided ample material for progressively discrediting formal traditional channels of representation.

Added to the above was the authoritarian and paternalistic nature of these channels. Historically, for much of the period of decolonisation and post-colonialism, party and state structures as well as economic enterprises reflected 'master-servant',

Credit: Steve Greenberg for the Seattle-Post Intelligencer, 1999



‘boss-employee’, ‘parent-child’, ‘hero-crowd’ relationships, reproducing the colour, class, racial and educational hierarchies of the wider social structure. Compliant following of strong leaders was a norm which produced results, and from which there was neither sustained nor successful dissent.

The era of globalisation brought changes as society and economy became more open, and as individual Jamaicans became more exposed to the Information Age.^{ix} In these circumstances, a mismatch was bound to develop between traditionally centralized, hierarchical, exclusionary and non-participatory mechanisms of voice and representation on the one hand, and the less compliant, more critical, more participatory, more assertive and qualified Jamaican citizen, on the other. This incongruity would have developed even if the political and state structures were performing perfectly and the economy was growing. Hence, the solution to bad governance is not simply good or better economic performance, though this is highly important. The solution must also entail transformation of the institutions of democratic governance to meet the enhanced needs and the increased potential of “the new Jamaican”.

These needs and this potential arise from a number of conditions. For example, the “new Jamaican” accesses mass media and is exposed to information, discussion and images of life elsewhere in ways and to an extent undreamed of at the time of independence less than 40 years ago. The average “new Jamaican” is more educated, more travelled, more in touch with Jamaicans abroad, more in contact with visitors to Jamaica, younger and, very importantly, more urbanized than her parents or grandparents.

On many indicators, Jamaican exposure to modern means of communication and transparency is well above both global and developing world averages. Thus, the tendencies - negative and positive - of today’s “critical citizens” are very much present in Jamaica, albeit conditioned by national peculiarities and local circumstances.^x Authorities at all levels - in the household, at the community level, in economic enterprises, in social, non-governmental and state bodies - are to varying degrees resented or rejected by the new Jamaican to the extent that any relationship with those authorities is based on the old hierarchies of class, status, colour, gender and formal education. An essential pre-condition for reducing apathy, alienation and aggressiveness as well as facilitating productive citizen re-engagement is the reconfiguration of these hierarchies.

Two manifestations of the extent of the malaise have been the degree of partisan de-alignment and the growth of electoral non-participation. Loyalist party voting has declined and issue-oriented electoral choices increased during recent decades. Consistent with these developments, survey data have confirmed the growth and consolidation of the “uncommitted,” “independent” element in the voting population. According to data from the Stone Polls, this percentage ranged between 45% and 55% of the electorate in the 1990s. Electoral

turnout, traditionally a main indicator of the legitimacy and effectiveness of existent institutions of democratic governance, has steadily declined.^{xi} Low turnout, of course, reflects a Caribbean and global trend revealing a near universal discontent with the gap between democratic values and democratic regimes.^{xii}

Democratic governance and conventional participation in Jamaica has been particularly ineffectual in rectifying three important problems:

1. High levels of corruption,
2. Abuses of the rule of law, and
3. Party centralism.

Corruption had been identified as a serious problem both in official documents as well as in public perception.

The award of public contracts, the disposal of public assets, the allocation of scarce benefits, 'influencing buying'

and 'influence selling' for private gain - each of these has been documented as arenas in which corruption thrives.^{xiii} Allegations have been made against party and government officials, officers in the police and security forces, and private sector and trade union functionaries. Rarely has there been a prosecution, much less conviction and punishment of any significant person for corruption. Understandably therefore, the Jamaican public regards corruption as a key problem facing Jamaican democracy.^{xiv} This is not far different from the international perception of corruption in Jamaica.^{xv}

Unquestionably, a major consequence of inaction or ineffective action by the authorities in coming to grips with this problem is widespread cynicism and lack of confidence in conventional channels of democratic governance. A major precondition for strengthening democratic renewal in Jamaica is, therefore, substantial reduction in levels of corruption.

A second source of democratic malaise is the erosion of the rule of law. Violent crime, in particular murder, has placed Jamaica far above the global average and ranks Kingston as one of the murder capitals of the world. Drug-related gang warfare is one major contributor to this situation and trafficking in illegal arms is a critical component of the illicit narcotics trade. Credible allegations of excessive use of lethal force by the police are widespread.

In this context, the inadequacy of available means of citizen redress and ineffective public oversight of the

police force undermine community confidence in the criminal justice system. "Vigilantism" and informal community justice is fuelled by the slowness of law enforcement system's to identify, apprehend, prosecute, convict and adequately punish wrong-

doers. Exacerbating this situation are deplorable prison conditions, inordinate delays in the court system and inconsistent, class-influenced sentencing practices.^{xvi}

More effective interventions in eradicating abuses in the rule of law are among the essential conditions for preserving and deepening Jamaican democracy. It is one of the clearest areas in which the inadequacy of existing channels of citizen voice, participation and government accountability leads to erosion of confidence in the established system and the rise of alternative centres of extra-legal community power.

The third area in which conventional participation has failed, with deleterious consequences for democracy, relates to the established political parties. By and large these are falling short in renewal, amongst the younger age cohorts and the middle social strata, thereby damaging their capacity to aggregate the interests and

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reflect the voice of important groups. This is occurring for a number of reasons. For instance, the traditional leader-centred culture of these organizations continues to discourage, even penalise internal dissent from party positions endorsed by the leader.^{xvii}

Moreover, the absence of any effective regulatory framework for the political parties contributes to weakening democratic governance. No criteria need be met to qualify as a bona fide party. Financial statements and accounts need not be lodged with any regulatory body nor published to the membership. The sources of party funding, in particular with respect to the identities and contributions of donors, remain secret. Private individuals or corporations are not required to declare political contributions - even in companies whose shares are traded publicly. The lack of transparency reduces effective accountability and facilitates corrupt influence peddling as well as gift giving. There can be no question that appropriate policy intervention and cultural change in the political parties are important conditions for arresting the decline of the parties and thereby strengthening Jamaica's democracy.

THE CHANGING ENVIRONMENT - THE RISE OF NON-CONVENTIONAL PARTICIPATION

Contributing to the weakening of democratic governance in Jamaica have been important changes in the political and economic environment, which have fuelled non-conventional mechanisms of citizen participation. Traditional forms of representation have failed to adjust to the new realities. These changes are associated with the particularities of liberalization in

Jamaica and the impact of globalisation. More so than in many other Caribbean territories, the timing and extent of liberalization, the reduction of protectionist barriers and the reconfiguration of the role of the state have produced multi-dimensional consequences with

serious implications for democratic governance.

Traditional institutions representing the sectors disadvantaged by liberalization - namely, trade unions, farmers' associations and 'grass roots' party structures - have declined in power and effectiveness

within the state and society. Traditionally, the trade unions in Jamaica have been among the most powerful institutions of civil society and an effective vehicle for working class representation in the system of democratic governance. However, beginning with the onset of economic liberalization in the 1980s, the power of trade unions has declined substantially. One important reason for the decline lies in changes in the character of the labour force accompanying the relative decline of the formal economy in agriculture and manufacturing as well as the contraction of the public sector. Employment has fallen in high-density unionized sectors, while the labour force has grown in the services sector and in the informal economy. As a consequence, today labour unions represent only 15 - 20% of the labour force, and are, by and large, outside of the ruling coalitions.

The informal sector, which is relatively disorganized and necessarily preoccupied with survival on the fringes of the formal economy, society and the state, faces the challenge of finding effective ways to influence the adversely skewed power relations in the system of governance. To the extent that the formal institutions have not adjusted to accommodate to the new reality of this sector's substantial significance, the informal sector

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as gift giving.***

is compelled to seek non-conventional forms of participation. These can be neither long ignored nor suppressed without damaging the fabric of democratic governance. Compromise, accommodation and empowerment of the informal sector are the only sustainable approaches consistent with strengthening democratic governance.

What is required is an across-the-board democratization of authority structures and processes

to share power with the new social forces, adjust rules accordingly and, on this basis, firmly enforce new codes against deviant conduct. This approach is critical in relation to both state institutions and corporate governance. Traditional hier-

archies at the workplace, low levels of communication and information sharing between management and labour, exclusionary decision-making and authoritarian practices all translate to low levels of labour productivity. On the other hand, experience is demonstrating that new qualities of transparency, dialogue and employee involvement in systems of corporate governance are proving to be vital elements in improving efficiency and raising the competitiveness of Jamaican firms and enterprises.

Failure to strengthen Jamaican democratic governance along these lines, in light of a changed environment, is driving the quest, primarily amongst the disadvantaged, for more effective means of influencing the authorities. Periodic fair and free elections and articulation of community needs via traditional institutions is clearly necessary, but not adequate. Newer modes of action and self-expression are gaining momentum. Foremost amongst these are the mass media. The

media in general, and talk radio in particular, have added to their traditional functions of information, entertainment and opinion, the roles of interest articulation, representation and facilitating participation for significant segments of the population. The Jamaican talk show has in substantial measure become a means through which the voice and concerns of the disadvantaged are brought to public attention and to the authorities, which might otherwise remain distant and

unreachable. Through this medium, responses from the authorities are sometimes more readily forthcoming than otherwise to parish-pump issues and to abuses of power of one sector or another. In this sense, the media has become a means of popular participation

and citizen oversight. Institutionalising and strengthening this role of the media is certainly one of the more urgent challenges for Jamaica's democratic governance.

The growth of more or less spontaneous protest and demonstrations as a means of seeking redress to injustice is a second method of non-conventional participation that has proliferated in Jamaica within recent years. The immediate occasion for such community-based protests may vary widely - poor roads, inadequate water supply, bad sewerage disposal, deficient public transport, or allegations of human rights abuses by the police. Whatever the trigger, such mass actions share in common a conviction that less aggressive forms of representation are ineffective and go unanswered. Hence, the "road-block," more often than not illegal, has arisen to parallel and ultimately supersede the more traditional letter or petition to the councillor MP. Failure to empower the citizenry, through institutions to which political

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authorities and service providers are obliged to respond, shall undoubtedly sustain the “road-block” as a popular means of non-conventional participation.

In other ways, civil society in Jamaica is undergoing transformation, such as with the now visible density of community-based organizations. Recent research identified over five thousand such bodies in Jamaica, of which

almost 60% are confirmed to be either active or partially active. Interestingly, it appears that the number of these organizations has grown substantially during the 1990s, i.e. during the very same period that long established political structures have stagnated and the more traditional institutions have declined. There is a clear and unambiguous need to develop appropriate mechanisms to empower community-based organizations as a means of strengthening Jamaican democratic governance.

In addition to geographically based community groups, the period has also seen the emergence of other kinds of non-governmental organizations. Invariably, these are centred on causes to do with the perceived deficiencies in Jamaica’s democracy.

Amongst the more representative of these, drawing primarily on professional groups and the middle strata, are the New Beginning Movement, the Constitutional Reform Network, the Citizens for Fair and Free Elections (CAFFE) and, most recently, Jamaicans for Justice (JFJ). These organizations, whilst largely set apart from the disadvantaged classes in social terms, have drawn both energy and *raison d’être* from the discontent of the masses and the deficiencies of the established politics. CAFFE reflected and addressed popular dissatisfaction with electoral malpractice in establishing an

organization of local election monitors. JFJ arose directly out of the nationwide mass protests of April 1999 and articulated its central rationale as the necessity to sus-

tain agitation for justice-related issues beyond short-lived demonstrations. Organisations such as these clearly have enhanced roles to play in arresting the decline in Jamaican democracy and in strengthening its institutions.

There is a clear and unambiguous need to develop appropriate mechanisms to empower community-based organizations as a means of strengthening Jamaican democratic governance.

THE GOVERNMENT’S RESPONSE

One significant response of the state has been the proposal of legislation to enhance openness in government and to reduce corruption in public life. The government appointed a Committee on Freedom of Information Legislation in 1995, and in June 1996 a report was tabled in parliament on Proposals for a Freedom of Information Act. Two and a half years later in November 1998, Prime Minister Patterson took the process one step further and tabled in the House of Representatives an official Ministry Paper setting out the Government’s position and drafting instructions for a Freedom of Information Act. Some public discussion took place around these proposals but it was not until December 2001, five and one half years after the 1996 Wells Report, that the Government tabled the Access to Information Act 2001.

A similar time elapsed between initial proposals for new anti-corruption legislation and the final passage of the law. It was in March 1996 that Jamaica voted along with other members of the Organization of American States, at a meeting in Caracas Venezuela, for the adoption of the Inter-American Convention Against Corruption. Not until April 1998 was the Bill giving

effect to the provisions of the Convention introduced into the Parliament. Appropriately, the proposed legislation was referred to a Joint Select Committee of the House of Representatives and the Senate. This Committee held open hearings on six occasions and received public submissions from four organizations.

In January 2000, the Joint Select Committee submitted its Report. Through much of 1999 and 2000 the proposed act attracted public discussion and the Parliamentary debate concluded with the passage of the Bill in December 2000. The time spent on debate and representations outside and within Parliament was well spent as the final act incorporated a number of substantial amendments to the Government's original proposals, making the Bill far more satisfactory. Amongst the more important amendments to the initial legislation put before Parliament by the Government were the following:

1. the deletion of the "gag clause," which would have had the effect of punishing the press for publishing certain types of information relating to allegations of corruption;
2. the broadening of the definition of corruption to embrace acts by private sector individuals, and not just public servants;
3. the granting of authority to the Corruption Prevention Commission to conduct investigations on its own initiative, and not be required to await a complaint as originally proposed;
4. the inclusion of an explicit (rather than implied) obligation in the law requiring the Commission to make an Annual Report public by laying it before Parliament.

All in all, over thirty significant changes and amendments were made to the original bill.

Yet, significant flaws remain in the law and one year after the passage of the legislation, the regulations without which the Corruption Prevention Commission cannot begin its work have yet to be passed. In regard to continuing weaknesses in the Act, three might be



mentioned. One is the continuing, though considerably narrowed, difference in regimes to which the Parliamentary and the non-Parliamentary public servants are subjected under the Integrity and the Corruption Prevention Commissions, respectively. An example of this difference is that alleged breaches of the corruption prevention law by civil servant "shall" be reported to the Director of Public Prosecutions whereas breaches by Parliamentarians under integrity legislation "may" be reported.

The second is the silence of the law on the question of gifts to political parties, though it is some comfort that the Joint Select Committee in its report recommended that "the matter of declaring gifts... should be a subject matter for legislation... as soon as possible".

The third deficiency lies in the failure of the legislation to impose on the Corruption Prevention Commission any statutory obligation to ensure public education and public involvement in the anti-corruption process.

Overall, the history of the Corruption Prevention Act contains important lessons regarding the dynamics of Jamaican politics. First, general public dissatisfaction with the performance of the country's democratic institutions, processes and leadership is a necessary, but inefficient foundation for reform. Secondly, popular discontent, heightened in this case by a perception of widespread corruption, has no impact on law-making or institutional reform unless it is accompanied by continual and multi-dimensional lobbying from influential "special interests" and civil society groups. Even then, public pressure has to be sustained and private representations directed at appropriate points in the system in order to progress from draft bill to amendments, to competent appointments, to key institutions, to the allocation of adequate resources, to the enactment of effective enabling regulations, to the consistent application of the "new approach", and finally to the implementation and enforcement. It was this blueprint of sustained public pressure and sensitive private diplomacy from civil society that allowed the Corruption Prevention Act to advance to this point. Hence, more of this formula is necessary to push the process forward in relation to effective implementation of the Act and to make meaningful the proposed Access to Information Legislation.

Without this form of partnering, the more modern and democratic tendencies and individuals within the

system of governance may succumb to the forces of conservatism, bureaucracy, corruption and inertia. The inevitable result is paralysis in the implementation and enforcement stages. This paralysis is the more deleterious to Jamaican democracy as it is invariably accompanied by a call for urgent change and impotent declarations from Government officials of their determination to effect democratic reforms.

Recently, numerous reform processes have, to varying degrees, fallen victim to the contradiction between word and deed, talk and action, legislation and implementation. Amongst these are Police Reform, Electoral Reform, Parliamentary Reform, Constitutional Reform, Labour Market Reform, and Financial Sector Reform. These and other necessary reform initiatives have invariably been accompanied or justified by numerous "blue ribbon" Task Forces, Committees and Commissions composed of leading representatives of the private sector, civil society and government.

It is not that these reform initiatives and committees achieve nothing. Much enlightened new legislation has been passed, e.g. the Bail Act, the Justice Reform Act, the Amendments to the Jamaica Constabulary Force Act, the repeal of the Suppression of Crime Act, and the Amendments to the Representation of the People Act. Nor is it the case that no innovative institutions have been established. The setting up of the office of Utility Regulation, the Police Public Complaints Authority, the National Contracts Commission, the Offices of the Contractor General and the Public Defender all testify to some action being taken. But in each case, to one degree or another, there is a "democratic deficit" constituted of one or another of the following:

It was this blueprint of sustained public pressure and sensitive private diplomacy . . . that allowed the Corruption Prevention Act to advance to this point.

1. inordinate delay between recommendations and action;
2. inadequate resource allocation;
3. insufficient attention to public education and involvement;
4. dilution of strong measures;
5. little or no enforcement of sanctions against politicians and private sector elites for breaches of law.

The last deficit, perhaps most corrosive to Jamaica's democratic governance, helps to bring the entire system of authority into disrepute and fuels anarchic tendencies. One case in point relates to the existing anti-corruption regime, in particular to the ineffectiveness of the Parliamentary (Integrity of Members) Act 1973. This Act requires each Member of Parliament to make an annual statutory declaration of income, assets and liabilities to an Integrity Commission. In its Report to Parliament in 2000, the Commission revealed that 38 such declarations remained outstanding for the period 1987-1999. The breaches of the Act were of a bi-partisan character - the report named 6 JLP MPs and 6 PNP MPs as in breach, including Ministers and former Ministers on either side. Moreover, the Report identified one JLP ex-Minister as having sent in only one of the 12 annual declarations due from him and one current PNP Minister as in breach for eight of eleven years between 1989-1999. For the year 1st January 2000 to 31st December 2000, the Integrity Commission Report identified 15 Parliamentarians (of 81) as being reported to the Parliamentary leaders under the terms of the Act for failing to reply to correspondence and/or submit financial statements as requested by the Commission. Amongst the 15 members reported were two (the Leader of the Opposition and the Speaker of the House) of the four Parliamentary Leaders themselves! *Yet in not one single case was any penalty as provided for in the act applied*

for a breach of the law. Perhaps even more notable, this matter has not received any significant consideration in the media nor been taken up in any sustained way by civil society.

Obviously, in a situation where existing law is inadequately enforced, passing new legislation by itself will be to no avail. This is particularly true when the new laws are hinged on governmental compliance. Indeed the passage of new legislation in the face of non-enforcement of existing laws may fuel rather than diminish public cynicism, as well as intensify declining confidence in the capacity of the old order to contribute to its own transformation. Experience is now irrefutable that transformation requires the continued awakening of civil society, the private sector and democratic tendencies in the governmental system to higher levels of activity and organization in both conventional (letter-writing and call-ins to talk shows) and unconventional forms (protests and demonstrations). Only in this way can existing and new legislation really have a decisive impact in transcending the old approach and facilitating the long delayed birth of a more modern and participatory democratic order.

CONCLUSION

There can be no doubt that Jamaican democracy is in urgent need of transformation. The core institutions of democratic governance - the electoral system, the executive, the legislative, the criminal justice as well as the political parties and civil society bodies - performed well in the past and established Jamaica as a leading democracy. Within recent times, however, democratic institutions have suffered serious decay. Popular dissatisfaction with the performance of the system has grown and there is a widespread recognition of the need for Jamaican democracy to become

more open, transparent, accountable and participatory. This is easier said than done as the focus of change encounters strong resistance from inertia, conservatism and corruption within the system. New laws, effective institutions, and active enforcement of existing legislation which all act to facilitate greater transparency are vital to the process of transformation. Equally necessary are greater levels of sustained activism and sophisticated organisation on the part of civil society. Through this framework for action, a fundamental change will become a reality.

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CORRUPTION CHALLENGES TO HUMAN RIGHTS, CITIZENS' SECURITY AND GOOD GOVERNANCE

The Honourable Lloyd Barnett

INTRODUCTION

Corruption is a corrosive influence on good governance, democratic institutions, citizens' security and human rights. Thus, the subject must be viewed in the broadest terms. It is insufficient to confront governance or security issues without simultaneously attending to the underlying issue of corruption. This paper seeks to identify the linkages and then disaggregate the responses, between corruption and Jamaica's continuing social ills.

SCOPE OF CORRUPTION

Corruption, its narrower and more legalistic meaning, denotes the payment of bribes for the award of contracts or the performance of functions. In its broader definition, as given in the Shorter Oxford Dictionary, it means the "perversion of integrity by bribery or favour." In its simplest terms, corruption is the misuse of office or power, or the exercise of discretion, or influence for personal gain, or partisan advantage. As is clear from the breadth of definitions, corruption can occur in many forms, from the, perhaps, clearest offence of bribery to the more subtle conflict of interest and influence trafficking.

In addressing corruption, one must examine not only the role of government and public bodies, but also assess the notable influence of the private sector. Although corruption is readily recognised and may be generally condemned where it involves the procurement of public contracts, it also involves the misuse of functions in the private sector. In contemporary societies where corporate

bodies exercise vast powers and where numerous and important public functions have been privatised, the effect of corruption within the private sector is of increasing significance. Moreover, in most instances of corruption in the public sector, there is private sector complicity.

In a modern society, a wide variety of citizens' actions and business activities are governed and controlled by regulations made by public authorities. Many of these regulations are complex and give to officials the opportunity to interpret their scope and effect, as well as the discretion to determine their application in individual cases. Even in the absence of regulatory provisions, access to goods, services and information is controlled in large measure by government agencies and corporate bodies. As the competition for these goods and services intensifies, this monopolization gives wide scope for corrupt practices.

Although proliferation of regulations can facilitate corrupt practices through increased opportunities for discretion by officials, the official motive for their creation is, in most cases, probably unrelated to the corruption that ensues. The consequence, however, is often that the complexities of the system may be deliberately used to create delays and frustration, thus making the anxious users of the system more amenable to paying bribes to secure their objectives. In many cases, applications are delayed for inordinate periods, and it is generally known that they will only be expedited if official "expedition fees" are paid to the officers or employees with the responsibility to see to their progress.

The Honourable Lloyd Barnett is a Jamaican barrister and holds the highest honour, the Order of Jamaica.

RELEVANT HUMAN RIGHTS PRINCIPLES

The “fight for human rights and the fight against corruption share a great deal of common ground. A corrupt government which rejects both transparency and accountability is not likely to be a respecter of human rights.”ⁱ Corruption often serves as an obstacle to citizens’ equal and full enjoyment of their rights. The corrupt exercise of a power or discretion essentially gives an unfair advantage to the person in whose favour it is exercised and discriminates against other persons who also sought or deserve the benefit. Thus, it infringes against principles of fair and equal treatment.

International human right laws and articles are nearly unanimous in incorporating provisions condemning the abuses and the discriminatory consequences of corruption. For example, Article 1 of the Universal Declaration of Human Rights states, “all human beings are born free and equal in dignity and rights.” Article 21 declares that “everyone has a right to equal access to public service in his country.”

In the International Covenant on Economic, Social and Cultural Rights it is stated in Article 11.2 that:

The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take individually and through international co-operation, the measures, including specific programmes, which are needed:

- a. To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most

efficient development and utilization of natural resources.

Article 2.1 of the International Covenant on Civil and Political Rights declares that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In the preamble to the American Convention on Human Rights, the States Parties reaffirm their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of men. Article 24 of the Convention provides that “all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

An analysis of these Conventions indicates that international human rights jurisprudence supports the principle of treating each person fairly and in accordance with due process. Jamaica is a party to these International Covenants. These principles are reaffirmed in Jamaican law by the provision of the Fundamental Rights (Additional Provisions) (Interim) Act, enacted in 1999, which provides in section 5 that “every person shall have the right to fair and humane treatment by any public authority in the exercise of any of its functions.”

DEROGATION FROM HUMAN RIGHTS PRINCIPLES

In the Preamble to the Inter-American Convention Against Corruption adopted in March 1996, the Member States of the Organisation of American States declare their conviction that: “corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as the comprehensive development of peoples.”

Corruption tends to produce and often results in a variety of harmful consequences, such as:

1. the appointment of persons or the grant of benefits to persons who are not the most needy or deserving;
2. the selection of persons to supply goods or services who may provide them at prices which are not competitive or of a quality which is unsatisfactory;
3. the reduction of growth in the economy because of the consequent waste of public resources and, therefore, a diminution of the State’s ability to provide its citizens with decent living standards;
4. the distortion of the priorities in public programmes so that public funds are devoted to schemes which are more likely to attract bribes or facilitate “kick-backs” than to advance the welfare of citizens;
5. the reduction in tax revenue through improper application of the powers granted to tax administrators; and
6. the discouraging of investments by honest entrepreneurs who will not indulge in the corrupt practices.

Corruption is particularly pernicious. . . In particular cases it discriminates against the honest and treats the dishonest with favouritism.

In a developing country, such as Jamaica, where there are very limited resources and scarce benefits for distribution, corruption is particularly pernicious in its effect. In a general way it creates inefficiency and intensifies poverty. In particular cases it discriminates against the honest and treats the dishonest with favouritism. It is antithetical to the principles of fairness, equality and due process. Governments which permit corruption to proceed unchecked and without sanctions bring their States into conflict with Article 3 of the International Covenant on Economic, Social and Cultural Rights, by which they undertake to ensure the equal right of men and women to the enjoyment of all the economic, social and cultural rights set out in that Covenant.

On the basis of the *Jamaica Survey on Living Conditions 1998 Report* published by the Planning Institute of Jamaica and the Statistical Institute of Jamaica, 15.9% of Jamaican households fell below the poverty line. It is believed that even this unsatisfactory percentage is achieved by reason of the significant contributions of the informal and underground economy. The social implications of this situation are serious in view of the fact that the wealthiest 20% of the population controlled 45% of the national consumption, and more than 2/3 of the households consumed less than \$20,000 Jamaican per month. However, since economic growth has stagnated in recent years, the prospect of improving living conditions significantly and reducing the gap between rich and poor are not very good. These prospects will be severely reduced if corruption is allowed to influence poor choices and bad governance. The ultimate result will be a failure of a significant percentage of the population to realise the right declared in Article 11 of the International Covenant on Economic,

Social and Cultural Rights “. . . of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”

Dr. Johann Graf Lambsdorff sums up the impact of corruption on public welfare in the following passage:

The objectives of government are pivotal to understanding the diverse negative effects of corruption on public welfare. Corruption renders governments unable or unwilling to maximize welfare. In the first case, it distorts agents' decisions and limits the contractual space available to agents and the government, acting as a benevolent principal. In the second case, a corrupt principal creates allocative inefficiencies, cripples its credible commitment to effective policies, and opens the door to opportunism.ⁱⁱ

ENDANGERING DEMOCRACY

There are many cases in which democratic constitutional systems have been overthrown because of widespread disapproval of the corrupt practices of governments. There can be very little doubt that corruption breeds cynicism about the political process and antagonism toward public administrators. The perception that politicians and public officials are corrupt creates an atmosphere of apathy towards government and hostility toward politicians. Accordingly, where there is a perception that corruption is a problem, public confidence in the constitutional institutions will decline. A poll conducted in Jamaica in 1999 indicated that 14.3% of the Jamaican population regarded corruption as most important to them.ⁱⁱⁱ This item was only surpassed in the poll results by the maintaining of law and order (26.7%) and fighting poverty (22.5%). It may also be

significant in this context that voter participation in elections has declined over the last 20 years.

Civil society has increasingly come to the realisation that politicians are not all or altogether altruistic. In general, politicians are highly motivated to gain and retain power. The personal aggrandizement, which is associated with these motives, reduces the incentive to concentrate on administrative efficiency in



Credit: Graham Harrop/Artizans.com

the general interest of the public. Corruption provides an instrument for purchasing support and extending influence since, by the peddling of public resources, political allegiance is won and political survival enhanced. It is for this reason that politicians often resist reforms, which are aimed at achieving transparency and accountability and at prescribing codes of conduct that are effective and enforceable. It is for the same reason that civil society must insist on the establishment and observance of rules and procedures that strengthen transparency and accountability.

ELECTORAL CORRUPTION AND THE RISE OF GARRISON COMMUNITIES

Free and fair elections are fundamental to democracy. The legitimacy of a government is dependent on popular acceptance that its right to govern was fairly established. In the absence of public confidence in the electoral process, the entire constitutional system is called into question, and a threat to political stability emerges.

The evolution of electoral politics in Jamaica has been plagued by corruption and violence. In the 1940's and 50's, violent clashes between rival political factions were mostly concentrated around election periods and largely involved the use of sticks and stones. The rate of apprehension, even if not conviction, was fair. In the 1960's, a dangerous new element entered the political rivalry. A most far-reaching development began in the creation of new housing schemes in which the units were allotted to the supporters of the governing political party. Political garrison communities thus developed and were replicated during successive administrations. As economic restructuring reduced the capacity of politicians to distribute the nation's scarce resources, political gunmen sought to exploit their own power and influence by establishing protection rackets. In particular, they intimidated contractors on building and engineering projects into paying them a percentage of the payroll and merchants into paying periodic levies in protection of their establishments, staff and goods.

On February 15, 1994, Prime Minister P. J. Patterson, in an address to the National Consultation on Values and Attitudes, stated:



The fight for scarce benefits and political spoils has contributed to a polarised society in which we operate as hostile tribes which seem to be perpetually at war, rather than working together to realise a common goal.

In 1996, the National Committee on Political Tribalism, headed by the Hon. Mr. Justice Kerr, stated:

The border wars between garrison communities of different persuasions result in:

1. increased difficulty in maintaining law and order;
2. an inability to maintain social infrastructure (roads, water, sewage, garbage disposal, electricity, shops, supermarkets, markets), which border or pass through disparate communities;
3. a restriction of movement through these areas which affects human rights, transportation, and job attendance and opportunities;
4. a restriction of business opportunities to the localized area as customers from other communities are denied access by blocked roads and real or perceived threats of violence.

Garrison communities are created by:

1. the development of large-scale housing schemes by the State and the location of the houses therein to supporters of the party in power;
2. homogenization by the dominant party activists pushing out the minority from within and guarding against invasion from outside; and
3. the expelled setting up of a squatter community.

In an article published in a daily newspaper in November 2001, Mr. Parnell Charles, an experienced politician and former Cabinet Minister, stated in respect of the crime problem in Jamaica:

We must admit that crime is not primarily a police problem, it is more of a political problem. The worsening problem of crime is a symptom of poor governance, of political mismanagement, of economic decay and a hopeless and frustrated people. The lack of sound, strong and inspiring political leadership means there is no sense of accountability and responsibility for anything. Corruption and indiscipline are rife and offenders rarely get caught or charged. Power is abused and misused, but no one is disciplined. Injustice and the abuse of human and constitutional rights are breached with impunity, as the government is seemingly lacking in the will to bring perpetrators to justice or restrain them. Political advantage, one-upmanship becomes the major consideration of every governmental decision, pronouncement or action. To be sure, a society in which politics dominates everything, in which corruption is pervasive, in which indiscipline is covered up, in which justice is perennially denied, is certainly fit for criminality and decay. There are other factors - drugs, illegal guns, gangs, etc., which contribute to our worsening crime problem.

Mr. Charles also asks:

Can there be any doubt that Jamaica today is full of unbearable stress, agonising economic demands, social anxiety, hopelessness, and feelings of unworthiness? The young men in the ghettos, without jobs, with access to guns, with kids to feed and to school, with mothers and girlfriends to care for, and without any source of income, will certainly find it easy to use their weapons to make a living. These young men do not feel worthy and a part of a society that cares whether they live or die. They feel alone, in the madness of the inner cities. Crime becomes the only means of survival.^{iv}

Although an opposition politician expresses these views, they do not vary greatly in essentials from the views held in non-political circles. In a recent opinion poll published in *The Sunday Observer*, crime and violence was rated as the number one problem facing Jamaica at this time by 70% of the persons polled. This perception is not ill-conceived because the rate of violent crime, especially murders, is quite high.^v The number of murders committed in Jamaica has increased from 469 in 1989 to over 1,000 in 2001, making Jamaica's murder rate one of the highest per capita rate in the world.

The Hon. Oliver Clarke, O. J., on his election in December 2001 as President of the Private Sector Organisation of Jamaica (PSOJ), announced that the PSOJ would, during his term of office, "push for greater law and order" in the country: "We will try hard to achieve a better society for all of us, big or small. Law and order, fighting corruption and encouraging growth and job creation will be our objectives."^{vi}

Dr. the Honourable Peter Phillips, the new Minister of National Security, in an address delivered at a UNDP Human Rights Round Table Symposium in December

2001, warned that “the basic survival of the state was threatened ‘if the present trends are allowed to continue’,” and listed a number of factors which augmented the threat. The list included Jamaica’s high murder rate of 35 per 100,000, placing the island near the top world-wide as the murder capital; ‘extreme fear’ of crime and violence in the society; a relatively low cleared-up rate for murders; inordinately high numbers of citizens killed by the police, and inordinately high number of police killed by citizens. He further stated:

“The state is unable to police significant areas of its territorial space. . . and in many of our public spaces law and order basically are not upheld by the agents of the state.”^{vii}

The linkages between poverty, hopelessness, corruption, political patronage and violence provide a recipe for social chaos and political instability. In developing countries, such as Jamaica, where the impact of globalization, free trade, structural adjustment and privatisation have had radical effects on the short term, imposing great hardships on the majority, the presence or even the perception of corruption among the governors lead the governed to doubt their sincerity with respect to advancing the public welfare and to question the integrity of the constitutional system which permits the abuses.

IMPERILING CITIZENS’ SECURITY

The problems of law and order have been exacerbated by the growth of narco-criminal activities. The gang leaders have, thereby, gained considerable financial resources, which they have used in depressed inner city communities to establish their

influence and control. By the distribution of the essentials of survival to the destitute, they have become “Chieftains” or “dons.” Politicians who had previously tolerated the violent activism of the gunmen, often justifying it on the basis of a need for self-defence, eventually found that they were marginalised in the communities by the loyalty that the community “dons” commanded. It appears that a practice is now developing by which

the community dons are awarded with the contracts for carrying out public works on the basis that they will be best able to maintain order and therefore the continuity in the works programme. This arrangement is accompanied by the making of financial contribu-

tions by the awardees to party political activities. The iniquity of this arrangement is that the benefits of public expenditures are enjoyed by the supporters of the Dons and the political party to which they are aligned to the exclusion of persons of different or no political persuasion. In this atmosphere of deterioration in law and order, the security forces have become increasingly alienated from the ordinary citizen. In responding to violent crime by the use of excessive force and brutality, the police sacrifice the opportunity to gain the allegiance or cooperation of the law-abiding citizens in the poorer communities. It is true to say that there have been times in which citizens’ security has been threatened not only by criminals, but also by the police and that in some communities when the door of a house is kicked down at night, the residents apprehend that it may be criminal gangs or police raiding parties.

These developments threaten to perpetuate and consolidate, within the social system, unofficial security systems and illegitimate local governments.^{viii} Although periods of peace or the suppression of violence may be

The linkages between poverty, hopelessness, corruption, political patronage and violence provide a recipe for social chaos and political instability.

brokered and contrived, these are short-lived. They are susceptible to the vagaries of inter-gang rivalry and intra-gang struggles for leadership. These gang leaders may switch political allegiance at will and, through intimidation and criminal exploitation of communities other than those they preside over, seek to augment their financial resources.

The American Convention on Human Rights states in Article 7 that "Every Person has the right to personal liberty and security." The State, therefore, has a duty to adopt appropriate measures to safeguard this right. There have been many studies of the anatomy of the society and the aetiology of the cancer of crime. There are also numerous recommendations as to how to solve the problem. Inevitably, the analyses have all led to the following propositions:

1. Citizens' security, though a primary responsibility of the State, can only be achieved with the cooperation of civil society.
2. The use of excessive force by the security forces and police brutality militate against the prospects for a police/citizen alliance in the fight against crime.
3. In order to establish the basis for this cooperative endeavour, the security forces must respect citizens' human rights and avoid conduct that will be regarded in the communities as unfair or partisan.
4. A well tested method of creating the conditions for this cooperative method is the utilization of various forms of community policing.
5. Corruption indulged in by politicians, public officials or the police breeds contempt for public administration. The administration of justice and all systems for the distribution of public benefits, jobs and contracts must be fair, non-partisan and transparent.
6. Hopelessness, particularly among the young, rather than poverty is an incentive to criminal activity and, therefore, social and economic programmes have to be developed and implemented so as to provide training and employment for the high percentage of unemployed persons.
7. The influence of the criminal dons in the communities must be diminished by providing alternative support systems and positive role models.
8. All linkages between the political parties and criminal gunmen must be severed.
9. The electoral process must be so organised that intimidation and violence have very little prospect of influencing the results in any constituency.
10. Human rights and the amicable resolution of disputes must become critical segments of the educational programme at all levels, as well as in the communities.
11. The law and the rules of conduct must be fair and, once established, must be obeyed and respected by citizens as well as officials.
12. The machinery for preventing the infringements of the law must be efficient, and the resources provided to the security forces to respond to infringements must be adequate.
13. Crime detection and apprehension must be tackled on a more scientific basis with the use of modern forensic and technological tools, as well as effective intelligence gathering.
14. The justice system must be reformed and modernised so as to reduce the delays and create public confidence in its efficiency and fairness.
15. Rules of conduct for all the major participants in the programmes must be established, clearly understood and monitored so as to ensure accountability and transparency.

16. The Government must summon the political will to effect the necessary changes and implement the required programmes.

The propositions and recommendations have been stated and re-stated by different persons, many eminent and learned, from time to time. Official lip service has been given to them. Foreign advisers have reconfirmed them. The question is not so much the absence of consensus, but of commitment. What are the prospects? Civil society is increasingly demanding that the political will be manifested. The private sector and non-governmental organisations have been devoting great effort in their pursuit. Most significantly, the Government and political leaders have taken specific steps to tackle the problems at the root and advance. These efforts must be intensified, coordinated and assiduously maintained.

One thing is clear: Jamaica can afford no further delay in tackling the interconnected problems of corruption, security and human rights. The psychological effects of corruption and violence, their impact on the economy and the sense of injustice and deprivation they engender, contribute to an unhealthy body politic. Progress in Jamaica is dependent on the creation of an atmosphere of transparency, justice and security, as well as urgency.

- iv "Worsening Problem of Crime in Jamaica," The Daily Observer, November 26, 2001
v Stone Poll Results, The Sunday Observer, November 25, 2001; See Appendix A.
vi The Gleaner, December 8, 2001
vii Report in The Sunday Observer, December 9, 2001
viii Both the public and private sector have admittedly sought "to cooperate" with "dons" in an effort to obtain security protection or communal peace.

ENDNOTES

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A STRATEGY TO PREVENT CORRUPTION AND THE ROLE OF COMMISSIONS AND CITIZENS

Bertrand de Speville

A primary goal of the Jamaican Corruption Prevention and Integrity Commissions is the collection of asset declarations of elected Members of Parliament and civil servants. According to the Jamaican anti-corruption legislation, asset declarations, listing income and resources, are then to be used to identify and assess the level of corruption. Asset declarations, however, are but one tool in the fight against corruption. Generally, they are neither effective for discovering corruption nor sufficient in reducing its occurrence. Asset declarations are most appropriate in preventing corruption through a review for conflict of interests. A comprehensive strategy for reducing corruption includes three prongs: prevention, enforcement of the laws and public education. This paper will provide a framework for addressing corruption in the Jamaica context through the use of the three-pronged strategy.

INTRODUCTION

Leaders of countries around the world are worried by the growth of corruption. They see the consequences and they realise that things can only get worse, if effective action is not taken quickly. It is little comfort to them (or us!) to know that no country is immune from corruption nor that one country is more corrupt than another. Each country has its unique characteristics, and its corruption, no doubt, has some special features. However, corruption is a universal phenomenon - no country is devoid of it - and, despite its numerous manifestations, it has certain features wherever it appears.

People have an ambivalent attitude to corruption - an attitude of uncertainty compounded by tolerance, indifference or resignation, a feeling that corruption is so pervasive that nothing can be done about it and we might as well learn to live with it. There seems little point in helping the authorities to combat corruption - they themselves are corrupt!

To overcome this ambivalence, a strategy must be designed that addresses both components of society: systems and people. As members of orderly societies all of us live and work in and with systems, both large and small. These systems present us with the opportunities to take improper advantage. It is rightly said that a system is only as good as the people who make it work. But the converse is equally true, people are only as good as their systems. If a system is bad because it offers opportunities for corruption, the people who operate the system are likely themselves to become bad. So it makes sense to examine each of these systems and make some changes, even replace or remove one system altogether, so as to minimise or eliminate opportunities for corruption.

Secondly, communities are comprised of people. If we are to turn against corruption, we must first learn about corruption - what it does to our community, how it spreads like dry rot. Then we have to realise that it can be beaten, but only if each of us is ready to play our part. We must shun corruption and determine that we will not allow it to be part of our daily lives, as it is now in so many countries, including Jamaica. So, we must educate the whole community about corruption and foster willingness to partake in the fight against it.

Bertrand de Speville, presently of de Speville & Associates, was formerly a Commissioner of the Independent Commission Against Corruption of Hong Kong.

SEVEN ESSENTIAL CONDITIONS FOR COMBATING CORRUPTION

It is now widely recognised that combating corruption successfully in any country requires certain conditions. These are the seven essentials:

1. Will: There must exist the political will to act against the problem.
2. Law: There must be strong laws comprising clear offences that reflect the values of the community, effective powers of investigation, and rules of evidence that assist the proper prosecution of those charged with corruption offences.
3. Strategy: Fighting corruption requires a clear, complete and coherent strategy, which must include three principle elements:
 - a. prevention by eliminating from systems, large and small, the opportunities for corruption;
 - b. effective enforcement of the laws;
 - c. educating the public about corruption and fostering citizen engagement in the fight.
4. Coordinated action: These elements must be coordinated in their implementation.
5. Resources: National leaders must recognise that fighting corruption successfully requires resources, human and financial.
6. Public support: The authorities cannot fight the problem without the help of the people. Therefore, the community must be involved from the beginning.
7. Time: Beating corruption will take time and, once the problem has been brought under control, it must be kept under control. The commitment must be long-term, and the provision of adequate resources for the fight must become a permanent item of annual national expenditure.

A STRATEGY FOR JAMAICA

An effective strategy against corruption in Jamaica must include the three elements noted above: prevention, enforcement of the laws against bribery and illicit enrichment, and education. The objective of the strategy is, of course, to reduce corruption to the point where it no longer undermines what Jamaicans are trying to build.

In many countries, it is assumed that a detailed asset declaration system will go a long way to eliminating corruption. However, asset declaration does not itself eliminate corruption; rather it is but one tool to be used in the overall effort. Nor can enforcement of the laws, prosecution and conviction alone bring corruption under control or provide a sustainable solution. The strategy must incorporate three critical elements - prevention, enforcement, and public education and support.

These three elements working together as a coordinated whole form the framework of the strategy. These principle ingredients must move forward together and complement each other. When they are made interdependent, any success in one of them enhances the others. Now the strategy is more powerful than the sum of its parts - truly an effective weapon against corruption.

ASSET DECLARATIONS

A system based on asset declarations alone is not sufficient to reduce corruption. However, it does play an important role. Declaration of assets are valuable in identifying conflicts of interest, and may deter the improper accumulation of assets and measure the accretion of wealth. Declarations usually include income and assets, the value of assets and liabilities above a certain amount, and property held by others on behalf of

the declarant. If the declaration is intended not only to discover conflicts of interests but also to fulfill the objectives of deterrence and measurement, it should require the source of assets to be declared as well as the assets of spouse, children and parents. Declarations are made on taking office, at regular intervals thereafter, on leaving public service and, sometimes, at a certain time after leaving the service.

Key Issues in Asset Declarations

Requiring an individual to declare his assets, income and liabilities is an infringement of his basic right to privacy. The law recognises that the state is entitled to infringe that right in the public interest, but restricts how far the state may lawfully go.

Thus, in establishing an asset declaration system, a number of issues must be carefully considered.

First, the requirement to declare should be made only as, when and to the extent necessary. Since declarations are a limitation of the right to privacy, they should be required only from those against whom the public interest necessitates this form of intrusion. Requiring declarations from all public service employees, regardless of their rank or responsibilities, cannot be justified. Only those whose official actions or decisions may affect, or be affected by, their private financial interests should be required to submit declarations. These will usually be senior officials, ministers and parliamentarians, and in some countries judges. They will also include officials who are less senior but occupy “conflict sensitive” posts.

Second, in trying to meet the objectives of deterrence and measurement, declarations are sometimes crafted to request an excessive amount of information. It is then that the declaration requirements are most

vulnerable to challenge as being unjustifiable infringements of privacy - unjustifiable because their limited effectiveness is disproportionate to the extent of the intrusion. Therefore, the extent of information must be carefully balanced with the requirements’ goals and utility.

A third consideration is the accessibility of asset declarations. Not all declarations need be made public. Indeed, confidentiality of these declarations is the guiding principle. Putting them in the public domain is the exception, and should be done only when there is clear public interest in doing so, and often only to the extent necessary. Declarations of ministers and legislators fall

into the category of exceptions and should be made available to the public. In some cases they should be published. A declaration is sometimes in two parts: one part listing the assets, which is made public, and the other stating the value of the asset, which is kept confidential. While electors need to know that a legislator holds

more than a certain amount of a particular stock, they do not usually need to know the exact amount or value.

Fourth, declaration requirements must have a basis in law and must be enforced. The requirements in civil law countries are usually set out in a law that attaches administrative sanctions to their breach. In common law countries administrative sanctions are usually contained in civil service rules made under the general authority to make rules for the order and good governance of the service. For legislators, however, the rules may be made by the legislature itself and enforced by its own disciplinary body. In some countries, like Jamaica, criminal law is invoked to reinforce declaration requirements. Unfortunately, as often as not, this results in insufficient

Since declarations are a limitation of the right to privacy, they should be required only from those against whom the public interest necessitates this form of intrusion.

enforcement owing to the higher degree of proof required for a conviction.

Finally, to be effective, any declaration system has to be properly designed and administered. The burden of administration is often overlooked; with the result that implementation is half-hearted or not cost-effective. In developing a system for collection and review of asset declaration, the objectives must be considered. This issue is further discussed below as an aspect of the role of commissions.

Objectives of Asset Declarations

The goals of the asset declaration system should guide the content and process by which they are collected and assessed. For example, if the sole aim of asset declarations is to identify conflicts of interest, a central registration agency is not really necessary. In this situation, it is better that declarations be made departmentally or, in large organisations, sub-departmentally. In the case of ministers, the prime ministerial or presidential office should receive and store the declarations. For legislators, the speaker's or chairman's office would be appropriate; it would also maintain any public or confidential registers and make any necessary publication arrangements. Regardless of who is submitting the declaration, the information contained within must be conveyed to the declarant's superior so that the primary objective of identifying conflict of interests can be achieved.

Too often, however, much store is set by the subsidiary aims of deterrence of bribery and measurement of illicit enrichment. These aims necessitate declaring the sources and values of the assets and income. If these aims are to have any prospect of being met, the declaration must be checked and investigated. Even if only a sample of them are to undergo this process, some centralised coordinating agency with

appropriate checking and investigating resources becomes necessary.

Experience suggests that asset declarations have little effect in deterring, let alone exposing, the dishonest and the corrupt. They are often seen as offensive intrusions into the respectable private lives of the majority of public servants. Declaration systems risk being unjustifiable infringements of the basic rights to privacy and to peaceful enjoyment of property and can require a disproportionate amount of state resources for the effect they might have on promoting integrity in the public service—resources that could be used more effectively on other aspects of a national integrity programme. However, as discussed below, declarations of assets and income do have considerable value in identifying and avoiding conflicts of interests.

PREVENTION

One component of the three-pronged strategy for addressing corruption is prevention. Preventing corruption before it occurs is the object of a well developed system for assessing potential or real conflicts of interests. Asset declarations can be a valuable tool in this effort when they are properly examined and assessed for conflicts of interest.

Public officials are duty bound to do their job impartially, fairly and without regard for their personal interests. It is sometimes said their duty is to act without fear or favour, malice or ill will. They must not take improper advantage of their position. But public officials, of course, have private lives and personal interests. In performing their public duties they must not allow their private interests to affect the way they do their job. If they have a private interest that would or could be affected by the decision they take in doing their job, they are said to have a conflict of interest - a conflict between their public duty and their private or personal interests.

Elected representatives have a similar responsibility. An exemplary parliamentary code of conduct puts it this way: "In general, no person bound by this code must place himself or herself in a position which conflicts with his or her responsibilities as a public representative in Parliament; nor may he or she take any improper benefit, profit or advantage from the office of Member."ⁱ



The public official or civil servant is under a duty to apprise his superior whenever he thinks he may be facing a situation where his public duty could be affected by his personal interests or vice versa. When alerted to the difficulty, the superior can make an appropriate decision, such as passing the task to a disinterested colleague or requesting the declarant to divest himself of the asset creating a conflict. For example, a civil servant responsible for awarding mining licences could be asked to dispose of shares that he holds in mining companies. In such circumstances, the duty of the civil servant to declare his personal position is clear. If he fails to do so, he should be subject to disciplinary action.

It is just as important to avoid a conflict of interest that is only apparent or potential. Actual, potential or apparent conflicts of interest are not always evident to the civil servant himself. The asset declaration of personal interests is, thus, used to identify and avoid a conflict well before it actually arises. The act of making the declaration at regular intervals serves to keep the civil servant aware of the importance of avoiding conflict between his public duty and his private interests.

The rationale for a declaration of assets system for elected representatives is similar. In some countries this system is called a "register of members' interests." Generally, unlike civil servants, elected representatives do not have superiors or employers who could pass the particular task to a fellow employee or instruct the elected representative to dispose of the offending asset.ⁱⁱ But, at least, if we let the public know what personal interests a representative has when he speaks or votes on a matter in the assembly, we know whether his view could be coloured by a personal interest and we can form our own judgement of his actions.

Asset declarations, including income and liabilities, are only one means of preventing conflicts of interest. A second method is to rely on the person who knows best when a conflict of interests arises - the person whose interests are affected. He must, therefore, be primarily responsible. Every public official should be under an affirmative duty to declare any conflict of interest to his superior and to comply with any lawful instruction intended to resolve the conflict. Those not subject to supervision, like judges and elected representatives, should be under a duty themselves to resolve or declare any conflict.

ENFORCEMENT

Addressing corruption through enforcement of the laws is clearly important to the success of the campaign. Corruption is many faceted. In Jamaica, corruption is, in broad terms, criminalised by the offences of accepting or offering a bribe, or illicit enrichment, whereby a public servant or member of parliament “owns assets disproportionate to his lawful earnings.”ⁱⁱⁱ

Corruption is secretive, complicitous conduct and is a serious crime in all modern societies. But, unlike “ordinary” criminality such as robbery, fraud or rape, the crime of corruption has no obvious victim who will complain to the police and provide evidence. The world has come to realise that, unlike those “ordinary” crimes, simply investigating, prosecuting, convicting and punishing cannot effectively tackle corruption. That has been tried everywhere - more severe offences, harsher penalties - but the problem just gets worse.

As for the strategy itself, it is self-evident that only one of its elements is the investigation of alleged violations and effective enforcement of the national laws against corruption. Nevertheless, for the public it is the enforcement arm that will provide evidence that the government means what it says and the evidence must appear reasonably quickly for there to be any chance of convincing a skeptical public.

Investigations of illicit enrichment through an asset declaration system are especially difficult, as rarely does the declarant admit to acting in a corrupt and illegal manner. Evidence of bribery, particularly against senior people, is hard to come by and successful prosecutions,

even in countries with sound criminal justice systems, are quite rare.

Even so, some governments, especially those of countries in transition, have faith in the efficacy of asset declarations as the means of identifying bribery and illicit enrichment. Even when properly done, investigations of alleged corruption are resource intensive, and sufficient resources are commonly not made available. Often the result is an ineffective and discredited system.

Nevertheless, investigations and enforcement of anti-corruption laws is a necessary piece in a complex puzzle. The system must be made to work if it is to maintain credibility. Thus, resources should be concentrated on investigating particular declarations rather than

Investigations of alleged corruption are resource intensive, and sufficient resources are commonly not made available. Often the result is an ineffective and discredited system.

inadequately checking all of them. The declaration to be investigated should be linked to a specific allegation or suspicion of illicit enrichment.

Investigations of corruption allegations or suspicions should be left strictly to those charged with that responsibility. Too often, well-meaning but inexperienced investigation results in failure. The examination of declarations in pursuance of a corruption investigation should entail all the investigation powers available to the corruption investigators, for example powers of search, seizure, arrest, detention, examination of bank and other accounts, requiring statements, etc. However, a warning note should be sounded that the use of intrusive powers without strong grounds for doing so is liable to successful challenge.

While it is perhaps obvious that, in relation to prevention and public education, those tasks that are regarded as the most pressing or the most likely to

succeed should be undertaken first, it does not follow that the most serious allegations should be given investigative priority. It is very important that every allegation be quickly and properly investigated, no matter how insignificant it may seem to be. The reasons are these:

1. What appears to be a minor matter quite often unravels into a much more serious case.
2. For the citizen who has brought himself to make a complaint, the matter will be important. If it is dismissed as unimportant, he is unlikely ever to return to the authorities, perhaps with a crucial piece of information. If community support is to be won, the minor complaint must be taken seriously.
3. Picking and choosing which reports to investigate and which to ignore gives rise to suspicion of improper influence having affected the decision or, worse, of corruption in the investigating unit.
4. Ignoring some complaints gives the impression that some corruption is tolerated, that double standards apply. The fact is that widespread small-scale corruption can do equally serious damage to the ethical climate of a country.

Of course, the amount of resources put into investigating what is indeed a minor matter will be small in comparison to the resources put into investigating a major matter. What is important is that in both cases the public should feel the investigation has been properly done. And in that connection the community can have an important role to play.

PUBLIC EDUCATION

The third-prong of the strategy includes fostering public support through education. Education is necessary to awaken citizens to the reality and consequences of the problem and their role in fighting corruption. But, as discussed above, people have an ambivalent attitude toward corruption. There is a sense of failure before steps are even begun. Some even argue that corruption is a necessary evil, that it “greases the wheels” and gets things done.

These attitudes must be changed for two reasons. First, if the laws against corruption are to be enforced, the allegations and suspicions of corruption have to be investigated. But, without information from the citizenry, there is nothing to investigate. Developing the willingness to participate in corruption prevention efforts is challenging, especially in countries where denunciation to the authorities is anathema or where the authorities are deeply distrusted. But it must be done, for unless the authorities are given good information about what is happening, they will be powerless to do anything about corruption. People must therefore be brought to feel that corruption has to be resisted, that the information they have is essential in the fight and that in giving information they will be protected and respected.

The second reason for education is that, in the long term, success can come only with the development of intolerance of corruption in everyone’s hearts and minds. Again, the effectiveness of enforcement is limited - you can investigate and prosecute forever; but without a change of attitude throughout the community, enforcement will not overcome corruption.

THE ROLE OF THE JAMAICAN COMMISSIONS

A national problem requires a strategy that applies nationwide, to all sectors of the community, not just the public sector. Some one or some body is needed to lead the implementation of this strategy and to coordinate its three elements. In a growing number of countries that role is given to an anti-corruption commission.

In Jamaica, the function of both the Commission for the Prevention of Corruption and the Integrity Commission is essentially to manage the declarations of assets required from public officials. If, as previously described, it is agreed that all three arms of the strategy are necessary to fight corruption, they must be applied and move forward together so as to complement one another. It then follows that their implementation will have to be coordinated by a body or person. With the appropriate powers and resources, the new Commission for the Prevention of Corruption is well placed to perform that coordinating role.

Implementing each of the arms of the strategy will require distinct skills, skills not usually found in a single individual. The investigator is unlikely also to be an educationist or a systems analyst. Thus, one possible mechanism for implementing the various components of the strategy is to assign the responsibility for that element to a particular agency or unit of government. The implementing agency or unit should be part of the public administration, as opposed to a non-governmental organization, for reasons of control and accountability. If an existing government agency has the capacity to undertake the implementation of one of the arms of the strategy and can be trusted to do the job properly, it may be better to use that agency than to create a new implementing agency.

The same reasoning applies with respect to the implementation of the other two pieces of the strategy. If an existing agency can be given the responsibility and can be made operationally answerable to the Commission, that may be the better way to proceed.

All the details of implementing each arm of the strategy need not, indeed should not, be decided at this stage. For example, it is unnecessary to decide now exactly how the anti-corruption message will be conveyed to police recruits nor whether the promotion system in the public administration should be the first system to be examined. It is the strategy and the institutional mechanism for putting it into practice that should be determined at this stage.

The Jamaica Corruption Prevention Act 2000

The Corruption Prevention Act was enacted at the end of December 2000, repealing the Corruption Prevention Act and containing the basic corruption offences of bribery in both the public and private sectors, bribery of a foreign official and illicit enrichment.

The Act also establishes the Commission whose main function is administering the system of asset declarations regularly required from public servants. Section 5(1) provides:

The functions of the Commission shall be -

- a. to receive and keep on 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 it in its examination;
- c. to make such independent enquiries and investigations relating to a statutory declaration as it thinks necessary;

- d. to receive and investigate any complaint regarding an act of corruption;
- e. to conduct an investigation into an act of corruption on its own initiative, if it is satisfied that there are reasonable grounds for such investigation.

A public servant to whom the Act applies has to furnish to the Commission an annual statutory declaration of his assets, liabilities, and income in the form set out in the Second Schedule to the Act.^{iv} When he ceases to be a public servant, he has to furnish a declaration at the end of 12 months from the date on which he ceased being a public servant.^v

In reviewing the mandate of the Corruption Prevention Commission, it quickly becomes clear that the system is not designed to identify and avoid conflict of interests. What purpose then does it serve? Is its true purpose to identify assets and/or income that are so much in excess of official emoluments as to raise questions about their sources and the legitimacy of those sources? Does the system enable the accretion of assets to be measured?

The new Jamaica Act relies on criminal punishment to ensure compliance and transparency. As set out in the legislation, failure to submit a declaration or submitting it late, omitting to declare certain items, making a declaration that is false in any material particular can all be dealt with as criminal offences. In Jamaica any such conduct is a criminal offence punishable by a maximum fine of \$200,000 Jamaican dollars and/or maximum imprisonment of 2 years.^{vi} The criminalization of these acts has not, in other jurisdictions, proven to be particularly effective. Rather, elsewhere, such conduct is likely to be dealt with as a breach of administrative law attracting an administrative penalty or as a breach of public service regulations attracting disciplinary sanction ranging from admonition to dismissal.

The question then arises: what is to be done about the declaration which is complete and true in every material particular but reveals an unsatisfactory state of affairs because:

1. assets and/or income are so much in excess of official emoluments as to raise questions about their source;
2. declared sources raise questions about their legitimacy?

There is a slight air of unreality about this scenario. Excessive wealth is more likely to be revealed by an individual's lifestyle than in his declaration. Dishonest or otherwise improper sources are unlikely to be declared, nor are excessive assets or income from such sources. This is especially so in countries where corruption is believed to be widespread and corrupt conduct is regarded as a crime entailing minimal risk of detection. The dishonest will continue to take their chances, and the obligation to make a declaration is unlikely to change their ways. All the while honest officials are subjected to major intrusions into their private affairs. That is why the subsidiary aims of deterrence and measurement are unlikely to be met.

How Can the Commissions Address Conflicts of Interest?

Conflict of interests and corruption may be related but they are not the same thing. Therefore, the management of a system of avoiding conflict of interests can and should be kept separate from the business of investigating allegations and suspicions of corruption. Combining the two functions risks confusion and doing neither properly, at considerable and unnecessary cost.

For conflicts of interests, establishing a number of mini-systems under the overall supervision of a body, like a public service commission, emphasises that



"I'm thinking of getting back into crime, Luigi,
- legitimate business is too corrupt."

avoiding such conflicts is essentially a matter of sound administration rather than a matter of uprooting entrenched corruption. The information contained in declarations must be kept confidential, except in the case of legislators and perhaps ministers, for it must be recognised that, apart from the infringement of privacy, the information would be valuable to the criminal fraternity. Departmental confidential registries should provide adequate protection. Like other personnel records, declarations should be retained until after the official leaves the public service. In the event of a corruption investigation they should be made available to the investigators.

Two features of the Jamaican system created by the Act stand out. First, if the main object of a declaration system should be to identify and avoid conflict of interests, it is difficult to see how the Commission will be able to achieve that object, except perhaps in the most blatant cases. Given the proposed asset declaration form, as found in Schedule II of the Act, the Commission will know little or nothing about the declarant's job or his particular duties, let alone his daily assignments, as it

does not require any of that information to be provided. The Commission will be completely unaware whether the personal interests of the declarant conflict with his official duties.

Second, the declarant's superiors know nothing about what he is declaring. The declaration system does not allow those who are best placed to identify and avoid a conflict of interest the access to the information that would enable them to do so.^{vii}

With a minor amendment to the law, the system could become an effective method of identifying conflict of interests. The Commission would remain the central depository of declarations and it would enforce compliance with the requirements of the law. But the declaration would be submitted to it via the declarant's superior so that he would have the opportunity of identifying any conflict and taking remedial steps.

Thus, in those countries, like Jamaica, where a central declaration system has been established, it becomes vital that the information provided in the declaration reaches the employee's superior in such a way that he can act appropriately, confidentially and in time to avoid the conflict of interest from occurring.

How Can the Commission Investigate and Enforce the Laws?

Whether the aim is conflict of interest or deterrence and measurement, investigations and subsequent prosecutions must receive significant attention and resources. The Jamaican legislation criminalizes both bribery and illicit enrichment, and places in the hands of the Commissions the primary responsibility of investigating allegations of these offences.

Illicit enrichment is the offence that experience in some parts of the world, Hong Kong being a good

example, shows to be an effective way of dealing with corrupt public servants. Possession of excessive wealth by an official coupled with his failure to provide a satisfactory explanation is in some countries, including Jamaica, made a criminal offence, visited with criminal penalties and the forfeiture of the property

In Jamaica, the Commission has the duty to receive and investigate any complaint regarding an “act of corruption,” including illicit enrichment. It also has the duty to conduct an investigation into such an act on its own initiative, if it is satisfied that there are reasonable grounds for such investigation.^{viii} An official apparently owning wealth in excess of his official salary can justifiably be made the subject of investigation. If he is found to own excessive wealth he can justifiably be asked to provide an explanation.

The Commission’s power to investigate is provided in the broadest terms in section 5(2) of the Act: “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.” The Commission may also, of its own volition, initiate an investigation.^{ix} However, as in other jurisdictions, the Commission must coordinate their efforts with existing institutions, such as the prosecution authority and the judiciary.^x

What Is The Role of the Commission in Educating the Public?

As with the prevention prong, there is little in the Jamaican law to guide the Commission in their role as educators. Nevertheless, it is well accepted in other jurisdictions that educating the public is a critical component of the strategy. That element could be entrusted to the Commission, even though the Corruption

(Prevention) Act 2000 does not refer in specific terms to anything like “educating the public against the dangers of corruption and enlisting public support”. A well-planned, community-wide education campaign would require the Commission to engage qualified staff. The 10 year old school pupil, the recruit police officer, the business manager, the Civil Service administrator have different educational needs in this difficult area of ethical values and criminal offences. There is no doubt that the real mark of success against corruption and the best defence against its return is the changed personal attitude of every member of the community.

THE ROLE OF CITIZENS

Every day the headlines tell us “Corruption here” “Corruption there.” It is not surprising we come to believe corruption is everywhere. Allegations of corruption fly around but never seem to be resolved. Nobody is charged, let alone convicted. We never know if the matter has been properly investigated. These allegations just accumulate, polluting the atmosphere. Before long we believe all our public figures, all our politicians and public officials, indeed all those around us are corrupt. We are obviously in need of fresh air. This state of mind is not peculiar to Jamaica - it occurs in every country where people believe that allegations of corruption are not properly investigated.

One of the functions of the Corruption Prevention Commission is to investigate thoroughly corruption allegations that are made to it. But the public has to be satisfied. People have to be reassured that the Commission has done a proper job of investigation. Experience in places like Hong Kong and Singapore show us that most allegations or suspicions of corruption do not result in a prosecution in court. Usually, the reason is that the necessary evidence is lacking or that the

allegation was mistaken. The investigation can go no further and must, therefore, be closed, but not before we are satisfied it really has been properly investigated.

How can the Commission reassure the public about that? It would be disastrous to make available for public scrutiny all those investigations that have to be closed. It would wreck the confidentiality of the Commission. Some of the Commission's work must be confidential; the public expects it.

There is an alternative. In addition to relying on citizens to provide complaints and evidence relating to alleged corruption, they can form a committee. This has been used successfully in Hong Kong over many years. A committee of trustworthy citizens is given the role of looking at those cases that investigators propose should be closed and providing advice. These citizens meet once a month for half a day and consider the cases that are to be closed. They can question the investigating officers. If they agree with the proposed closure, they advise accordingly. If they do not, they can suggest that further investigation should be done or that the legal advice should be reconsidered. Their work is, of course, confidential.

In that way the people are reassured that ordinary citizens, acting in the public interest and on behalf of the public, have satisfied themselves that investigations have been done thoroughly. The air begins to clear.

CONCLUSION

A campaign against corruption must be built step by step:

1. The adoption of the strategy and the institutional mechanism by which it will be implemented;
2. The determination of the main policy issues that will affect the course of the campaign;

3. The making of a survey of the current state of affairs and of public attitudes to corruption so as to provide a benchmark against which to measure future progress;
4. The preparation and enactment of the legislation that will state the strategy, create its implementing mechanism, grant the necessary powers and provide the safeguards against abuse;
5. The appointment of the coordinating person or body and the provision of financial and technical support that will be needed at the outset;
6. The selection and training of the personnel who will be given the responsibility for carrying out the coordinator's instructions;
7. The raising of public awareness and expectation of the government's determination to deal with corruption;
8. The start of operations by the coordinator;
9. The development of the campaign over time
10. Finally, the regular accounting for the conduct and progress of the campaign.

It is also important that consensus should continue to be built at each stage, in ever widening circles, so that before long the consensus becomes nationwide. Through these steps, corruption, in the long-term, will be reduced to the point where it no longer undermines and hampers development in Jamaica. There is every reason to believe that what has been achieved elsewhere can be achieved here.

ENDNOTES

i Republic of South Africa National Assembly Code of Conduct in regard to Financial Interests.

ii In some countries one way to minimise a conflict of interest requires control over the offending asset to be removed from the

elected representative or public official by transferring the asset into a “blind” trust, the trustees of which have complete and exclusive control of the asset.

iii Section 14(5)(a), Corruption (Prevention) Act 2000.

iv Section 4(1).

v Section 4(6).

vi Section 15(2).

vii The Act goes further, making “secret and confidential” all information relating to statutory declarations and making it an offence to disclose any such information except for the purposes of the Act (see section 6).

viii See section 5(1).

ix Section 5(1).

x See, for example, section 12(2).

ETHICS IN GOVERNMENT AND THE ISSUE OF CONFLICTS OF INTEREST

Mark Davies

The main purpose of ethics laws lies not in punishing wrongdoing, but in preventing it, not in catching people, but in teaching them. In ethics, education is the name of the game.

INTRODUCTION: GLOBALIZATION AND GOVERNMENT ETHICS LAWS

While rarely used in the United States, the word “transparency” is understood to refer to that whole host of laws, regulations, attitudes, and actions that go into making a democracy more open and more honest. In the broadest sense, transparency thus includes not only open government laws and regulations but also criminal laws on official misconduct, anticorruption measures, lobbying restrictions, campaign finance provisions, election reform, and government ethics laws or, more accurately, government conflicts of interest laws.

Although these various laws and regulations support and interact with one another, their purposes, goals, and implementation differ to a greater or lesser degree. In this regard, government ethics laws and regulations, in particular, differ from criminal laws on official misconduct.

This chapter addresses government ethics laws as they exist in the United States generally and in New York City especially.

PURPOSE AND NATURE OF GOVERNMENT ETHICS LAWS

When a corrupt public official steals government funds or government property or uses his or her government position to extort money from a private citizen or company or takes a bribe or a kickback or an illegal campaign contribution, that official has committed a criminal act that is punished by criminal laws, prosecuted by prosecutors, and might have been prevented by anticorruption measures.

Government ethics laws are a bit different. Their purpose lies not so much in stopping and punishing corrupt public officials but rather in promoting the reality and the perception of integrity in government by preventing unethical conduct before it occurs.ⁱ So government ethics laws focus not on the corrupt public official but on the public official who is basically honest but who does something stupid - like taking a gift from someone he or she is doing business with in his or her government job. Accepting such a gift, while not a bribe or a kickback, looks terrible and makes the public think that the government is corrupt, when in fact it is not.

It is absolutely true in New York City - and, one suspects, in most other cities and countries - that the vast majority of public officials are honest and want to do the right thing. But they must be told what the rules are, and they must be encouraged to obey them. The rein lies the role of government ethics laws: to provide guidance to government officers and employees and

Mark Davies is the Executive Director of the New York City Conflicts of Interest Board.

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reassurance to citizens that those government officials are acting in the public interest.

In fact, government ethics regulation has existed for a long time. In the United States, such laws originated in the contracting scandals in the American Civil War over a century ago. In Germany, formal ethics regulations date at least to 18th century Prussia and have their roots in the middle ages.ⁱⁱ In France, King Louis IX promulgated government ethics restrictions almost 750 years ago.ⁱⁱⁱ

Despite all that history, misunderstandings about government ethics laws abound. First, these ethics laws do not deal with morality. They deal with the reality and the perception of divided loyalty. They deal with conflicts (usually financial conflicts) between a government official's private interests and his or her public duties.

One should stress in this regard the significance of the role that perception plays in government ethics laws. No matter how honest a democratic government is in fact, how can it function properly if the people believe the government is corrupt?

PRINCIPLES OF GOVERNMENT ETHICS REGULATION

As noted above, as their first principle, governments ethics laws seek to prevent unethical conduct before it occurs. As the saying goes: It is better to shut the barn door before the horse escapes, not after. So these laws focus on prevention, not punishment. Once the violation occurs, the damage is done, driving one more nail into the coffin of public confidence in government.

Government ethics laws must also be simple and clear. People cannot obey an ethics law they do not understand. The best ethics law in the land is seriously flawed if the lay person cannot understand it.



Credit: Shannon Burns/CartoonStock.com

Moreover, ethics laws must be tailored to fit the particular government: its level (is it national, regional, local?), its size (does it have 100 employees or 100,000 employees?), its nature, and the culture. For example, New York City prohibits high level City officials from holding a political party office.^{iv} That prohibition works fine in New York City. But in a small upstate village, where the number of volunteers for public and political service remains insufficient to meet the demand, the provision may well force village boards and political parties to fight over potential members and condemn one or the other or both to unfilled vacancies. Such a provision would not work, and would not make sense, in that small community.

Furthermore, ethics laws must be sensible. Government employees will not obey - or will only grudgingly obey - an ethics law that does not make sense to them. The final principle underlying government ethics regulation may best be presented by way of example. Suppose that a government financial officer has some personal financial problems, such as a dying father, a sick child, and a broken down car. Further suppose that a bank that she deals with in her government job offers her an interest free loan. No bribe is proposed, and

no quid pro quo is suggested. But if she takes that loan, quite possibly she will lose her job. What then happens to the bank? In New York City - and in most cities and states in the United States - absolutely nothing. Many will find that outcome outrageous, like dangling a hunk of bread before the eyes of a starving man and then punishing him for taking it. Yet, what does the bank have to lose?

Suppose, however, that under the ethics law any person or company that caused a government official to violate the ethics law could be debarred (prohibited) from doing any business with that government for three years. Perhaps then that bank would think just a little bit harder before going after a government official. Government should protect its employees better.

These then are the basic principles of a government ethics law, at least in the United States. And every provision in an ethics law, including the structure of the enforcing authority, must comply with these principles.

THE THREE PILLARS OF AN EFFECTIVE GOVERNMENT ETHICS LAW

An effective government ethics law rests upon three pillars: a code of ethics, disclosure, and administration. These pillars resemble the three legs of a three-legged stool. If one removes any of the legs, the stool topples. All three legs must remain in place if the ethics law is to stand.^v

THE FIRST PILLAR: A CLEAR AND COMPREHENSIVE CODE OF ETHICS

The first pillar of an effective government ethics law is a code of ethics. Simple, sensible, straightforward, and short, the code of ethics must be understandable by every official and employee - without a lawyer. Most officials also prefer bright line - that is, clear cut - rules, whenever possible. The code should set a uniform,

minimum standard applicable to every officer and employee of the government, from the street sweeper to the president, although certain high level officials may have even stricter standards.

The code of ethics should be a comprehensive list of do's and don'ts that will guide and protect government officials. Indeed, it may be said that an ethics law is the best friend of government employees because it tells them what the rules are, helps them stay out of trouble, and protects them against friends or supervisors or private employers who just "want a little favor." Bribery laws and antikickback laws by their very nature call into question the integrity of public officials. But ethics laws may be presented as supportive of public officials.

To keep the code of ethics readable to the average lay employee, it should not contain any definitions or exceptions, which should, instead, appear in separate sections. Indeed, definitions should be kept to a minimum and should never expand the duties of the public official as set forth in the code of ethics itself. The goal is this: a government employee who reads and follows only the code of ethics and ignores the rest of the ethics law will not violate that law.

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Ethics codes contain many different kinds of provisions, but the most common, and most important, provisions are the following:

General prohibition: on using one's government position for private gain for oneself, one's family, one's private employer or business, a recent private employer, a major private customer or client, or a person with whom one has a financial relationship.

This provision is the most basic ethics restriction and is intended to prevent government officials from using government resources for private purposes. The provision helps prevent waste, inefficiency, favoritism, and corruption and helps reassure citizens that their tax dollars (and their officials) are working only for the public good, not for private interests.

Prohibited positions or ownership interests: in companies doing business with the government.

This provision helps prevent divided loyalties since officials may otherwise feel compelled to help a company or business they work for or have an interest in. It protects officials against pressure from a private employer.

Gifts: from persons doing business with the government.

This provision is one of the most important ethics restrictions. It protects against divided loyalties and against a public perception that an official who accepts such a gift is corrupt.

Confidential government information: revealed or used for private purposes while in government service or after leaving government service.

This provision protects government secrets, trade secrets of firms that do business with the government, and the privacy of individual citizens.

Appearances and representation: appearing before a government agency for a private person or representing a private person in a government matter.

This provision also protects against divided loyalties and against misuse of one's public office (or confidential government information) for a private purpose.

Private compensation: receiving pay from anyone other than the government for doing one's government job.

This provision has the same basic purpose as the gifts restriction

Inducement of others: causing another government official to violate the code of ethics.

This provision helps prevent the injustice that results when a public official who violates the ethics law is punished while the public official who encouraged the violation goes unpunished.

Superior-subordinate relationship: having a financial relationship with a superior or subordinate. This provision not only protects subordinates against financial pressure by superiors (who can refuse to loan money to one's boss?) but also helps prevent financial entanglements that undermine the chain of command or result in a subordinate being forced to take an inappropriate action because of the threat of financial retaliation by his or her superior.

Political solicitation: asking subordinates (or private persons one deals with in one's government job) to make political contributions or engage in political activity.

Forcing public officials to engage in political activity or make political contributions undermines the independence and integrity of the public service and

creates the perception that government exists to serve only those in power.

“Two-hats:” holding a political party position and a government position at the same time. This provision addresses the same problems as the restrictions on political solicitation.

Revolving door (post-government employment):

1. negotiating for a job with a private person or firm that one is involved with in one’s government job.

This provision helps prevent divided loyalty and the risk that the government employee may not vigorously perform his or her government job in order to obtain a new job with a private employer.

2. appearing before the government on behalf of a new employer within a set time (e.g., one year) after leaving the government.

This provision, along with the general prohibition and the gifts restriction, is one of the most important provisions of an ethics code. It protects the government against former employees or their new employer receiving favored treatment, to the detriment of the public. It also protects against one company being preferred over another company merely because the first company hires former government employees and protects against the public perception of such favoritism.

3. after leaving government, working for a private person on a matter one worked on for the government (permanent bar).

This provision provides the same protection as the other post-employment restrictions and also helps prevent the misuse of confidential government information.

Avoiding conflicts of interest: accepting an interest, job, or gift that would cause the government official to be in violation of the code of ethics.

This provision backs up the other prohibitions of the ethics code and attempts to head off a conflict of interest before it surfaces.

Improper conduct generally: engaging in conduct (or having an interest) that conflicts or appears to conflict with one’s government duties.

This “catch-all” provision, when prudently interpreted by the ethics commission, gives the commission the authority to specify conduct that is ethically improper, in addition to the conduct covered by the other provisions of the code of ethics. Usually such a provision sets a standard that is too vague to permit the imposition of penalties, unless the standard is defined by the ethics commission or unless the government official does something that the ethics commission has previously told him or her would violate this provision.

Restrictions on private persons and firms:

1. causing a government official to violate the code of ethics. This provision helps protect government employees against pressure by private persons and companies and forces the public to take some responsibility for the integrity of public officials.
2. appearing before a government agency that has an employee who also works for the private person or firm. This provision prevents both the fact and the appearance of favoritism being shown to the outside businesses and employers of government officials.

If, in a particular case, the application of one of these provisions does not make sense and in fact harms the government or the public, then the ethics commission should have the authority to

waive the prohibition in that instance, if such a waiver would be in the best interests of the government and the public. Waivers are discussed below.

THE SECOND PILLAR: DISCLOSURE

The second pillar of an effective ethics law is disclosure, of which there are three kinds: transactional disclosure, applicant disclosure, and annual disclosure.

Transactional Disclosure

Transactional disclosure is pinpoint disclosure that occurs when a potential conflict of interest actually arises. This type of disclosure, which is the most important kind of disclosure, reveals the name of the government official involved and the nature of the potential conflict of interest. Transactional disclosure is usually accompanied by recusal, that is, disqualifying oneself from discussing, acting on, or voting on a matter as a government official when doing so would result in a violation of the code of ethics.

The form of the transactional disclosure will depend on whether it occurs at a public meeting or not. Transactional disclosure at a public meeting takes the form of an oral disclosure on the public record of the meeting. For example: “I’d like to state for the record that my wife works for the applicant for this permit. So I recuse myself from discussing or voting on this matter.

The purpose of transactional disclosure is to inform the public, other government officials, persons doing business with the government, and the media about the

conflict of interest, so that they can police the conflict and so that they know that the government official is acting with honesty and integrity.



Credit: Dan Rosandich/CaroonStock.com

Applicant Disclosure

The second kind of disclosure is applicant disclosure, which is not terribly common in the United States. Applicant disclosure is disclosure by a private person or non-government entity that is bidding on government business or requesting a permit or license from the government. The bidder or applicant must state in the bid or application the name of any official in the government who has an interest in the bidder or applicant or in the bid or application, to the extent the applicant knows. An “interest” includes the interest of members of the official’s family.

The purpose of applicant disclosure is two-fold. First, it helps to make the affected government official, other government officials, other bidders or applicants, the public, and the media aware of possible conflicts of interest - and thus avoid them. Second, it provides a check on transactional disclosure by the public official.

Annual Disclosure

The third kind of disclosure is annual disclosure, which consists of a form that higher level officials fill out once each year listing certain basic information about their assets and liabilities, such as the location of real property the filer and his or her family own, the names of the filer's private employers, and his or her outside businesses (if any). Only those officials who are in a position to have a significant conflict of interest should file annual disclosure reports. These officials include elected officials; candidates for elective office; members of boards and commissions; department heads and their deputies; officials who set government policy; officials involved in negotiating, approving, paying, or auditing contracts, permits, or licenses; and officials involved in adopting or changing laws or regulations.

Annual disclosure has four main purposes. First, it focuses the attention of officials at least once each year on where their potential conflicts of interest lie. Second, annual disclosure alerts the public, the media, the government, and people who do business with the government to what the official's private interests (and, therefore, his or her possible conflicts of interest) are. Third, annual disclosure provides a check on transactional disclosure. Fourth, and most important, it helps to prevent a potential conflict of interest from actually occurring.

The following guidelines should be kept in mind when drafting annual disclosure forms. They should be tailored to the official's position and agency. For example, a deputy finance minister may need to disclose far more about his or her stock holdings than a deputy agriculture minister.

In addition, financial disclosure forms should request only that information which would reveal a possible violation of the code of ethics. Furthermore, as a general rule, annual disclosure forms should require disclosure only of the fact of an interest, not of the amount of the interest. Annual disclosure forms should be as short and simple as possible while asking all of the relevant questions. Indeed, a question should not be asked unless a reason exists for asking it.

That most government officials hate annual disclosure results from the failure of most annual disclosure laws to comply with these guidelines. Such laws often are far too intrusive and just do not make sense. Yet annual disclosure is critical because, as noted above, it tells officials where their potential conflicts of interest lie and thus helps avoid those conflicts of interest, thereby fulfilling the central purpose of an ethics law.

Annual disclosure reports should not be left to gather dust in some back room. Rather, they should be

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some back room.***

reviewed by the ethics commission or ethics office for possible conflicts of interest. Since annual disclosure reports on their face rarely reveal a conflict of interest, they must be compared against other databases, such as a list of

government contractors. It is for that reason that the contents of such reports must be computerized; only with the aid of a computer can an ethics commission or ethics office make such comparisons effectively.

The purpose of annual disclosure, like the purpose of ethics laws generally, lies in preventing, not punishing, conflicts of interest. Nonetheless, penalties must exist (and must be strictly enforced) for failure to file an annual disclosure report, for filing it late, for failing to disclose required information, or for reporting false infor-

mation. If no penalties and enforcement exist, no one will obey the annual disclosure law. In New York City, violation of the City's financial disclosure law carries a maximum fine of \$10,000.^{vi}

Finally, annual disclosure reports must be easily and quickly available to the public, the media, other government officials, and people who do business with the government. Public availability is critical since ordinarily it is these persons, particularly the media, not the ethics commission or ethics office, that possess the resources to examine the forms to ferret out possible violations of the code of ethics. No ethics commission or office will know of every possible conflict of interest or have the staff to check every form. Public disclosure of annual disclosure forms is therefore essential.

It should be noted in passing that some governments, such as New York City, also require certain high level officials, such as commissioners, to file confidential disclosure reports. These reports are not part of the ethics law and therefore may not comply with the principles discussed above. They are, instead, anticorruption measures that, in the case of New York City, for example, have been adopted by the Mayor's Office for a small percentage (less than 2%) of New York City officials, namely those in particularly sensitive positions.

THE THIRD PILLAR: ADMINISTRATION

Finally, the third pillar of an effective government ethics law is administration: training and education, advice, waivers, disclosure, and enforcement.

Administrative Structure

The administrative structure for an ethics law must, first and foremost, promote both the reality and the per-

ception that the enforcing body - ordinarily either an ethics commission or an ethics office - is independent from the political process and from outside influences.

An ethics office is usually part of some other government agency or reports directly or indirectly to the government's chief executive officer, such as the president, mayor, or the governor-general. An ethics commission, on the other hand, is an independent body of three or more private citizens who usually serve only part time on the commission.

For at least three reasons, an ethics commission is usually preferable to an ethics office. First, an ethics commission, if properly set up, will have more independence than an ethics office. Second, because of that fact, the public will have more confidence in it when it reaches a decision that favors a high-ranking government official. Third, because its members are private citizens, it will be more open to outside views, particularly the views of the business community and civic groups. Such independence may, to be sure, appear threatening to a government that is experimenting for the first time with an ethics agency.

However it is set up, the ethics commission or ethics office must be staffed by persons of independence and the highest integrity. Anything less will only engender public cynicism. Some ethics laws require a more or less even distribution of political party affiliation on the ethics commission or restrict service on the commission by present or former public officials or political party officials. Some ethics laws require that some members of the ethics commission be women or minorities.

To preserve both the fact and the appearance of the independence of the members of the ethics commission, they should be subject to certain restrictions. In

particular, ethics commission members should not be permitted to have an interest in any contracts with the government, should not lobby the government in any private capacity, should hold no other government offices, should engage in no political activity, and should receive minimal pay for their service on the commission.

Ethics commissioners should be appointed for fixed terms. In addition, ethics commissioners should be removable only for cause and only after a hearing, which should be public, at least at the option of the commissioner.

Finally, the ethics office or ethics commission must have enough funds to do its job, although experience in the United States has shown that an effective ethics agency need not be expensive.

DUTIES

Ethics offices and ethics commissions have five primary duties.

1. **The Duty to Train and Educate.** If the purpose of government ethics laws lies in preventing conflicts of interest, then perhaps the most important duty of an ethics commission or ethics office is to teach government officials what the code of ethics requires - and what the penalties are for violating it. Thus, the first duty of an ethics commission or ethics office is training and education.

At least a quarter of an ethics commission's or ethics office's staff should be devoted to this area. Ethics agencies are often tempted to commit disproportionately fewer resources to training and education because its success cannot be measured easily. But the temptation

thus to slight training and education should be resisted.

Ultimately, every officer and employee of the government should receive ethics training. Ethics training and education should begin with those public servants most susceptible to ethics violations: elected officials, high level appointed public servants, government attorneys, government inspectors, and government employees involved in contracting with and auditing private vendors. Vendors and contractors themselves should be encouraged to familiarize themselves with the government's code of ethics.

Serious consideration should be given to appointing responsible ethics officers or ethics liaisons in every government agency. The agency ethics official will also act as a liaison between his or her agency and the ethics commission or office.

Ethics training programs may consist of workshops, briefings, and seminars. Whatever formats are used to teach the code of ethics, the programs must be interesting and, if possible, fun. If employees are bored, they will not pay attention; if they do not pay attention, they will not learn.

Perhaps the most important duty of an ethics commission or ethics office is to teach government officials what the code of ethics requires - and what the penalties are for violating it.

Ethics publications should consist of whatever works best to spread the ethics message. Employees who enjoy comic books or flash cards may find such devices effective means of learning about the ethics law.

At the very least, the ethics commission or ethics office should provide a plain language guide to the ethics law, short leaflets on various ethics topics (such as gifts, moonlighting, political activities, and post-employment), brochures to guide various types of employees (such as lawyers or purchasing agents), and a summary of

provisions relevant to private contractors and vendors.

Ethics training and education can never hope to make every government employee an expert in the ethics law. Instead, such training and education seeks only to make the employees aware that such a law exists and that certain activities, such as receipt of gifts or outside employment, raise potential ethics problems. Many police in the United States carry a little card on which is written the warning they must give to suspects when arresting them. Perhaps an “ethics card” should be distributed to every government employee, listing possible problems.

2. The Duty to Provide Advice. The second duty of an ethics commission or ethics office lies in providing oral and written advice on ethics issues. Giving quick answers to government officials’ ethics questions helps prevent conflicts of interest from occurring. Such advice also provides what politicians in the United States refer to as “cover:” an official unjustly accused by the press or the public or a political opponent of violating the ethics law can produce an opinion by the ethics commission or ethics office stating that his or her conduct did not violate the law. In most cases, that is the end of the story. Perhaps for that reason, in New York City, the mayor’s office and the City Council are the Conflicts of Interest Board’s best customers for advice on the City’s ethics law.

Many ethics agencies in the United States assign attorneys, on a rotating basis, to answer ethics questions by telephone. Such “attorneys of the day” can often head off unethical conduct. To encourage public servants to request advice, they should be able to ask a question by telephone without revealing their name.

Written opinions, which ordinarily are available only in response to a written request, should be given quickly. The staff of the ethics commission should

answer simple questions. Only complicated questions, or questions the answer to which is not clear on the face of the law or from prior opinions, should require consideration by the full commission. Formal advisory opinions provide guidance in the interpretation of the ethics law and should thus be publicly available and distributed to every government agency. To preserve confidentiality, however, publicly available copies should not reveal any information that identifies the requester.

Indeed, with the exception of waivers (discussed below), all of the ethics commission’s or ethics office’s communications with government officials seeking advice must be protected against disclosure to the public or to other government officials or agencies, at least to the extent that the request for advice relates to future conduct. (Past conduct may be a potential enforcement matter.) Absent the assurance and preservation of such confidentiality, public servants will hesitate to contact the ethics commission or office for advice, thus thwarting one of the primary purposes of an ethics law - to avoid conflicts of interest by giving advice in specific cases.

3. The Duty to Grant Waivers .From time to time, a provision of the code of ethics may not make sense in a particular case but may instead create a significant hardship for the individual government official or even harm the government itself. In these instances, the ethics commission should have the power to waive the provision, at least in some instances. (Granting waiver power to an ethics office, as opposed to an ethics commission, raises significant potential for abuse - in public perception if not in reality - by high level officials within the government.)

To protect against abuse, waivers should be subject to three requirements. First, the ethics law should establish the legal standard for granting a waiver (New York

City, for example, permits waivers if the position “would not be in conflict with the purposes and interests of the city.”^{vii} Second, waivers should require the approval of the agency of the official seeking the waiver. Third, to protect against unjustified waivers or a public perception that the ethics commission is granting waivers unfairly, waivers must be public. Making waivers public allows other officials, the public, and the media to evaluate whether the facts in the waiver request are accurate (a task for which the ethics commission may lack the necessary resources) and whether the waiver is justified.

4. The Duty to Regulate Disclosure. The fourth duty of an ethics commission or ethics office lies in administering the annual disclosure requirements in the ethics law, collecting the transactional, applicant, and annual disclosure statements, reviewing them for completeness and possible conflicts of interest, maintaining disclosure statements on file, and making them available to the media and the public. The ethics commission or office must also undertake to punish those government officials who fail to file such statements or who file them late or who file false or incomplete statements.

5. The Duty to Enforce. An ethics commission without effective enforcement authority is a toothless tiger that raises expectations it cannot meet and, as a result, merely increases public cynicism. Thus, the enforcement process becomes critically important to the success of an ethics law.

The purpose of enforcement lies in educating officials about the requirements of the code of ethics, showing officials that the government is serious about the ethics law, and punishing unethical behavior in order to discourage other officials from committing conflicts of interest (deterrence). Enforcement is one of an ethics commission’s most powerful educational tools.

Effective enforcement rests upon seven principles. First, as discussed above, government ethics laws,

including their enforcement scheme, aim at prevention, not punishment. Second, government ethics laws must be largely self-enforcing. Absent an army of investigators, ethics commissions must rely for enforcement primarily upon self-interest, peer pressure, whistle blowers, concerned citizens, and particularly the media.

Third, enforcement must be not only fair and equitable, both in reality and perception, but also sensible. Fourth, private citizens must take responsibility for officials’ compliance with ethics laws. The law must require applicant disclosure, prohibit private citizens or companies from inducing a public servant to violate the ethics law, and provide appropriate penalties, including debarment, for violations.

Fifth, ethics laws must empower ethics commissions to conduct their own investigations. Ethics commissions must have subpoena power, the authority to start their own investigations without waiting for a complaint, and must have investigators on staff. Yet the commission must also have the power to draw upon additional resources, such as a department of investigation, as needed.

Sixth, ethics commissions must have full enforcement power over every officer or employee who is subject to the code of ethics. Finally, ethics commissions must be funded sufficiently to permit adequate investigation and enforcement. Inadequate resources invite public censure and cynicism.

To ensure that the punishment can be made to fit the crime, a wide range of penalties should be available for violation of an ethics law. Most important, the ethics commission should be empowered to impose a civil fine. In some rare cases, however, such a fine would be a small price to pay for substantial financial benefits received by a public servant in violation of the ethics law. Thus, the government should be able to obtain damages from the official to compensate it for the additional cost it had to

pay. In addition, the government - or the ethics commission on behalf of the government - should be able to compel the official to disgorge any gains that he or she received as a result of the ethics violation. Indeed, disgorgement of ill-gotten gains should be available even if the government was not harmed by the official's ethics violation.

The ethics commission, on behalf of the government, should also be empowered to declare null and void any contract with the government obtained as a result of a violation of the ethics law. Other penalties that should be available for violation of the code of ethics are disciplinary action (suspension or removal from office or employment), private letters of censure by the ethics commission, criminal penalties, and negotiated dispositions (settlements). Private letters of censure enable the ethics commission to dispose quickly of cases that either do not constitute significant violations of the ethics law or for which compelling evidence of a violation is lacking.

In cases of particularly serious ethics violations, criminal fines or even imprisonment should be available. Under some ethics laws, the ethics commission itself may prosecute ethics violations criminally. Under other ethics laws, criminal prosecutions of such violations rest with the state prosecutor. In any event, the ethics law should not require the ethics commission to delay its own civil proceedings until a pending criminal prosecution is completed. Although an ethics commission will almost always do so as a matter of policy, mandating such delays in the civil case will permit the criminal prosecutor to thwart, perhaps indefinitely, an ethics enforcement proceeding.

All settlements must be public if they contain an acknowledgment by the public servant that his or her conduct violated the ethics law - private settlements conflict with the purpose of ethics laws to prevent ethical violations from occurring and to educate other employees about the requirements of the law - but the only information made public is that information contained in the settlement itself.

As discussed above, private citizens and companies, particularly those seeking government permits or contracts, should have a stake in government officials complying with the ethics law. Therefore, the ethics commission, either directly or through a court proceeding, should have the power to punish a private person or company that has violated the ethics law, for example, by inducing a government official to disclose confidential government information. Although civil fines, damages, disgorgement of ill-gotten gains, nullification of the contract or permit, and even criminal fines or imprisonment may offer suitable penalties in such cases, two additional remedies should be available: injunctions and debarment. Injunctions prohibit, under penalty of criminal fines and imprisonment, a person or company from taking an action in violation of the ethics law.

Debarment, perhaps the single most effective remedy against a company with substantial government business, prohibits the offending company and its principals from doing any business with the government for some specified period, such as three years. (In drafting a debarment provision, care must be taken that unethical corporate officials may not avoid the effects of the law merely by setting up another corporation.)

To ensure that the punishment can be made to fit the crime, a wide range of penalties should be available for violation of an ethics law.

The final point to be considered with respect to the duty to enforce an ethics law is confidentiality. A tension inevitably exists between the need to protect government officials against unfounded accusations, particularly by political opponents or disgruntled employees, and the need to reassure the government, complainants, and the public that the ethics commission will address accusations of ethical impropriety quickly, aggressively, and fairly. A similar tension exists between, on the one hand, the need to reassure complainants that, if they come forward, they will be protected against retaliation (demotion, loss of job, or even physical harm) and, on the other hand, the need of the accused public official to know the identity of the complainant in order to prepare a defense. Each government must decide for itself how best to resolve these tensions. One possible resolution is the following.

A tension inevitably exists between the need to protect government officials against unfounded accusations, particularly by political opponents or disgruntled employees, and the need to reassure the government, complainants, and the public that the ethics commission will address accusations of ethical impropriety quickly, aggressively, and fairly.

To permit the ethics commission to weed out unsubstantiated or unfair accusations, ethics laws may provide for a confidential probable cause notice to the alleged violator. Only after an ethics commission receives the answer to the notice and sustains probable cause would the pleadings and proceedings become public. Deliberations of the ethics commission, like a court's deliberations, remain private. Many ethics laws require that any complainant who has submitted a sworn complaint to the commission be given notice of the outcome of the complaint. The complaint and the identity of the complainant are usually kept confidential, unless the

complainant testifies at the hearing on the matter. In addition, many governments have enacted so-called whistle blower laws to protect public servants against retaliation when they reveal (blow the whistle on)

waste, fraud, corruption, or ethics violations. Absent such protection, government employees may hesitate to report an ethics violation or may resist cooperating in any investigation or hearing on the violation.

CONCLUSION

In the United States, the public's lack of confidence in the integrity of government has reached epidemic proportions. Indeed, much of the public seems to believe that its public officials are either lazy or crooked - if not both - when, as a matter of fact, the exact opposite is true.

While they are certainly not as exciting as sting operations and do not put many corrupt officials in jail - they are not intended to - ethics laws, effectively enforced, can go a long way toward reassuring the public that its government is honest. What is true of corruption is no less true of conflicts of interest. Conflicts of interest will never be eliminated, not entirely. But they can be controlled.

Example of Bookmark Distributed to Public Employees
In New York City

***Before you do any of the
following . . .
call your ethics officer or the
ethics commission:***

- (1) Accept a gift from someone doing business with your agency.
- (2) Work for a private firm that does business with your agency.
- (3) Take any official action that will financially help a member of your family or a business you own or work for.
- (4) Use or disclose to any private person or firm confidential government information.
- (5) Ask a subordinate to work on a political campaign or give a political contribution.
- (6) Discuss possible future employment with a firm you are dealing with in your government job.

ENDNOTE

- ⁱ See Mark Davies, Government Ethics Laws: Myths and Mythos, 40 N.Y.L. Sch. L. Rev. 177-88 (1995).
- ⁱⁱ See Mark Davies, The Public Administrative Law Context of Ethics Requirements for West German and American Public Officials: A Comparative Analysis, 18 Georgia J. Int'l & Comp. Law 319, 324-25, 333-36 (1988).
- ⁱⁱⁱ David Schacher, "A 'New' Model Conflicts of Interest Law," in COGEL Guardian 5 (March 1997).
- ^{iv} New York City Charter § 2604(b)(15).
- ^v Temporary [New York State] Commission on Local Government Ethics, Final Report, 21 Fordham Urb. L.J. 1-60 (1993); Mark Davies, Keeping the Faith: A Model Local Ethics Law - Content and Commentary, 21 Fordham Urb. L.J. 61-126 (1993); Mark Davies, Considering Ethics at the Local Government Level, in Ethics, Lawyers & the Public Sector (American Bar Association 1999).
- ^{vi} New York City Administrative Code § 12-110(h).
- ^{vii} New York City Charter § 2604(e).

THE RIGHT TO INFORMATION AND JAMAICA'S ACCESS TO INFORMATION ACT

Alasdair Roberts

The Government of Jamaica should be congratulated for introducing its proposed Access to Information Act.ⁱ By adopting this law, Jamaica will join a rapidly growing movement for increased governmental openness. Even among parliamentary democracies with a long tradition of secrecy, freedom of information laws have been widely adopted. Twenty-five years ago, there was no access-to-information (ATI) law anywhere in Canada. Today, almost every government in Canada - federal, provincial, or local - is subject to ATI requirements. These statutes are now considered to be quasi-constitutional documents.ⁱⁱ There has been a similar expansion of ATI law throughout Australian governments. Other nations -including New Zealand, Ireland, the United Kingdom, and soon Scotland -have adopted ATI laws as well. In many of the new democracies, the right to information has been entrenched in national constitutions. International treaties, such as the 1992 Rio Declaration and the Nice Treaty signed by European leaders in December 2000, also recognize the fundamental importance of the right to information.

As the proposed Jamaican law points out, the right to information is a bulwark for a system of constitutional democracy.ⁱⁱⁱ The right to information held by public authorities is an instrument for protecting fundamental civil and political rights, such as the right to fair treatment by public authorities or the right to self-government. It is also an instrument for promoting social and economic welfare, by discouraging wasteful public spending and reducing uncertainty among citizens and businesses about the direction of government policy. Transparency is also recognized to be a prerequisite for governmental legitimacy. Governments that do not

respect the right of access to information cannot expect to hold the public's trust.

Access laws play an important role in reducing corruption within government institutions. By making available information about procurement processes and successful bids, access laws make it more difficult for officials to engage in unfair contracting practices. Similarly, access to information about decisions regarding the conferral or withholding of other benefits by government institutions, or regulatory or policing decisions, reduces the probability that such decisions will be taken for improper reasons. Access laws may also make it more difficult for senior officials to make larger policy decisions that are not supported by sound analysis. Access to information about the formulation of policy can reveal instances in which policy decisions were taken without careful consideration, and instances in which decisions contradicted advice provided by professionals within the public service.

The broad principles that should govern the design of ATI laws are now widely recognized. There should be a presumption of openness, subject to well-defined exemptions where disclosure would cause significant harm to legitimate interests. There should also be a right to information where some broader public good outweighs such harm, and easily-accessible and effective enforcement mechanisms, to ensure that public authorities respect the spirit of the law. Administrative restrictions, such as provisions imposing fees or barring unreasonable requests, should also strike a fair balance between the interest in disclosure and the costs imposed by allowing access to information.

Professor Alasdair Roberts is the Director of the Campbell Public Affairs Institute at The Maxwell, Syracuse University.
Website: <http://www.campbellinstitute.org>

The proposed Jamaican law contains several progressive features and is broadly consistent with access to information laws adopted elsewhere in the Commonwealth. However, some of its provisions are more restrictive than those of comparable ATI laws. The Jamaican law would be strengthened by refining some proposed exemptions: imposing limits on proposed “conclusive certificate” provisions; adding an overall public interest test; strengthening appeal procedures; and reconsidering the exclusion of some security and intelligence functions and older government documents.

EXEMPTIONS TO THE RIGHT TO INFORMATION

The list of exemptions contained in the proposed Jamaican Access to Information Act does not differ substantially from those contained in comparable laws in other countries. Nonetheless, the wording of four exemptions could be clarified to ensure that the public interest in disclosing information is given proper weight.

Cabinet documents

Like many laws, the proposed Jamaican Act would exempt Cabinet documents.^{iv} However, it has been recognized in other countries that older Cabinet documents do not need the same level of protection, because the potential harm from disclosure is greatly reduced. For example, Canada’s Access to Information Act limits its exclusion to Cabinet documents that are less than twenty years old.^v New Zealand’s Ombudsman has also said that the age of Cabinet documents must be considered in applying the comparable exemption in New Zealand law.^{vi} Similarly, the Australian Law Reform Commission has recommended that Australian law be amended so that Cabinet documents older than twenty years are not exempted.^{vii}

Internal deliberations

The proposed law also exempts documents that contain information about internal deliberations among public servants.^{viii} The comparable exemption in Canadian law restricts this exemption to documents that are less than twenty years old, and stipulates that certain documents are not exempt if they relate to plans that have already been put into operation.^{ix} While Australian law does not exclude older documents, it does direct authorities to consider the public interest in disclosure, which may achieve the same result.^x While the proposed Jamaican provision also includes a requirement to consider the public interest, it is weaker than the Australian provision, because the Appeals Tribunal is prohibited from considering whether the test has been properly applied.^{xi}

Interstate communications

The proposed law exempts documents containing information communicated in confidence to the government by or on behalf of a foreign government or by an international organization.^{xii} Canadian law adds the condition that the exemption should not be applied if the government or organization that supplied the information consents to the disclosure.^{xiii} Courts have interpreted this to mean that authorities have an obligation to seek consent for disclosure of such documents.^{xiv} Departments follow a similar practice under American law. A provision regarding consent similar to that found in Canadian law might be appropriate, given the growing importance of interstate communications in the age of globalization.

Breach of confidence

The proposed law exempts documents if disclosure “could found an action for breach of confidence.”^{xv} Every law recognizes the need to provide some

protection for information provided in confidence; on the other hand, there is also a risk that authorities and businesses will collaborate to throw a blanket of confidentiality on information that properly belongs in the public domain. The proposed exemption incorporates the common law on breach of confidence, which presumably restricts the exemption to genuinely confidential information, the disclosure of which could cause significant harm. However, there is a small but potentially significant difference in the wording of this exemption and the comparable exemptions in other laws. Jamaican law exempts information that could found an action for breach of confidence. Australian, British and Irish law exempts information that would found such an action.^{xvi} The latter approach imposes a higher burden of proof on public authorities.

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LACK OF AN OVERALL PUBLIC INTEREST

Decisions about disclosure of information require two calculations. The first considers whether a specific harm is likely to be caused by the disclosure of information. However, a significant risk of harm is not, by itself, enough to justify non-disclosure. Sometimes there may be important benefits from disclosure that outweigh such harms. Decisions about disclosure should take account of benefits from disclosure as well as harms.

Newer access to information laws compel governments to take benefits from disclosure into account by including a statutory mandate that is sometimes known as a “public interest test” or “public interest override.” For example, the freedom of information law of British Columbia states that:

1. Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information:
 - a. about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
 - b. the disclosure of which is, for any other reason, clearly in the public interest.
2. Subsection (1) applies despite any other provision of this Act.^{xvii}

Britain's 1997 White Paper on freedom of information also described a distinct public interest test as “an essential element of the right to know.”^{xviii} The UK's Freedom of Information Act 2000 includes a general public interest test, although it

does not apply to some especially sensitive areas.^{xix} A similar public interest test is included in New Zealand's Official Information Act.^{xx}

The proposed Access to Information Act 2001 does not include a comprehensive public interest test. Limited public interest tests are available for only two exemptions: relating to information about deliberative processes, and information about heritage sites and endangered species.^{xxi} Furthermore, the Appeal Tribunal does not have the authority to consider whether Ministers correctly balanced benefits and harms from disclosure of information.^{xxii} An alternative approach would be to establish a general public interest test - affecting all or most exemptions in the law - and allow the Appeal Tribunal to undertake its own assessment of the public interest while considering complaints.

CONCLUSIVE CERTIFICATES

Among the most important restrictions in the proposed Jamaican law are those that permit the use of conclusive certificates. Such certificates would be issued by the Prime Minister or another member of Cabinet. A certificate may be issued when requested documents are determined to be Cabinet records; or because disclosure would prejudice security, defense or international relations; or because disclosure would undermine the government's capacity to manage the economy.^{xxiii}

The certificate is intended to conclusively resolve the question of whether the public interest is served by disclosure of information. The Appeal Tribunal would have no authority to nullify such certificates.^{xxiv} There is no time limit on the force of such certificates.

Other Commonwealth ATI laws also give ministers the authority to issue conclusive certificates. Certificate powers are generally stronger in the older access to information laws, such as those of Australia and New Zealand - but even these older versions are more limited than the proposed Jamaican law. Even so, provisions in Australian and New Zealand law have been sharply criticized, and proposals have been made for significant reform.

Australia's Freedom of Information Act, adopted in 1982, allows conclusive certificates on matters of security, defence and international relations. However, an Appeal Tribunal is permitted to review the Minister's decision and recommend the revocation of certificates. If the Minister chooses to ignore the recommendation, he must read an explanation in the House of Representatives or Senate.^{xxv} Even so, a recent review

by the Australian Law Reform Commission recommended that the circumstances in which certificates may be issued should be narrowed, and a two-year time limit be imposed on some certificates.^{xxvi} Two government officials familiar with the Australian law wrote at the time:

The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of [freedom of information] deci-

sions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents. To some extent, the certificate provisions are a hang-

over from the days before [freedom of information], when the feared impact of the legislation was clearly exaggerated. . . . The provisions should be removed from the Act, enabling the [Administrative Appeals Tribunal] to reach a determinative decision on the merits of the exempt status of documents.^{xxvii}

New Zealand's Official Information Act, also adopted in 1982, allows conclusive certificates for

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security, defence or international relations, as well as law enforcement. However, the Information Commissioner retains the authority to ask for a reconsideration of the decision to issue a certificate.^{xxviii} Nevertheless, a 1997 review by the Law Commission of New Zealand concluded that such certificates were “in principle difficult to justify” and recommended that the grounds for issuing certificates be narrowed to national security alone. The Commission preferred an alternative arrangement in which the entire Cabinet would be permitted to prevent disclosure only after an order had been made by the Information Commissioner.^{xxix}

Newer laws impose more restrictions on certificates, and provide for closer oversight of certificate powers. For example, Ireland's Freedom of Information Act allows conclusive certificates on matters relating to security, defence and international relations, as well as law enforcement. Although this limits the Information Commissioner's investigative function, the High Court retains limited power to review and quash certificates. Certificates expire after two years, although they may be renewed. Ministers must also provide an explanation for the certificate to a Cabinet committee, which must undertake periodic reviews and request revocation of a certificate where it is found to be unnecessary. Ministers must also report annually to the Information Commissioner on their use of the certificate power.^{xxx}

Similarly, the United Kingdom's Freedom of Information Act permits conclusive certificates to be issued relating to information held by security agencies, or information whose disclosure might endanger national security. These certificates limit the investigative role of the Information Commissioner.

However, the higher-level Information Tribunal retains the authority to quash certificates.^{xxxi}

Canada's Access to Information Act contained no such certificate powers until after the September 11 terrorist attacks. Anti-terrorism legislation adopted in December 2001 gives the Attorney General the authority to issue certificates prohibiting the disclosure of information for the purpose of protecting national defence or national security.

However, the authority is limited in three ways: the certificate can only be issued after an order for release of information has been made by the Information Commissioner or a court; the certificate remains subject to a limited form of judicial review; and the certificate expires after fifteen years.^{xxxii}

In summary, the trend in legislation is to impose stronger limits on conclusive certificates than proposed in Jamaican law. Such limits may include: imposing an obligation to provide notice to Parliament when certificates are issued; time limits on certificates; permitting the issuance of certificates only after an independent body has made an order for disclosure; allowing an independent body to investigate and make recommendations that certificates be revoked; or limited judicial review of certificates.^{xxxiii}

ADMINISTRATIVE PROVISIONS

The proposed Jamaican Access to Information Act contains progressive features that will make it easier for individuals to exercise their right to information. For example, it makes clear that public authorities have an obligation to assist individuals who request help in drafting their request for information.^{xxxiv} Public

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authorities also have a positive obligation to make internal manuals publicly available.^{xxxv} Provisions regarding fees for making requests may also be progressive, although this will depend on careful implementation of the law.

Many ATI laws include three kinds of fees: an application fee; an hourly fee for labour expended in searching for records and preparing records for disclosure; and a per-page fee for reproduction of documents.^{xxxvi} All three fees play an important role in controlling the demand for information. A sharp increase in application fees can lead to an equally sharp decline in the number of requests for information. In some jurisdictions, officials also use estimates of likely search and reproduction charges to encourage reconsideration of broad requests for information. Non-governmental organizations sometimes complain that discretion over fees is abused, or that fees unfairly penalize poor or non-business requesters.

Jamaica's proposed Access to Information Act seems to include a simpler fee system than that used in many other countries. The law provides for an application fee, and states that requesters shall pay "the cost of reproducing" documents.^{xxxvii} There appears to be no charge for labour expended in searching for records, reviewing records, or preparing records for disclosure. This may reduce the unfairness of the fee system for poorer applicants. On the other hand, it also eliminates one of the tools used in other jurisdictions to ease the burden on public authorities.

This has two implications. The first is that there may be stronger incentives for the government to establish a relatively high application fee. The second is that public authorities may rely on another provision of

the proposed Jamaican law, which allows them to refuse requests that "substantially and unreasonably interfere with the authority's operations."^{xxxviii} Firm decisions

about the reasonableness of requests will also be encouraged by the proposed law's stipulation that response times cannot exceed a total of sixty days.^{xxxix}

We should anticipate that applicants will make a significant

number of requests for waiver of the application fee if it is set at a high level, and that there will be a significant number of complaints about authorities' refusal to answer "unreasonable" requests. This could cause lengthy delays in responding to requests, particularly if applicants are required to exhaust internal reviews before making complaints to the Appeal Tribunal. In complicated cases, requesters could make four complaints: one for internal review about the reasonableness of the request; a second to the Appeal Tribunal on the same subject; a third for internal review of the substantive decision to withhold information; and a fourth to the Appeal Tribunal on the same subject. This problem could be dealt with by creating a quicker process for dealing with complaints about fees or about the reasonableness of requests - such as the elimination of internal review procedures for such complaints, and an expedited process for such complaints within the Appeals Tribunal.

It may also be appropriate to include a specific requirement for public authorities to consider the broader public interest when making decisions about the waiver of fees (under section 12(3)) or decisions to refuse "unreasonable" requests (under section 10(1)(b)). In some circumstances, the administrative costs created by a request may be substantially outweighed by the good done by disclosure of information.

The proposed Jamaican Access to Information Act contains progressive features that will make it easier for individuals to exercise their right to information.

ENFORCEMENT MECHANISMS

The effectiveness of the proposed Access to Information Act will hinge largely on its enforcement mechanisms. Experience elsewhere in the Commonwealth has shown that laws that fail to provide quick and inexpensive procedures for resolving complaints will rarely be used.

Access laws typically adopt one of three approaches to enforcement:

1. Individuals are given a right to make an “internal appeal” to another official within the institution to which the request was made. If the administrative appeal fails, individuals may appeal to an independent tribunal, which may order disclosure of information.
2. Individuals are given a right of appeal to an independent ombudsman or information commissioner, who makes a recommendation about disclosure. If the institution ignores the recommendation, an appeal to a court is permitted.
3. Individuals are given a right of appeal to a tribunal or commissioner who has the power to order disclosure of information. No further appeal is provided for in the access law, although the commissioner's actions remain subject to judicial review for reasonableness.

Many newer ATI laws adopt the third approach to enforcement. It avoids internal appeals, which are unlikely to produce a reversal of contentious decisions. It also avoids the need for costly and time-consuming appeals to courts.

The enforcement procedures described in the

The effectiveness of the proposed Access to Information Act will hinge largely on its enforcement mechanisms.

proposed Access to Information Act follow the first model.^{xl} This aspect of the bill is modeled on Australia's Freedom of Information Act. However, there is dissatisfaction in Australia with this aspect of the law. In many cases, internal review has failed to resolve disputes and

only added to costs and delays. In 1995, the Australian Law Reform Commission recommended that the law be amended so that complainants have the option of taking their com-

plaints directly to the independent Tribunal.^{xli} In effect, the Law Reform Commission recommended the adoption of the third approach to enforcement.

Problems of delay under Jamaican law could be particularly serious because of its approach to the handling of “unreasonable” requests and fee collection, discussed earlier. Individuals may find that requests often result in two successive complaints: the first about the breadth of a request, and the second about withholding of sensitive information. In such circumstances, a requirement for internal review could prove especially



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burdensome.

A second concern about enforcement procedures in the proposed Jamaican Act relates to the authority of the Appeal Tribunal. The law appears to give the Appeal Tribunal the power to order disclosure of records when it finds that complaints are justified. This would be a positive feature of the proposed law. However, this order power is subject to important restrictions relating to conclusive certificates and public interest tests, which have been discussed earlier.

There may be another important restriction. The proposed Jamaican law says that the Appeal Tribunal “shall not . . . grant access to an exempt document in so far as it contains exempt matter.”^{xlii} The language of Australian law, upon which the Jamaican law is apparently based, is different: it prevents a Tribunal from granting access to information *that it has determined to be exempt matter*.^{xliii} The Australian wording makes it more difficult for higher courts to interfere in Tribunal judgments about disclosure of information. It should be clarified whether change of words in the proposed Jamaican law will give higher courts broader authority to reverse Tribunal decisions. If so, there is a risk that public authorities will use this provision to make appeals against adverse Tribunal decisions. Such appeals would add substantially to costs and delays, and seriously discourage non-governmental organizations from using the law.^{xliv}

The Jamaican Appeal Tribunal also appears to have more limited investigative powers than its Australian counterpart. The Jamaican Appeal Tribunal will have the right to call for and inspect documents.^{xlv} By

contrast, Australian tribunals also have the power to issue summons to witnesses, compel production of documents and other evidence, and take evidence other oath. There are also penalties for contempt of the Tribunal under Australian law.^{xlvi}

A final concern about proposed enforcement mechanisms will have to be addressed during the implementation of the proposed law. The work of the Tribunal should be organized to allow appeals without a lawyer, and avoid delays caused by excessive formality. A recent review of Newfoundland’s freedom of information law concluded that the need for legal representation posed an insur-

mountable barrier for many citizens.^{xlvii} Independent review bodies in some jurisdictions have found that informal mediation is an effective method of resolving many complaints.

OTHER LIMITATIONS IN THE PROPOSED LAW

Generally, the proposed Jamaican Access to Information Act takes an appropriate approach in defining the range of institutions that should be subject to the right to information. Notably, it includes many government-controlled corporations, as well as the discretion to include other organizations whose activities are essential to the welfare of Jamaican society.^{xlviii} Provisions such as these will be important given the growing role of the private sector and quasi-governmental organizations in providing public services.

Generally, the proposed Jamaican Access to Information Act takes an appropriate approach in defining the range of institutions that should be subject to the right to information.

At the same time, the proposed Jamaican Access to Information Act contains two other significant limitations that deserve close scrutiny -one relating to the proposed exclusion of parts of the security and intelligence, and the other relating to older government documents.

Exclusion of security and intelligence services. A first and significant restriction contained within the proposed Access to Information Act is the exclusion of security and intelligence services, in relation to their intelligence gathering activities. The rationale for protecting such information is obvious. The difficulty is the method used for providing protection.

One method, used in Australian and British law, and proposed in Jamaican law, is to completely exclude a class of particularly sensitive information from the ambit of the law. Another method - used in New Zealand and Canadian law -is to keep the information under the ambit of the law, but to include in the law a clear exemption that permits the withholding of such sensitive information.

The choice of methods can have important implications for citizens. If a document is entirely excluded from the law, citizens may find that they are unable to use the proposed enforcement mechanisms contained in the ATI law to resolve disputes about access to the document. For example, the proposed Jamaican law gives the Appeal Tribunal the right to call for and inspect "exempt documents," and to determine whether the decision to deny access to those documents was reasonable.^{xlix} It is unclear whether the Tribunal would have authority to inspect completely excluded documents. This raises the possibility that there may be no effective independent review to assure that the exclusion is being properly applied. By contrast, the risk of abuse by government is substantially reduced when sensitive information is not automatically excluded from

the reach of the law. Governments can claim exemptions, but the independent Tribunal remains able to review exempt documents to determine whether exemptions are justly applied.

Canadian experience supports this view. A recent Canadian government study found that exemptions contained within its Access to Information Act provided "powerful and sufficient tools" for protecting sensitive information held by the security and intelligence community.^l A second study for the Canadian government criticized another aspect of Canadian law, which excludes -rather than exempts -Cabinet documents. The study observed that the government had "failed to articulate any sound reason" for using an exclusion, and recommended its replacement with an exemption that would be reviewable by the Information Commissioner and the courts.^{li}

Exclusion of older documents. A second limitation of the proposed Access to Information Act is the exclusion of documents created more than seven years before the implementation of the law, or about 1995.^{lii} (The Minister does have authority to issue orders extending the ATIA to older records).^{liii} The seven-year limit was included in proposals released by the Prime Minister in November 1998, and presented as a method of making implementation of the law a "manageable exercise."^{liv}

This is a broader restriction than in other ATI laws. No limits on access to older documents were included in the laws of New Zealand, Canada or the United Kingdom. Although Australia and Ireland excluded some older documents, a caveat was added. Broadly, Australian and Irish laws do not impose any limit on access to older documents containing personal or business information, or older documents that are needed to make sense of more recent documents.^{lv}

Moreover, had government's 1999 freedom of information bill been adopted, Jamaicans would have had a right to documents created after 1992. If the seven-year rule cannot be removed, it might be appropriate to loosen the restriction so that it includes all documents that would have been covered by the 1998 proposals—that is, all documents created after 1991. This is equivalent to adopting a ten-year limitation.

MAKING USE OF THE LAW

Jamaica's proposed Access to Information Act represents a promising step toward improved transparency. The proposed law can be made more effective by refining some exemptions and rules about conclusive certificates, adding an overall public interest test, reconsidering some exclusions, and ensuring that there are easily accessible and effective remedies for problems of non-compliance. With amendments to address concerns such as these, the proposed law will strike a fair balance between the public's right to information and the public interest in protecting sensitive information.

However, it should be emphasized that adoption of a well-drafted law is only a first step toward openness. It will be important for the government and non-governmental organizations to promote public awareness of the law. The law will be also ineffective if citizens and non-governmental organizations lack the capacity to exercise their right to information. For example, the media are less likely to use ATI laws if they cannot afford to hire skilled reporters or support lengthy investigations of public institutions. Advocacy groups are unlikely to take full advantage of access laws if they lack resources to maintain a staff and pursue complex requests. These

organizations should look for creative ways to pool resources so that they can build expertise and exploit the opportunities created by the new Access to Information Act.

Jamaica's proposed Access to Information Act represents a promising step toward improved transparency.

Similarly, access laws will not be used if elements of civil society are incapable of acting on the information obtained through access requests. A fettered press, which faces legal penalties or persecution for news reports that are critical of government, does not have a strong incentive to use an access law. Advocacy groups are less likely to use an access law if there are no channels for effective political action. Individuals and businesses will request information about the administrative activities of government only if remedies are available for cases in which officials have acted inappropriately. In short, an access law is unlikely to be used extensively unless other steps are taken to build capacity within civil society and increase its influence over the policymaking and administrative processes of government.

ENDNOTES

- ⁱ Access to Information Act 2001 (Jamaica), tabled in the House of Representatives on December 4, 2001.
- ⁱⁱ Remarks by Hon. John Reid to the Conference on Access to Information, National School of Public Administration, Warsaw, March 15, 2001.
- ⁱⁱⁱ See section 2, Access to Information Act 2001 (Jamaica).
- ^{iv} Section 15, Access to Information Act 2001 (Jamaica).
- ^v Section 69(3)(a), Access to Information Act (Canada).
- ^{vi} Law Commission of New Zealand (1997). Review of the Official Information Act. Wellington: Law Reform Commission of New Zealand. October 1997. Report no. 40. Page 79.
- ^{vii} Australian Law Reform Commission (1995). Open Government: A Review of the Federal Freedom of Information Act 1982. Canberra: Australian Law Reform Commission. Report no. 77. Paragraph 9.12.

- viii Section 19, Access to Information Act 2001 (Jamaica).
- ix Section 21(1), Access to Information Act (Canada).
- x Section 36(1)(b), Freedom of Information Act (Australia).
- xi Sections 19(3) and 33(5)(b)(iii), Access to Information Act 2001 (Jamaica).
- xii Section 14(b), Access to Information Act 2001 (Jamaica).
- xiii Section 13(2)(a), Access to Information Act (Canada).
- xiv *Ruby v. Canada* (Solicitor General) (2000) Federal Court of Canada, Court of Appeals, (June 8, 2000).
- xv Section 17(b)(i), Access to Information Act 2001 (Jamaica).
- xvi Section 45(1), Freedom of Information Act (Australia); Section 41(1)(b), Freedom of Information Act (United Kingdom); Section 26(1)(b), Freedom of Information Act (Ireland).
- xvii Section 25, Freedom of Information and Protection of Privacy Act (British Columbia).
- xviii United Kingdom (1997). *Your Right to Know: The Government's Proposals for a Freedom of Information Act*. London: Stationery Office. December. Cm 3818. Paragraph 3.16.
- xix Sections 2(2) and (3), Freedom of Information Act (United Kingdom).
- xx Section 9(1) of the Official Information Act states that authorities must consider whether, "in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available."
- xxi Sections 19(3) and 21(2), Access to Information Act 2001 (Jamaica).
- xxii Section 33(5)(b)(ii), Access to Information Act 2001 (Jamaica).
- xxiii Section 24, Access to Information Act 2001.
- xxiv Section 33(5)(b)(iii), Access to Information Act 2001 (Jamaica).
- xxv Section 58, Freedom of Information Act (Australia).
- xxvi The review recommended the discontinuance of certificates for the Commonwealth-state relations exemption and the deliberative processes exemption: Australian Law Reform Commission (1995). *Open Government: A Review of the Federal Freedom of Information Act 1982*. Canberra: Australian Law Reform Commission. Report no. 77. Paragraphs 8.17 and 8.18.
- xxvii Quoted in: Campaign for Freedom of Information (2002). *The ministerial veto overseas*. London: Campaign for Freedom of Information. January 8, 2002. Page 4.
- xxviii Section 31, Official Information Act.
- xxix Law Commission of New Zealand (1997). *Review of the Official Information Act*. Wellington: Law Reform Commission of New Zealand. October 1997. Report no. 40. Pages 97-99.
- xxx Sections 25 and 27, Freedom of Information Act (Ireland). See also McDonagh, Maeve (1998). *Freedom of information law in Ireland*. Dublin: Round Hall Sweet and Maxwell. Pages 115-119.
- xxxi Sections 23(2), 24(3), and 60, Freedom of Information Act (United Kingdom).
- xxxii Sections 43 and 87, Anti-terrorism Act.
- xxxiii This explicit authority had been contemplated in earlier discussion papers: Office of the Prime Minister (1998). *Ministry Paper 43/98: Proposals for a Freedom of Information Act*. Kingston, Jamaica: Office of the Prime Minister. November 23, 1998. Page 14.
- xxxiv Section 7(3)(a), Access to Information Act 2001 (Jamaica).
- xxxv Section 4 and First Schedule Section 1(e)(i), Access to Information Act 2001 (Jamaica).
- xxxvi Under Canadian law, "preparation" of documents is usually limited to the task of severing or redacting exempt information from documents, and does not include time expended in deliberating about exemptions or consulting with other authorities: McNairn, Colin and C.D. Woodbury (2000). *Government Information: Access and Privacy*. Toronto: Carswell. Page 2-34. By contrast, under United States law some "commercial use" requesters may also be required to pay a charge for time expended in reviewing records to determine the applicability of exemptions: 5 United States Code 552(a)(4)(A)(ii)(I).
- xxxvii Section 12(1), Access to Information Act 2001 (Jamaica).
- xxxviii Section 10(1)(b), Access to Information Act 2001 (Jamaica). Another problem may also be created by the drafting of section 10(1)(b) of the proposed law. The drafting differs slightly from that of earlier versions of the bill. In its current form, the bill appears to allow refusal of requests for "all documents of a particular class, that contain information of a particular kind," without regard to the question of "substantial and unreasonable" interference in the authority's operations. A slight alteration of the clause may be desirable to make clear that authorities must demonstrate substantial and unreasonable interference in all cases.
- xxxix Authorities must respond within thirty days, and are permitted to make one extension of the deadline by no more than thirty days (Section 7(4) of the Access to Information Act 2001 (Jamaica).) By contrast, Canadian law permits agencies to

make one extension “for a reasonable period of time, having regard to the circumstances”: Section 9, Access to Information Act (Canada).

lv Section 12(2), Freedom of Information Act (Australia); section 6, Freedom of Information Act (Ireland).

xl Section 33(1)(a), Access to Information Act 2001 (Jamaica).

xli Australian Law Reform Commission (1995). Open Government: A Review of the Federal Freedom of Information Act 1982. Canberra: Australian Law Reform Commission. Report no. 77. Page 13.6.

xlii Section 33(5)(b)(i), Access to Information Act 2001 (Jamaica).

xliii Section 58(2) of the Australian Freedom of Information Act states: “Where, in proceedings under this Act, it is established that a document is an exempt document, the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted.” (emphasis added.)

xliv A 1997 study suggested that this had been the experience under Quebec law, which gives courts broader latitude to review decisions of its access to information commission: Macdonnell, Rod (1997). Access law biased against public. Montreal Gazette. Montreal. April 16, 1997. Page A9.

xlvi Section 33(6), Jamaican Access to Information Act.

xlvi Sections 40 and 63, Administrative Appeals Tribunal Act (Australia).

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ACCESS TO INFORMATION: HOW IS IT USEFUL AND HOW IS IT USED?

Richard Calland

The scene: a small village in rural India. The whole of the village has gathered to listen as public records are being read out. A villager is listed in the public record as having rented out his plough to the government-sponsored irrigation project. “No,” he says, “I did not do that. I was away in Delhi at my cousin’s wedding at that time.” There is laughter, as well as outrage, as people immediately discover how they have been tricked and how public money has been siphoned away from them and their village. More false information is revealed: Examples such as items for bills for transport of materials for 6km when, in fact, the real distance is just 1km. A worker, employed according to government records on the construction of a new canal, stands up and asks: “What canal?” Workers involved in the building of houses confirm that fifty bags of cement, not one hundred, were supplied and used. At the end of the public hearing the chant goes up: “What do we want? Information. What do we want? Information.”

INTRODUCTION

Meaningful participation in democratic processes requires informed participants. Secrecy reduces the information available to the citizenry, hobbling their ability to participate meaningfully.

Joseph Stiglitz, Former Senior Vice President and Chief Economist of the World Bank¹

The Right to Know

We live in an “information age.” There has been an explosion in the amount of information held by governments, companies, non-governmental organizations

(NGOs) and other citizen organizations. Information is power. Very often, the more you know, the more you are able to influence events and people. For citizens and citizen organizations, it is an age of opportunity and immense challenge. As a sector, civil society must ensure that it does not get left behind. Information is vital for individual citizens, communities, and citizen’s organizations if they are to fully participate in the democratic process.

Information is not just a necessity for people - it is an essential part of good corporate and state governance. Weak companies and bad governments depend on secrecy to survive. Secrecy allows inefficiency, wastefulness and corruption to thrive.

In terms of government, access to information allows people to scrutinize the actions of their government and is the basis for informed debate of those actions. For the private sector, access to good information is vital for tendering, for open competition, and for an efficient marketplace of ideas and products.

When Jamaica passes its own law, it will be joining an international bandwagon, one that has gathered great momentum in recent years. But the international experience shows that for an access to information law to work well in practice and to be useful to both government and citizens and their civil society organizations, it should meet a number of key principles. The purpose of this paper, therefore, is to:

1. Look at the Access to Information Law from a practical user’s perspective and try and answer the questions:

Richard Calland is the Executive Chair of the Open Democracy Advice Center, Cape Town, South Africa.

- a. What is the value of an access to information law?
- b. How can an access to information law be used?
2. Set out the main principles that need to be adhered to, if the Jamaican law is to be effective in practice and valuable to its users.
3. Offer a concise evaluation of the current draft of the Jamaican Bill in the light of the potential value of a strong, clear law and the international experience.

In doing so, a number of case studies are used to illustrate the potential value of an access to information law for all sectors of Jamaican society. In particular, because of South Africa's history and context, a more detailed comparison with its law, the Promotion of Access to Information Act 2000, is provided.

The Global Trend Towards Greater Transparency

It is not, perhaps, immediately obvious how and why the right to access information is so important. But the case of the Indian State of Rajasthan, where they say "The Right to Know, the Right to Live," helps make this crystal clear. Deep in the rural communities, a peoples' movement- the Mazdoor Kisaan Shakti Sangathan (MKSS) organization- has shown how information can empower ordinary people and improve their lives. Historically, local people have had difficulty getting paid the minimum wage. At election time, politicians would make promises about the minimum wage in return for votes, but these promises were rarely turned into reality. Campaigners realized that it was only by obtaining the relevant documentation, in particular the muster rolls (a list of persons employed and wages paid), that they could be successful. The right to information and the right to survive thus became united in peoples' minds.

Now Rajasthan, in common with most states in India, has a Freedom of Information law. Its government

recognized that it was better to create a law that would affirm the right to access to information and provide a system to underpin this right. This is part of a global trend; in the past twenty years many countries have passed freedom of information laws.

Often, the decision to protect peoples' right to access information has been part of a wider process of democratisation. Since the end of the Cold War and Communist rule at the end of the 1980s, there has been a rush to pass such laws in Central and Eastern Europe. Amongst others, Bulgaria, Bosnia, the Czech Republic, Hungary and Slovakia have all passed laws in the last decade.

In the East, there is a similar trend. The Philippines recognized the right to access information held by the State relatively early, passing a Code of Conduct and Ethical Standards for Public Officials and Employees in 1987. Thailand passed its Official Information Act in 1997, and similar laws have been passed in Japan and South Korea.

Most Western European countries, as well as longer-established democracies such as the United States, Sweden, Canada and Australia, all have access to information laws. And, in Africa, Nigeria is soon to follow South Africa's example by passing its own Act.

INFORMATION, DEMOCRACY AND ACCOUNTABILITY

For some reason, many governments appear to think that they can only govern effectively if they operate in total secrecy and their citizens do not know what they are doing, supposedly on behalf of the larger population. African governments are taking the lead in this approach to governance and in many countries in the region, secrecy in government has attained the status of state policy. It is perhaps

the result of a messiah complex which imbues political leaders with a feeling that only they know what is best for the people and that citizens cannot be trusted to make important decisions on issues that affect their lives or how they want to be governed.

Ejetaen Ojo, Executive Director: Media Rights Agenda, Lagos, Nigeria, October 2000.

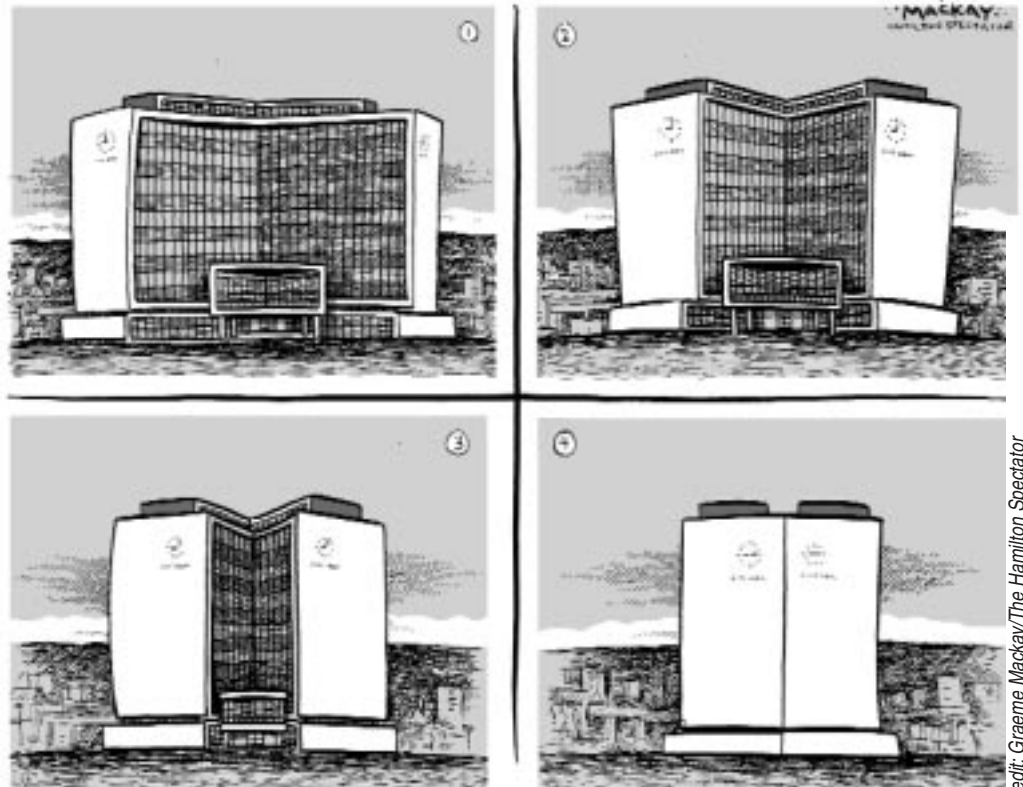
THE CASE OF SOUTH AFRICA

Secrecy is a function as well as an effect of undemocratic rule. Throughout the apartheid era, South Africa's increasingly paranoid white minority government suppressed access to information on social, economic, and security matters in an effort to stifle opposition to its policies of racial supremacy. Security operations were shrouded in secrecy. Government officials frequently responded to queries either with hostility or misinformation. Press freedom was habitually compromised, either through censorship of stories or through the banning and confiscation of publications. Information became a crucial resource for the country's liberation forces, and their allies in international solidarity movements, as they sought to expose the brutality of the *apartheid* regime and hasten its collapse.

Consequently, opposition groups came to see unrestricted access to information as a cornerstone of transparent, participatory and accountable governance. This consensus was ultimately captured in South

Africa's new constitution. A democratic parliament then gave further shape to the right of access to information by passing enabling legislation—a process in which civil society organizations played an unusually influential role.

One of the most important aspects of the interim constitution that guided South Africa's transition to democracy was the introduction of a Bill of Rights designed to ensure equal protection for a broad range of human, socio-economic and civil rights, irrespective of race, gender, sexual orientation, disability, belief, and other factors.ⁱⁱ Among the rights upheld was that of access to publicly-held information. Section 23 of the interim constitution stated: "Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights."



Secrecy Shrouds City Hall

Credit: Graeme Mackay/The Hamilton Spectator

By entrenching an independent right of access to information, rather than leaving it to be protected by the right to freedom of expression as has generally been the case in international human rights instruments, the drafters underscored its significance in South Africa's constitutional order.

Following the historic general election of 1994, the interim constitution's broad right of access to information was expanded further. Section 32(1) of the final constitution, enacted by the National Assembly in 1996, guarantees "everyone...the right of access to any information held by the state

and any information that is held by another person and that is required for the exercise or protection of any rights." Not only is the right of access to pub-

licly-held information no longer qualified by the stipulation that the information be needed for the exercise or protection of a right, but a qualified right of access to information has also been established with respect to private bodies and individuals. The legislation was, however, permitted to include "reasonable measures to alleviate the administrative and financial burden on the state." To balance, in other words, the state's potentially competing obligations to protect citizens' information rights and to provide fair, efficient, and cost-effective administration.

THE SOUTH AFRICAN LAW

The Promotion of Access to Information Bill reaches out towards new horizons. It captures both the spirit and the necessity of the age in which we live. Information is the life-blood of our times; we need it to survive and to prosper, almost as much as we need oxygen to live. This new law does something truly innovative and truly radical. It aspires

not only to enhance an information rich society, but also to democratize the use, ownership, application and access to information. If information represents power, then we must ensure that it is not monopolised by the rich and powerful.

Priscilla Jana ANC MP, National Assembly, February 2000.

The South African Promotion of Access to Information Act 2000 (POATIA) begins by "recognising that the system of government in South Africa before 27 April 1994 resulted in a secretive and unresponsive culture in public and private bodies which often led to an

abuse of power and human rights violations." As was noted in the section above on the history of the Act, the right to access to information is a part of the new set of human

rights designed to prevent a repeat of history and to ensure that South Africans can fulfill their potential as human beings.

The Objects of South Africa's Promotion of Access to Information Act 2000

1. To give effect to the Constitutional Right to Access Information (section 32 of the Constitution), and to generally promote transparency, accountability and effective governance of all public and private bodies, by establishing procedures to do so.
2. To enable requesters to obtain records held by the State and by private bodies as swiftly, inexpensively and effortlessly as reasonably possible in a way that balances this right with the need for certain justifiable limitations, such as privacy, commercial confidentiality and effective, efficient and good governance.

In addition, the Act's objects include the empowerment and education of everyone so as to:

1. understand their right to access information
2. understand the functions and operation of public bodies
3. effectively scrutinize, and participate in, decision-making by public bodies that affect their rights.

A System for Accessing Information

Beyond the fleshing out of the right to access records, the South African (SA) Act, in meticulous detail, creates a system for using the law. This is vital for its success. There is no point in having a law that provides for the right to access to information, if there is not at the same time a clear and workable system of mechanisms to enable citizens to use the law.

Hence, the SA law requires government to ensure that a manual is produced. This is a crucial obligation, as it will provide both government and the requester citizen with a "road map" of the records held by that part of government. If the manual is well produced, it will enable government to categorise records and, thus, facilitate automatic disclosure or publication, as is encouraged by the Act. In addition, the Information Officer must ensure that the relevant contact details are included in the telephone directory.

In particular, the Information Officer must decide which records shall be automatically published. The evidence from other countries is that the more records that are automatically published or disclosed, the easier and cheaper it is for government to administer the law.

Furthermore, deputy information officers must be appointed in sufficient number to "render the public body as accessible as reasonably possible for requesters of its records." The SA Act envisages that deputy information officers will be the operational hubs of the new system of open information, reporting to the Information Officer who, in most cases, is likely to be the most senior person in the department or body (often the Director-General).

The SA law requires that a prescribed form be used so as to "provide sufficient particulars to enable an official of the public body concerned to identify the record or records requested." With this and with the request in general, the deputy information officers are

under an explicit duty to assist requesters, thus enabling the requester to comply with the request procedures.

Most importantly, the SA Act provides for clear time limits: a decision must be made within 30

days (though the transitional rules extend this period for years one and two to 90 and 60 days respectively). The Act sets out the specific grounds for extending the period of the decision and declares a deemed refusal, where the time limit for making a decision is not met.

There is no point in having a law that provides for the right to access to information, if there is not at the same time a clear and workable system of mechanisms to enable citizens to use the law.

Private Information:

The “Horizontal” Right to Know

Powerfully, the South African law also creates the mechanism whereby an individual citizen may access privately-held information, so that he or she may meaningfully exercise other rights in the Bill of Rights. This applies especially to the group of rights in the constitution known as socio-economic rights, such as the rights to adequate health care, education and clean environment.

It is also important for the right to equality. The experience in other parts of the world has shown that in equality cases it is very difficult to prove discrimination due to a lack of evidence. Access to information will facilitate such a claim by allowing an open assessment of all the facts surrounding the alleged discrimination. Equally importantly, therefore, if such activity is open to scrutiny it may also serve as a deterrent to the continued violation of rights.

In terms of sectors such as banking and pensions, the opportunity to use the legislation to expose unlawful or unjust policies such as “red-lining” now exist. In the realm of consumer protection there will be the opportunity to ask for information relating to safety testing. With product pricing- drugs, for example- there is the opportunity to get information relating to the production costs and profit margins and how these affect affordability and accessibility. In the sphere of the environment, there will be an opportunity to elicit the information pertaining to pollution testing. For example, a factory may be emitting pollution, causing endemic ill health in a community. It may be important, therefore, to access the testing records of the company. Science and industry develop thousands of new kinds of potentially dangerous consumer products, many of which are extremely complicated, leaving consumers puzzled and

confused. Consumers’ good health and safety are often threatened due to lack of information concerning the quality, safety and reliability of products and services that they buy.

Prices for essential services and products such as bank transactions, insurance policies, bus and train fares, fuel consumption, as well as for essentials such as food-stuffs, are often increased without prior notification and proper justification. Lack of information makes it extremely difficult for communities to decide whether price hikes are fair.

In some of these cases, an individual will be able to make the application for the information. Often, though, there will be no one with the wherewithall to make the application, to have the strength of purpose and the resources or to pursue an appeal if the request is refused by the private entity. Those whose rights are most seriously threatened will be powerless to obtain the information they most desperately need. This is why South Africa decided to permit the state to have the opportunity to make a request for privately-held information, whether directly on behalf of an individual or community, or in order to pursue a policy directed at protecting the rights of its citizens.

Critics of this proposal saw it as a state intrusion into privacy- a fear of ‘Big Brother State’. The state can, of course, still abuse its power- and clearly the South African Information Act adds to the Executive Power’s panoply of constitutional and statutory privileges by granting access to public sector information. But, this paradigm needs to be recast in the light of the massive global economic developments of the past decade. The South African Bill was passed into law by parliament a week after a new company, Glaxo Wellcome SmithKline Beecham, was created through merger, with an estimated turnover of around 100 billion US Dollars. The South

African economy, in contrast, has a budget of not much over 20 billion US Dollars.

So the question is: where does the real power lie? We are dealing with a new set of power relations. Horizontal rights seek to address the inequalities that these relationships create. To exclude the state, despite its obvious stake, from the new system of open information on the grounds that it is too powerful would be perverse in the face of these new realities. In fact, the SA Act will ensure that the state, operating in the public interest and in pursuit of its constitutional obligations, will be able to access information that is needed to protect or exercise the rights of its citizens. Thus will the state be brought into the human rights framework, both in terms of its holding of information and in terms of its obligation to obtain information on behalf of its citizens, most especially those sectors of society least able to protect its interests.

USING THE LAW: SOME CASE STUDIES FROM AROUND THE WORLD

As Amartya Sen, the Nobel Prize-winning economist observed, there has never been a substantial famine in a country with a democratic form of government and a relatively free press. Inequality of access to information, he has argued, is a form of poverty. Without knowledge, you cannot act.

Fighting for the Right to Know: Thailand: Case Study Oneⁱⁱⁱ

In May 1992, Thai army soldiers fired at thousands of pro-democracy protesters who had gathered at Bangkok's Sanam Luang park in an uprising against

Suchinda Kraprayoon, the general who had appointed himself prime minister only six weeks earlier. Scores were killed when troops fired their rifles straight at the crowd and pursued demonstrators in the streets and back alleys of the capital. The violence ended only when King Bhumibol Adulyadej himself intervened and a transitional government was formed to prepare for elections.

Eight years later, the Thai government, in response to the demands of the relatives of those murdered in the uprising, released the report of an army investigation of the "Bloody May" massacre. The report provided previously secret information on what went on during those tumultuous days and the possible role of two political parties in the carnage. "Now the healing can begin," said an editorial in *The Nation*, the newspaper that in 1992 braved military censors by publishing photographs and accounts of the violence.

The release of the army report was a milestone in a country where the military remained a powerful and secretive institution that had so far not been held to

account for its actions. For the first time, thanks in part to a new information law that allowed citizen's access to a wide range of official documents, the army was releasing information on one of its deepest and darkest secrets.

Thailand had come a long way. The 1992 uprising marked the formal withdrawal of the military from power and the end of the era of coups d'état. In the following years, Thais laid the foundations- including a new constitution, media reforms and the information law- for what is now Southeast Asia's most robust democracy.

***Inequality of access to
information . . . is a form of
poverty. Without knowledge,
you cannot act.***

For the longest time, the rulers of Southeast Asia maintained political control through information control. Powerful information ministries muzzled the press, setting guidelines for what could be reported and what could not. A culture of secrecy pervaded the bureaucracy, making it difficult, if not impossible, for citizens to find out how their governments were doing their work and how public funds were being spent.

Since the late 1980s, however, democracy movements, technological advances and the increasing integration of regional economies into global trade and finance have challenged such stranglehold. In Indonesia, the Philippines and Thailand, the media have played an important role in providing citizens information on the excesses of authoritarian regimes. The power of an informed citizenry was dramatised in uprisings that took place in the streets of Manila in 1986, in Bangkok in 1992 and in Jakarta and other Indonesian cities in 1998.

Today, in these countries, a free press provides a steady stream of information on corruption, the abuse of power and assorted forms of malfeasance. Greater access to information has also shed light on the past, whether it is military wrongdoing as in the case of Thailand, or the thievery of deposed dictators, as in the case of the Philippines and Indonesia. Information has empowered not just the press, but citizens as well, allowing them to challenge government policy and denounce official abuse.

Uncovering Corruption in the Thai School System: Thailand: Case Study Two^{iv}

The first major case under Thailand's right to access information act revolved around the admissions process to Kasetsart Demonstration School, one of several highly

regarded, state-funded primary schools. The admissions process to the school included an entrance examination, but test scores and ranks were never made public, and

the student body was largely composed of dek sen- children from elite, well-connected families.

These factors created a widely held public perception that some form of bribery played a part in the admissions process.

In early 1998, a parent whose child had 'failed' to pass the entrance examination asked to see her daughter's answer sheets and marks, but was refused. In the past, that would have been the end of the road- she and her daughter would have been left aggrieved, frustrated, and powerless. Instead, she invoked the access to information law.

In November 1998, the Official Information Commission ruled that the answer sheets and marks of the child and the 120 students who had been admitted to the school were public information and had to be disclosed. There was a period of public controversy, but eventually the school admitted that 38 of the students who had 'failed' the examination had been admitted because of payments made by their parents.

The child's parents then filed a lawsuit arguing that the school's admission practices were discriminatory and violated the equality clause of Thailand's new Constitution. The Council of State, a government legal advisory body with power to issue legal rulings, found in her favour and ordered the school and all state-funded schools to abolish such corrupt and discriminatory practices.

Using Its New Law to Powerful Effect: South Africa: Case One

In 1999, the South African government decided to declare a moratorium on the publication of crime statistics, which are the subject of considerable political controversy. The reason provided for the moratorium was to improve the collation and thereby the quality of the statistics.

The moratorium hampered the work of concerned organizations committed to the transformation of criminal justice in South Africa. A newspaper, the Cape Argus, took up the argument with the government and finally launched an application for a specific set of statistics relating to car hijackings in and around the main Cape Town freeway. The newspaper argued that it and its readers had the right to the information because it was a matter of public importance and interest. A South African NGO, the Open Democracy Advice Centre (ODAC), intervened in order to strengthen the case by showing how service-providing NGOs, such as Rape Crisis, need the statistics for their work. ODAC mobilised support from a range of such organizations to submit a joint amicus application.

As a result of the action, brought using the right to access information, the government was forced to publish a 1998 crime statistics report of its own commission, which specifically stated that there was no reason to withhold crime statistics during the period of re-organization. In fact, it recommended the opposite, in order to encourage public input on the accuracy of the statistics. The Ministers for Safety and Security withdrew their contest of the case, and the moratorium on publishing the information was lifted.



Transparency for the Victims of Apartheid: South Africa: Case Two

A central plank of President Nelson Mandela's post-transition project for building national unity was the Truth and Reconciliation Commission (TRC). The truth commission process had three main components: to hear evidence of violations of human rights and make findings; to consider applications by abusers for amnesty; and to award reparations (compensation) to those who had suffered gross violations of human rights.

A full report of the TRC has now been published, recording in comprehensive detail the cruel individual and institutional dimensions of *apartheid*. Hearings by the Amnesty committee have been completed, with scores of applications resolved. But, the third aspect- reparations- has been left hanging. Hardly anyone has received anything. A support group for victims of *apartheid* has been established, called the Khulemani Group. Their first goal was to try and find out the government's exact policy on reparations. They approached

the Open Democracy Advice Centre (ODAC) for advice on how to request this necessary information. ODAC assisted the Group in preparing a formal application under the South African Access to Information Act. The Government conceded that there was a policy document, but was nevertheless reluctant to release it.

Having failed to provide a copy of the document within the 90 day time limit, the Khulemani Group has, on ODAC's advice, now appealed the "deemed refusal" to the relevant Information Officer, the Director-General of the Department of Justice. He will now be compelled to either provide the policy document or point to the clause under the Act that exempts him from having to disclose it.

Either way there are due process protections; if an exemption is applied- and it is difficult to see what exemption could properly apply to this case- then the matter can be further appealed to the Courts. Although this case is causing frustrations to the Khulemani Group, the key is that they do have legal redress and the law provides both them and the government with a clear process for determining access.

NEW ACCESS TO INFORMATION ACT IS ATTRACTING MUCH USE: BULGARIA

Although the Bulgarian Access to Public Information Act only came into force in July 2000, citizens and citizen support organizations, such as the Access to Information Program Foundation, have used it regularly.^v Completed or current cases include:

1. The Government was forced to provide information on the number of complaints of ethnic or racial discrimination made by ethnic minorities.
2. An environmental protection NGO requested minutes of Supreme Experts Ecological Council meetings.

3. An economic policy NGO has appealed the refusal by National Health Fund to release information of its regional units' 2000 budgets and financial reports.
4. An NGO has requested from the Central Electoral Committee the record of its vote counting procedures.
5. A local citizens' group has requested a copy of the report on the noise level of a building in the town where they live.

Lessons for Citizens and Citizens' Organizations

First, the right to access information creates the opportunity to garner information to bolster the research that underpins civil society organizations' campaigns.

Second, organizations have learned that they must actually use the legislation, especially in the early days. Requesters must be assertive and demand good service under the law. The experience in the United States, where they have had Freedom of Information laws for over 30 years, shows that the early few years are crucial in determining habits- on both sides. After that, systems are created, and norms established. Thus, organizations must take test cases, such as the South African test case against the government's crime statistics moratorium.

Third, organizations must encourage government towards a "right to know" approach, encouraging governments to automatically publish the majority of its information. The Internet age creates opportunities in this respect, such as e-government (with user-friendly search engines to help guard against the danger of overload).^{vi} Clearly, the "hard cases," the pieces of information we most want and government most wants to protect, will not ever be automatically disclosed, unless by mistake. But there is a huge volume of useful

information that could and should be put into the public sphere. It is in the government's interest, as the more that they automatically disclose, the fewer the decisions in relation to requests for information that they will have to make and the cheaper the new system will be to manage.

Fourth, use of the legislation organizations can help shape the government's response. In the U.S., for example, the environmental lobby was so effective in using the legislation that the federal government created a whole new structure - the Environmental Protection Agency - which has subsequently been used by concerned organisations to facilitate community requests for information.

Fifth, organizations will need to be vigilant in terms of time delays, to ensure that government does not suffocate the law by taking forever to respond to requests.

Sixth, organizations will, as usual, need to find champions in government and strategic partners, from the specialist civil society sectors (whether it be environmental, HIV-AIDS, human rights groups, and so on), with unions, professional associations and with the media.

Finally, organizations will need to work together, to promote better and more effective use of Access to Information laws. For example, the new South African NGO, **The Open Democracy Advice Centre**, is a collaboration among three of its largest NGOs and is intended to provide a service to other NGOs in the use of the Access to Information Act.^{vii} In the U.S., **The Freedom of Information Clearinghouse** is a joint project of *Public Citizen* and *Ralph Nader's Center for Study of Responsive Law*. It provides technical and legal assistance to individuals, public interest groups, and the media

who seek access to information held by government agencies.^{viii}

KEY PRINCIPLES FOR A USEABLE AND USER-FRIENDLY ACCESS TO INFORMATION LAW

Breadth and Depth

Who does the law apply to? Which bodies will the law not apply to and why? Does the law cover records held by private bodies as well as public bodies? If not, are the records held by semi-governmental or semi-autonomous entities, like electricity boards, adequately covered by the definition of "public information"? Does it provide access to some internal government policy advice and discussion in order to promote public understanding, debate and accountability around public policy-making?

Exemptions

What information is exempt? Are the exemption categories tightly and clearly drawn? Are they reasonable and in line with international standards? Are the exemptions based on "harm tests" in which non-disclosure is only permissible if it can be shown that disclosure would harm a specified interest, such as national security? Are as many as possible of the exemptions discretionary? Is there a public interest over-ride?

The System

Is it user-friendly? Does it encourage application and openness? Are the bureaucratic procedures (such as request forms) fair, clear and reasonable? Do citizens have to pay a fee and if so, is the fee reasonable and affordable? Are there provisions for urgency?

The right to access information creates the opportunity to garner information to bolster the research that underpins civil society organizations' campaigns.

A Culture of Openness and Duty to be Proactive

Does the law mandate or encourage a “right-to-know” approach whereby as much information as possible is automatically disclosed in a user-friendly and accessible way? Will citizens be entitled to information in the form they request it? Is it an offence to shred records or lie about the existence of records in order to avoid disclosure?

Enforcement

How does the citizen enforce the right? Will he or she have to go to court, or will there be an independent commissioner, commission or tribunal? Is the enforcement route accessible, inexpensive and speedy? Are there firm timetables laid down for providing information and strong penalties for failure to meet them?

THE DRAFT JAMAICAN LAW: DOES IT PASS THE USABILITY TEST?

With HIV-AIDS in the 1980s the British Government came under a lot of pressure and there was in the end fantastic amounts of openness...a classic example of a major crisis being examined in public, dealt with in public, debated in public, and being resolved far more effectively than the BSE (“mad cow disease”) crisis, where the government is now perceived to have lied about the problem. And to me that’s an illustration of why openness is now a precondition of successful government.

Andrew Puddephatt, Executive Director: Article 19:
Global Campaign for the Right to Information

As with most legislation, the Jamaican proposed Access to Information Act has some clear strengths and weaknesses. In light of the discussion above, I now turn to specific provisions within the proposed law and examine whether, in fact, they pass the usability test.

Breadth and Depth of the Law’s Application

Although the draft law does not go as far as South Africa in extending coverage to all private information that is required for the exercise or protection of a right, section 5(3) does provide the Minister with a significant degree of power to bring private bodies within the ambit of the law when the company either provides services that are essential to the welfare of Jamaican society or enjoy the position of a monopoly. It is fairly obvious that both provisions will be subjected to some fairly intense legal scrutiny in the Courts were they to be invoked by government.

All access to information laws around the world include provision for non-disclosure of records relating to national security; that is both inevitable and appropriate. But the blanket exemption- that is to say, an exemption that covers, automatically, a category or type of information- of both the Governor-General and the Cabinet (under clauses 5 and 15, respectively) are unwelcome, as is the “intelligence gathering activities” of what appears to be the full range of law enforcement and criminal justice bodies, which is unnecessary and risks serious abuse.

Governor-General and Cabinet documents are often innocuous so far as national security and other related matters are concerned. This provision, therefore, does not protect Jamaican security but may act to prevent information, which should otherwise be automatically released, to be unnecessarily excluded by virtue, deliberate or otherwise, of their being branded “Cabinet.” It is entirely likely, for example, that the policy document relating to reparations for South African victims of apartheid has either been seen by cabinet or one of its sub-committees, but no one is going to seriously suggest that this would be a sensible or defensible reason for not disclosing the policy.

In general, blanket exemptions are unattractive in terms of usability from a requester, citizen perspective, because they focus on the owner/holder of the information rather than the information itself. The better course is to have clearly drafted exemption sections for the type of record, rather than broad blanket exemptions for the holding department or entity. This is a better way of covering “intelligence gathering” records.

The current draft invites abuse, because so much of the activities of the police, for example, could be brought within the loose rubric of “intelligence gathering.” In the South African example concerning the unlawful moratorium in the publication of crime statistics, the preciseness of the national security exemption meant that it was, rightly, hard for the South African government to justify its unnecessary and unhelpful shift towards secrecy. Armed with the current Jamaican draft, the SA government would have been surely tempted to claim that the crime statistics were an “intelligence gathering” activity and thereby blanket-exempt.

Exemptions

The wording of the exemption in clause 10(1)(b), relating to refusal to grant access when the application refers to “all documents” or “all documents of a particular kind” or with particular information, is a cause for concern, mainly because of the potential chilling effect. This is true even though subsection (2) provides some additional guidance as to when the refusal provision may be applied. The reason for this is that often it is absolutely essential to access a whole class or type of record, as both the Thailand schools case study above

In general, blanket exemptions are unattractive . . . The better course is to have clearly drafted exemption sections for the type of record, rather than broad blanket exemptions for the holding department or entity.

and, again, the South African crime statistics case study show.

Perhaps unwittingly, clause 11(1)(b), which states that “information that could reasonably be regarded as irrelevant to the applica-

tion” may be deleted, creates a further exemption for “irrelevance” (albeit it adds a reasonableness test). The general principle of good practice should apply: either a record falls squarely within a clearly defined exemption or it should be disclosed, and that arbitrary discretion-making, such as that likely to be encouraged by clause 11(1)(b), should be removed as much as possible from the decision-making process.

Clause 18, the exemption of documents affecting the national economy, is far too loosely drawn. As it stands, it would provide a block to the disclosure of any record revealing corruption or maladministration in government.^{ix} Moreover, the clause is likely to attract unnecessary caution amongst those deciding access to information requests. In the case of the South African crime statistics, again, it is more than possible that decision-makers in government would decide that a worsening crime rate would be bad for tourism and investment and therefore bad for the economy. Yet, in fact, the markets reacted adversely to the announcement of the moratorium because it was felt that government had something to hide and was choosing to hide the bad news in an undemocratic fashion.

The deliberative process clause (section 19), which exempts from disclosure an official document that contains opinions, advice or recommendations and/or a record of consultations or deliberations, is flawed because it fails to link the type of document to any form

of mischief. Where such clauses appear elsewhere, such as in the U.S. or South African law, they are linked to the notion of candour; the idea is that policy-makers should not feel restricted in terms of their candour with each other during the decision-making phase. The Jamaican bill does not contain any such limitation on documents that may be exempt from release. As currently drafted, therefore, it is too broad an exemption and too loosely drawn.

Finally, unlike similar laws in other jurisdictions, there is no general public interest override covering the exemptions. Most laws around the world link a harm test to the notion of public interest, so as to trump the exemption when appropriate.

The System

It is too early to say whether the Jamaican system, so vital to the effectiveness of the law, will be good enough and user-friendly enough. On paper, most of the provisions that one would expect and hope to see are there. For example, the time limits are reasonably clear and the guiding information that public bodies must provide in accordance with the First Schedule is in line with international good practice.

However, effective implementation depends largely on a combination of political will and adequate resources. Where there is any doubt about either - as there was and still is in South Africa - then the level of procedural detail prescribed by the Act needs to be increased. In this, as is the case elsewhere, the governing/implementing regulations will be very important.

A Culture of Openness

Clauses 10(3)(c) and (d) offer some rather curious

opportunities for diverting and delaying tactics. So far as 10(3)(c) is concerned, either a record should be exempt or not, irrespective of timing.

Deciding what is and is not in the public interest in relation to the “premature release” of the record is likely to attract partisanship so far as the timing of the release of the information is

concerned. Clause 10(3)(d) may well cause a frustrating delay for applicants, especially where the media is the requester. Ironically, this section appears to state that when something is of general public interest- i.e. really important to a lot of people- there must be a delay in the publication of the information so that parliamentarians can be the first to know. This may well undermine the credibility of the law in that it puts parliamentarians ahead of citizens in the pecking order.

Enforcement

On the face of it, a specially established [section 31(4)(b)] Appeal Tribunal is likely to provide a more user-friendly and accessible method of appeal than a Court and is, therefore, to be welcomed. However, section 33(5)(b) confuses the situation and may well serve to weaken the due process protection that the establishment of an Appeal Tribunal appears to offer. Section 33(5)(a) says that the Appeal Tribunal may consider the case de novo, and make any decision that could have been made on the original application for the information, but sub-section (b) goes on to seriously constrain this power. Sub-sections (b)(i) and (ii) combine to deny the tribunal any power to apply the only two clear areas of public interest discretion offered by the exemptions: governmental deliberations (section 19) and environment (section 21). Second, sub-section (b)(iii), dovetailing with section 24(3) creates a powerful loophole for government in relation to three swathes of information:

Effective implementation depends largely on a combination of political will and adequate resources.

national security documents (section 14), cabinet documents (section 15) and documents affecting the national economy (section 18). Given the concerns raised about the breadth and looseness of all three sets of exemptions, it is particularly unfortunate that they should be exempt from any sort of appeal or review.

The Duty To Be Proactive - Adopting a Right to Know Approach

It is disappointing that the draft law neither mandates nor encourages the “right-to-know” approach adopted in the most modern laws elsewhere. Inevitably, this makes the law both less user-friendly and more expensive and resource consuming to operate.

CONCLUSION

The current draft of the Jamaican Access to Information Act, 2001, provides a strong platform for enabling people to access the information that government holds in their name. As such, there is the potential to bring about a new and meaningful level of transparency to Jamaican governance and society, for the good of both government and the Jamaican people. However, the current draft contains a number of problem areas that need to be resolved if it is to achieve these goals. In certain places, identified above, it may do more harm than good. Thus, it runs the risk of raising and then crushing expectations. None of the concerns are insurmountable. Reference to best practice elsewhere, especially the South African case, should help ease the way forward to an improved final draft bill that properly balances the needs of government with the rights of its citizens.

ENDNOTES

- ⁱ Joseph Stiglitz, ‘On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life,’ Oxford Amnesty Lecture, Oxford University, United Kingdom, January 27, 1999.
- ⁱⁱ Section 8(2) of the interim constitution stated: ‘No person shall be unfairly discriminated against, directly or indirectly ... on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.’ The final constitution added pregnancy, marital status and birth to the list of grounds [section 9(3)].
- ⁱⁱⁱ This is an edited extract from the introduction to *The Right to Know: Access to Information in South-East Asia* by Sheila S. Coronel.
- ^{iv} Extracted from “Global Trends on the Right to Information: A Survey of South Asia”, published by ARTICLE 19, the Centre for Policy Alternatives, Sri Lanka, the Commonwealth Human Rights Initiative (CHRI), and the Human Rights Commission of Pakistan.
- ^v (www.aip-bg.org)
- ^{vi} US law has been bolstered by an eFOI law in 1996, which promotes right-to-know through electronic publication of government information.
- ^{vii} www.opendemocracy.org.za
- ^{viii} http://www.publiccitizen.org/litigation/free_info/. The Clearinghouse is a nonprofit organization. This site contains links and resources to assist citizens in using the Freedom of Information Act (FOIA), as well as information and testimony on their involvement with Freedom of Information issues and cases. Also found at this site: **The United States Freedom Of Information Act: Lessons Learned from Thirty Years of Experience with the Law**. By Amanda Frost, Director of Public Citizen’s Freedom of Information Clearinghouse http://www.publiccitizen.org/litigation/free_info/articles.cfm?ID=6127
- ^{ix} 18. - (1) An official document of a type specified in subsection (2) is exempt from disclosure of its disclosure or, as the case may be, its premature disclosure would, or could reasonably be expected to, have a substantial adverse effect on the Government’s ability to manage the Jamaican economy.(2) The types of documents referred to in subsection (1) include but are not limited to, documents relating to taxes, duties or rates, interest rates or currency or exchange rates.

THE ACCESS TO INFORMATION ACT, 2001

Minister Colin Campbell

The Access to Information Act, 2001 is a very critical Bill that will give citizens the right to access official government documents, and other related information except those exempted for legal and/or confidential reasons by the Act. It is indeed a bold step that the Jamaican government is taking to expand its citizens' participation in the entire democratic process and to remove the cloud of secrecy that is characteristic of the civil service. Underlying the very concept of freedom of information are three fundamental principles on which democratic governments are based, namely, accountability, openness and public participation. These coincide with the following objectives of the Act:

1. To ensure that Jamaicans experience all aspects of democracy as so ascribed to them by the constitution.
2. To improve the level of political participation by citizens and to promote an atmosphere of trust and responsibility.
3. To remove the culture of secrecy that usually surrounds the civil service by advancing openness and accountability as strategies for development.
4. To improve the government's effectiveness and aid in promoting sound policy initiatives.
5. To increase public knowledge and awareness.

The creation of the Access to Information Act, 2001 was influenced by extensive research and consultations both locally and internationally, to ensure that the Bill complies with international standards while taking into consideration the cultural characteristics of the land. We are confident in our efforts that the Bill will be

a resounding success and that Jamaicans, all over, will benefit from its dawn in the information age.

To ensure that the Access to Information Act remains true to its mandate, the government plans to put in place the necessary apparatus and systems to:

- Establish the right structures to facilitate an easy flow of requests.
- Procure the necessary capital, human and otherwise, needed to make the transition from a culture of secrecy in the civil service to one of transparency and accountability as quickly as possible.
- Make the necessary arrangements for citizens to access the various records with relative ease.
- Design and implement policy initiatives aimed at establishing an operational records management system.
- Facilitate an independent review process.

A POSITIVE SHIFT TOWARDS ACHIEVING TRANSPARENCY

A culture of secrecy has characterized public sector operations in Jamaica, primarily because of the Official Secrets Act. Access to Information legislation marks a movement away from secrecy to openness in government. Implicit in the Access to Information legislation is a paradigm shift away from this secrecy towards the availability of information, which will essentially render the retention of the Official Secrets Act an anachronism. It is therefore proposed that, in time, the Official Secrets Act should be repealed and replaced and that provisions be put in place for the criminalization of

Colin Campbell is the Jamaican Minister of Information

restricted categories of information where disclosure would be inimical to the public interest. One of the most controversial areas in dealing with this Bill is the scope and extent of exemptions, which should be permissible.

When all the issues are considered it must be recognized that we, the people of Jamaica, need to address the realities of our culture and understand that the management of change will not take place overnight. Nevertheless, the government of Jamaica pledges its unwavering support to the task. The challenge, therefore, which the public sector, in particular, faces is how to liberate itself from a culture which is deeply ingrained, and come to accept that in a democratic society the principles of accountability and openness are important elements in a government of the people, by the people and for the people.

The proposed Access to Information legislation recognizes the fact that good governance is not simply concerned with government in the traditional sense but with the activities of those who, through the exercise of power, affect the lives of our people in critical areas by the decisions, which they make. On these words we press forward with the task on hand.

DAWNING OF A NEW ERA IN JAMAICA

The Access to Information Act, 2001 has passed through various stages and is currently with a Joint Select Committee of the Houses of Parliament for deliberations, after which a report will be submitted to the House. The role of the Joint Select Committee is to therefore ensure that the objectiveness of the process is maintained. In keeping with this charter, the Committee continues to promote a critical, non-partisan approach in its assessment of the Bill so that its many potentials for advancement and implementation can be realized. The people of Jamaica are thus assured that the Act is neither farcical nor pretentious but that in actuality it represents a very important piece of legislation that will confer enforceable legal rights onto citizens. That is, the Act gives the citizen the right to an appeal process if a request for information is denied. In the instance where the appeal process is exhausted it is also within the citizen's right to take the matter to court.

FURTHER RESOURCES FOR FOSTERING TRANSPARENCY AND PREVENTING CORRUPTION

GOVERNMENT AGENCIES

Attorney General's Office
Attorney General AJ Nicholson
Mutual Life Building
North Tower, 2nd Floor
2 Oxford Road
Kingston, Jamaica
T: (876) 906-1682
F: (876) 906-7665

Contractor-General's Office
Mr. Derrick McKoy
Contractor-General
17 Knutsford Boulevard
P.O. Box 540
Kingston 5, Jamaica
T: (876) 929-0075
F: (876) 929-7335

Corruption Prevention Commission
Justice Chester Orr, Chairman
19 Graham Heights
Kingston 6, Jamaica
T: (876) 978-7788
F: (876) 931-8886

Department of Public Prosecution
Mr. Kent Pantry
Director of Public Prosecutions
Public Building West
King Street
Kingston 5, Jamaica
T: (876) 922-6321
F: (876) 922-4318

Integrity Commission
Mr. Uriel Salmon, Chairman
8 St. Lucia Crescent
Kingston 5, Jamaica
T: (876) 926-2288

Ministry of Information
Minister Colin Campbell
Office of the Prime Minister
1 Devon Road
Kingston, Jamaica
T: (876) 927-9607
F: (876) 968-6723

Ministry of Justice
Minister AJ Nicholson
Mutual Life Building
North Tower, 2nd Floor
2 Oxford Road
Kingston, Jamaica
T: (876) 906-1682
F: (876) 906-7665

Ministry of National Security
Minister Peter Phillips
Mutual Life Building
North Tower, 7th Floor
2 Oxford Road
Kingston, Jamaica
T: (876) 906-4908
F: (876) 906-1712

PROFESSIONAL ORGANIZATIONS

American Chamber of Commerce-Jamaica
Ms. Becky Stockhausen, Executive Director
81 Knutsford Boulevard
Le Meridian Pegasus
Kingston 5, Jamaica
T: (876) 929-7866
F: (876) 929-8597
Email: amcham@cwjamaica.com

Jamaica Chamber Commerce
Ms. Marcia Bryan
Executive Director
7 East Parade
Kingston, Jamaica
T: (876) 922-0150
F: (876) 924-9056
Email: jamcham@cwjamaica.com

Jamaica Civil Service Association
Mr. Wayne James, President
10 Caledonia Avenue
Kingston, Jamaica
T: (876) 968-7087
F: (876) 926-2042

Private Sector Organization of Jamaica
Mr. Oliver Clarke, President
39 Hope Road
Kingston 6, Jamaica
T: (876) 927-6238

The Jamaican Bar Association
Ms. Hilary Philips, Q.C., President
78-80 Harbour Street
Kingston, Jamaica
T: (876) 967-3783
F: (876) 967-3783

CIVIL SOCIETY ORGANIZATIONS

CAFFE: Citizens Action for
Free and Fair Elections
Archbishop Samuel Carter, S.J., O.J.
1 Grants Pen Road,
Kingston 8, Jamaica
T: (876) 925-5158

Coalition of Concerned
Jamaican Citizens
Reverend Al Miller, Chairman
58 Halfway Tree Road
Kingston 10, Jamaica
T: (876) 960-3084
F: (876) 929-5768

Dispute Resolution Foundation
Ms. Donna Parchment, Executive Director
5 Camp Road
P.O. Box 543
Kingston 5, Jamaica
T: (876) 906-2456
F: (876) 754-9769
Email: drf@mail.infochan.com

Farquharson Institute of Public Affairs
Mr. Frank Phipps, Chairman
5 Lyncourt
Kingston 6, Jamaica
T: (876) 978-6587
Email: farquharsoninstitute@yahoo.com

Independent Jamaica Council of
Human Rights (1998) Ltd.
Mr. Lloyd Barnett, Q.C., Chairman
131 Tower Street
Kingston, Jamaica
T: (876) 967-1204

Jamaica Council of Churches
Reverend Dr. Howard Gregory, President
14 South Avenue
Kingston 10, Jamaica
T: (876) 926-0974
F: (876) 926-0974

Jamaicans for Justice
Dr. Carolyn Gomes, President
1 Grants Pen Road
Kingston 8, Jamaica
T: (876) 755-4524-6
Email: ja.for.justice@cwjamaica.com
Website: www.jamaicansforjustice.org

Legal Aid Council
Ms. Nancy Anderson, Executive Director
12 Ocean Boulevard
Kingston, Jamaica
T: (876) 922-0080

National Consumers' League
Miss Joyce P. Campbell, President
29 Beechwood Avenue
P.O. Box 275
Kingston 5, Jamaica
T: (876) 926-6388
F: (876) 926-5545

Operation Save Jamaica
Mr. Bruce Fletcher, President
Kingston 5, Jamaica
T: (876) 960-6942
F: (876) 968-7662
email: bruceaf@hotmail.com

Stella Maris Foundation
Stella Maris Church Community
Monsignor Richard Albert
62 Shortwood Road
P.O. Box 1285
Kingston 8, Jamaica

St. Patrick's Foundation
Monsignor Richard Albert, Founder and Chairman
193 Bay Farm Road
Kingston 11, Jamaica
T: (876) 925-9520
F: (876) 905-1575

Transformation Jamaica
Mrs. Donna Duncan-Scott, Managing Director
Care Of Jamaican Money Market Brokers Ltd.
6 Houghton Terrace
Kingston 8, Jamaica
T: (876) 960-3181
Email: donna_duncan@Jmmb.com

Transparency International
Ms. Beth Aub, Director
Box 74
Mona Post Office
Kingston 6, Jamaica
T: (876) 944-3219
Email: maub@annigel.com.jam

ABOUT THE CONTRIBUTORS

Lloyd Barnett, O.J., B.A., LL.B. (Hons.), LL.M., Ph.D. (London), of Lincoln's Inn, Barrister-at-law, is a practising attorney in Jamaica and several Commonwealth Caribbean countries. He is the author of *The Constitutional Law of Jamaica* (OUP) and *The Jamaica Constitution- Basic Facts and Questions* and has published several legal articles, particularly in the area of human rights and public law. Dr. Barnett is Chairman of the General Legal Council and the Independent Jamaica Council for Human Rights. He is a member of the Council of the Jamaican Bar Association and is a past President of the Jamaican Bar Association and the Organization of Commonwealth Caribbean Bar Associations. Dr. Barnett was a member and Chairman of the Constitution Commission of Jamaica and has served as a Consultant to the Governments of Aruba and Nevis on Constitutional Reform. He was a member of the Review Team of the U.W.I. Faculty of Law and Chairman of the Review Committee of the Council of Legal Education.

Dr. Barnett is a member of the Board of Directors of the Inter-American Institute of Human Rights and of the Council of the Centre for Independence of Judges and Lawyers. Dr. Barnett is the Editor of the *Jamaican Law Reports* and Consulting Editor of the *Trinidad and Tobago Law Reports* and the *Law Reports of the Eastern Caribbean States*. He is a former Jamaican Senator and a former Chairman of the Caribbean Council of Legal Education.

In 1999, Dr. Barnett was awarded a Jamaican National Honour, the Order of Jamaica for his outstanding contribution in the field of jurisprudence in the Region.

Richard Calland is Programme Manager of PIMS, the Political Information & Monitoring Service at the Institute for Democracy in South Africa (IDASA), where he has worked since 1995. Calland was a leading member of the ten-organisation Open Democracy Campaign Group that conducted extensive research and lobbied intensively in relation to what was then the Open Democracy Bill (now the Promotion of Access to Information Act 2000). Large parts of the bill were re-written by the Parliamentary Committee as a result of the lobbying of the Campaign Group.

Prior to coming to South Africa in 1994, Calland practised at the London Bar for seven years, specialising in Public Law. He has an LLM in Comparative Constitutional Law from the University of Cape Town (1994). Calland is Executive Chair of the newly established Open Democracy Advice Centre in Cape Town, which provides advice and support for organisations making requests for information under the Promotion of Access to Information Act and also conducts test case litigation.

Colin Campbell was born on February 27, 1958 to a St. Elizabethian Teacher and a St. Ann Businessman, who are both now in their 50th year of marriage. He attended the St. Paul's Primary School, Munro College, Calabar High School, and his tertiary training was achieved at the International Training Institute in Sydney, Australia.

As a journalist and communications expert, Colin Campbell joined the staff of the Jamaica Broadcasting Corporation in 1973, and became Acting Chief

Television News Editor at age 24 after being one of the main directors of the nightly news from the tender age of 19.

Colin, along with three (3) members of the Jamaica Broadcasting Corporation formed a Public Relations and Advertising Firm, Communication Services Limited in 1982. He served as Secretary and then Vice President of the Advertising Agencies Association of Jamaica and Treasurer of the Press Association of Jamaica.

Jimmy Carter (James Earl Carter, Jr.), thirty-ninth president of the United States, was born October 1, 1924, in the small farming town of Plains, Georgia. He was educated at Georgia Southwestern College and the Georgia Institute of Technology, and received a B.S. degree from the United States Naval Academy in 1946. He later did graduate work in nuclear physics at Union College. In 1962, Carter won election to the Georgia Senate. He lost his first gubernatorial campaign in 1966, but won the next election, becoming Georgia's 76th governor on January 12, 1971. He was the Democratic National Committee campaign chairman for the 1974 congressional elections. Jimmy Carter served as president from January 20, 1977, to January 20, 1981. Noteworthy foreign policy accomplishments of his administration included the Panama Canal treaties, the Camp David Accords, the treaty of peace between Egypt and Israel, the SALT II treaty with the Soviet Union, and the establishment of U.S. diplomatic relations with the People's Republic of China. He championed human rights throughout the world. On the domestic side, the administration's achievements included a comprehensive energy program conducted by a new Department of Energy; deregulation in energy, transportation, communications, and finance; major educational programs under a new Department of Education; and major environmental protection legislation, including the Alaska Lands Act.

Mark Davies has served as Executive Director and Counsel of the New York City Conflicts of Interest Board since January 1994. He previously served as Executive Director of the New York State Temporary State Commission on Local Government Ethics, where he drafted the Commission's bill to completely revamp New York State's ethics law for local government officials, and as a Deputy Counsel to the New York State Commission on Government Integrity.

During 15 years of private practice, he specialized in litigation and municipal law. He has also served in local political party positions. A graduate of Columbia College and Columbia Law School, he has taught at St. John's and New York law schools, and is currently an Adjunct Professor of Law at Fordham University School of Law. He is also a member of the executive committee of the New York State Bar Association's Commercial and Federal Litigation Section, whose newsletter he edits, and is the chair of the newly established Ethics and Professional Responsibility Committee of the State Bar's Municipal Law Section.

He has lectured extensively on civil practice and on ethics and has authored some two dozen publications, including several articles on governmental ethics laws, the municipal ethics chapter for *Ethical Standards in the Public Sector* (ABA 1999), and the governmental ethics chapter for a new international work on *Ethics and Law Enforcement: Toward Global Guidelines* (Praeger 2000). He is the directing editor and revision author of West's McKinney's Forms for the CPLR and the directing editor and lead author of *New York Civil Appellate Practice* (West 1996).

Bertrand de Speville, formerly Commissioner of the Independent Commission Against Corruption of Hong Kong, is a consultant in anti-corruption, good governance and integrity systems.

His engagements have included projects for the Organisation for Economic Cooperation and Development, the Council of Europe, the United Kingdom Department for International Development, the World Bank, the Asian Development Bank, the United Nations Office for Drug Control and Crime Prevention, the United Nations Development Programme, USAID, Transparency International, The Carter Center, national governments and private sector corporations. For the past five years he has been the adviser to the Council of Europe's Multidisciplinary Group on Corruption.

As Commissioner of the ICAC he was responsible directly to the Governor of Hong Kong for the conduct of the campaign against corruption, and in particular for the continuing drive to raise the ethical standards of Hong Kong business.

Mr. de Speville is a lawyer who trained and practised in London in the private and public sectors. He went to Hong Kong in 1981 as a legal adviser to the Hong Kong Government. He was Solicitor General from 1991 to 1993, when he was concerned mainly with criminal legal policy and the implementation of Hong Kong's newly introduced human rights legislation.

Trevor Munroe is Professor of Government and Politics at the University of the West Indies, Mona Campus. He holds a doctorate in political science from Oxford University and Bachelor of Science and Master of Science degrees in Government from the University of the West Indies. Professor Munroe has authored seven academic books and a number of scholarly works on democratic governance in the Caribbean. His most recent book *Renewing Democracy into the Millennium: The Jamaican Experience in Perspective* (1999) was completed while at Harvard as a Visiting Scholar.

He is an Independent Senator in the Jamaican Parliament and serves on various Joint Select Committees dealing with governance issues, including anti-corruption and access to information legislation. Dr. Munroe is also leader of one of Jamaica's major trade unions and a long standing activist in civil society. He is a Rhodes Scholar and two-time Fulbright Fellow at Harvard University.

Laura Neuman is the Senior Program Associate for the Americas Program at The Carter Center. She directs and implements transparency projects, including projects in Jamaica, Costa Rica and the United States. Ms. Neuman edited a widely distributed booklet on fighting corruption in Jamaica and presented at a number of seminars relating to the proposed Corruption Prevention and Freedom of Information Acts. In Costa Rica, she worked with the government, private sector and non-governmental organizations to coordinate a transparency seminar on the role of civil society in monitoring public contracting and procurement. As part of her work on transparency, she facilitates The Carter Center's Council for Ethical Business Practices, a working group of leading Atlanta corporations that act to promote the adoption of business codes of conduct, integrity and transparency in the private sector. Ms. Neuman has also worked on election monitoring missions in Venezuela, Guatemala, the Dominican Republic, Nicaragua, Peru and the Cherokee Nation. Ms. Neuman led The Carter Center international observation delegations to the Dominican Republic (2000) and Venezuela (1999, 2000). She has also recently co-authored an article on Venezuela for *Current History*. In October 2000, she coordinated the Challenges to Democracy in the Americas Conference held at The Carter Center. Ms. Neuman is a member of The Carter Center Human Rights Committee.

Prior to joining The Carter Center in August 1999, Ms. Neuman was senior staff attorney for Senior Law

at Legal Action of Wisconsin, the state's largest legal services provider for low-income persons. In 1996, she won the prestigious Older Adult Service Providers' Consortium Advocate of the Year award. In 1997, Ms. Neuman worked in the Dominican Republic for one year, teaching AIDS awareness and education and assisting in the formation and organization of a local women's cooperative.

She is a 1993 graduate of the University of Wisconsin law school, receiving the Ruth B. Doyle Award for Leadership and Excellence. She received a bachelor degree in international relations in 1989 from the University of Wisconsin, Madison. Ms. Neuman is presently working towards her Master's degree in International Public Health, with a specialty in infectious diseases, at Emory University.

Alasdair Roberts is an Associate Professor in the Maxwell School of Citizenship and Public Affairs at Syracuse University. He is also Director of the Campbell Public Affairs Institute at Syracuse University.

A native of Pembroke, Ontario, Canada, Professor Roberts began his B.A. in politics at Queen's University in 1979. He received a J.D. from the University of Toronto Faculty of Law in 1984, a Master's degree in Public Policy from the Kennedy School of Government at Harvard University in 1986, and a Ph.D. in Public Policy from Harvard University in 1994.

From 1990 to 2001, Professor Roberts taught in the School of Policy Studies at Queen's University, Canada. He was Associate Director of the School from 1993 to 1995. He has also held visiting appointments at Georgetown University's Graduate Public Policy Institute and at the University of Southern California's Washington Public Affairs Center. He was a visiting scholar at the Council for Excellence in Government in Washington, D.C. in 1997-98 and a fellow at the

Woodrow Wilson International Center for Scholars in Washington, D.C. in 1999-2000.

Professor Roberts is currently a fellow of the Open Society Institute, New York; a visiting fellow at the School of Policy Studies at Queen's University; a member of the Canadian Treasury Board Secretariat's Academic Advisory council; and a member of the Board of Editors of *Public Administration Review*.

His research focuses on two areas: public sector restructuring, and transparency in government. His work has been widely published. He received the Dimock Award for best lead article in *Public Administration Review* in 1995 and the Hodgetts Award for best English article in *Canadian Public Administration* in 2000.