



**1st Commonwealth Regional Conference for heads of Integrity
Commissions and Anti-Corruption Bodies in the
Caribbean**

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**THE INDEPENDENCE OF INTEGRITY
COMMISSIONS IN OECS MEMBER- STATES
AND RECOMMENDATIONS FOR
STRENGTHENING THE LEGISLATIVE AND
ADMINISTRATIVE REGIME**

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INDEPENDENCE OF THE COMMISSION

- Black's Law Dictionary, (Abridged 6th Ed. 1991, p. 530) defines "independence" to mean "the state or condition of being free from dependence, subjection or control."
- "Freedom from control, by, or subordination to" connotes a status or relationship to others that rests on objective conditions or guarantees. In determining whether oversight bodies can be considered independent regard must be had to:

INDEPENDENCE OF THE COMMISSION CONT'D

- (a) the statutory regime in terms of:
 - (I) express statutory prescription;
 - (II) their financial security;
 - (III) their security of tenure;

- (b) their institutional relationship with respect to matters of administration to the executive branch of government bearing directly on their autonomous statutory functions; and

- (c) perception: whether they may be reasonably perceived as independent. (See Valente v. R [1985] 2 SCR 673 at 674, and *The Report of the Rt. Hon. Mr Justice P.T. Georges on the Independence of the Judiciary*, February 16th 2000, in Carib LB. 28.)

INDEPENDENCE OF THE COMMISSION CONT'D

[I] Expressed Statutory Independence

The Integrity statutes in the OECS countries expressly provide that the Commissions are not subject to “the direction or control of any person or authority” in the exercise of their functions.

- Antigua and Barbuda (ANU): Integrity in Public Life Act, 2004, No. 24 of 2004; section 12(2);
- Dominica (DOM): Integrity in Public Office Act, 2003, No. 6 of 2003; section 13;
- Grenada (GDN): Integrity in Public Life Act, 2013, No. 24 of 2013, section; 12(2)(a);
- Montserrat (MONT): Integrity in Public Office Act, 2010, No. 2 of 2010; section 13; and
- St. Lucia (SLU): Integrity in Public Life Act, 2004, No. 6 of 2004; section 8.

INDEPENDENCE OF THE COMMISSION CONT'D

[III] Financial Provisions

- The independence of the Commissions is also safeguarded by the provisions in the integrity legislation which require that the expenses incurred by the Commissions for the purposes of the Act once approved by the Executive, are to be a charge on the Consolidated Fund and are not therefore subject to annual appropriation. (ANU – s.31; DOM – s.52; MONT – s.52; SLU – s.39).

INDEPENDENCE OF THE COMMISSION CONT'D

[III] Tenure Security

Their independence is further reinforced by the security of tenure of Commissioners for the fixed term of their appointments and the provision that a member of the Commission may be removed from office only for inability or misbehaviour and only on the determination of an independent tribunal appointed for that purpose and not by the Executive. (ANU – s.9; DOM – s.7 (3) – (7); GDN – s.9; MONT – s.7 (2) – (6). But see SLU section 5(a) which provides that a vacancy in membership may occur by “the revocation of the appointment of a member” by the Governor General, without more).

CONSTITUTIONAL MINISTERIAL RESPONSIBILITY AND COMMISSIONS' STATUTORY INDEPENDENCE

- The system of democratic governance established by our Westminster model constitution enshrines the principle of parliamentary control of the Executive as the foundation of constitutional government. The doctrines of collective (cabinet) responsibility and of individual (ministerial) responsibility to Parliament subject the exercise of the powers of the state to democratic control.
- Under these constitutions the head of state on the advice of the Prime Minister is authorized to assign portfolio responsibilities in writing to Ministers for the conduct of any business of the Government, including the administration of any department of Government. (e.g. DOM. Constitution s. 61).

CONSTITUTIONAL MINISTERIAL RESPONSIBILITY AND COMMISSIONS' STATUTORY INDEPENDENCE

- Where a Minister is charged with responsibility for any department of Government he shall exercise general direction and control over that department and, subject to such direction and control the department shall be under “the supervision” of the Permanent Secretary (e.g. DOM. Constitution, s. 68).
- But the Constitution and Parliament may also confer powers of the State on non-elected office-holders and institutions and what the British call “Non- Ministerial Departments”. For example, all the OECS constitutions have made specific provisions for certain public offices including the office of the Director of Public Prosecutions, Chief Elections Officer, and Director of Audit to function with the guarantee of independence from “the direction or control of any person or authority” in the exercise of the autonomous powers and functions conferred on them.

CONSTITUTIONAL MINISTERIAL RESPONSIBILITY AND COMMISSIONS' STATUTORY INDEPENDENCE

- The Privy Council in [Attorney General of Fiji v. Director of Public Prosecutions of Fiji (1983) 2. A.C.672] held that it was permissible for the Governor General to assign to the Attorney General / Minister in his portfolio such of the functions of the DPP as were not required by the Constitution itself or any other law to be exercised exclusively by the DPP.
- The Board pointed out that the DPP had responsibilities in addition to his independent section 85 functions on which an assignment was capable of taking effect.

CONSTITUTIONAL MINISTERIAL RESPONSIBILITY AND COMMISSIONS' STATUTORY INDEPENDENCE

- The Board(per Lord Fraser of Tullybelton) stated that the DPP's functions under the Constitution and his non-assignable responsibilities under other laws are not exhaustive of all his responsibilities. There are other areas of his responsibility which might fall under the “*general direction and control of the Attorney-General by virtue of the assignment and of section 82, without contravening section 85(7)*”.

CONSTITUTIONAL MINISTERIAL RESPONSIBILITY AND COMMISSIONS' STATUTORY INDEPENDENCE

- These include:

[I] the funding of the DPP's office and explanations/ justifications of his estimates to Parliament;

[II] provisions for accommodation and facilities for the DPP, and

[III] the complement and the terms and conditions of engagement of staff of the DPP's department.

- But he added: *"...Their lordships say "might" because they wish to avoid any appearance of drawing up a list of matters for which responsibility has been assigned, and also to allow for the possibility that circumstances might arise in which a government behaved so unreasonably, for example, by exercising such excessive financial pressure on the DPP's department that the inference would be that they were really seeking to interfere with his independence."* (p.682)

CONSTITUTIONAL MINISTERIAL RESPONSIBILITY AND COMMISSIONS' STATUTORY INDEPENDENCE

- Though they may not be “departments of Government” within the meaning of the Constitution or part of the administrative structure of the Public Service, the integrity commissions in the OECS are statutory authorities exercising state power and are part of the “business of Government” within the meaning of the Constitution.

CONSTITUTIONAL MINISTERIAL RESPONSIBILITY AND COMMISSIONS' STATUTORY INDEPENDENCE

- Therefore, the relevant Minister may be assigned portfolio responsibility for the Commission under the provisions of the Constitution subject to the necessary reservation in respect of the Commissions exclusive and protected statutory functions. (See, Dominica Constitution s. 61 with s.68, AG of Fiji v. DPP of Fiji [1983] 2 A.C. 672 and Mossell (Jamaica) Ltd. (t/a Digicel) v. Office of Utilities Regulations and Ors (Jamaica) [2010] UKPC (21st January, 2010; Ex Parte Attorney General, Namibia [1995] 3 LRC 507 at p. 521G).

CONSTITUTIONAL MINISTERIAL RESPONSIBILITY AND COMMISSIONS' STATUTORY INDEPENDENCE

- The assignment could properly include the matters referred to by Lord Fraser of Tullybelton for which the Minister would be accountable to Parliament.

MAINTAINING APPROPRIATE “ARMS LENGTH” RELATIONSHIP WITH THE EXECUTIVE AND CONFINE MINISTERIAL RESPONSIBILITY WITHIN ITS PROPER LIMITS AND AWAY FROM DAY-TO-DAY ADMINISTRATION OF THE COMMISSION

RECOMMENDATIONS

- In a paper on:

“OVERSIGHT BODIES – IMPLEMENTATION OF INTEGRITY LEGISLATION IN VERY SMALL CARIBBEAN STATES” DELIVERED AT THE PUBLIC ADMINISTRATION IN VERY SMALL STATES CONFERENCE, MARLBOROUGH HOUSE, LONDON, APRIL 23-24, 2013

RECOMMENDATIONS CONT'D

Under the heading : **“WHAT DOES NOT WORK?”** I stated:

1. “ Dependence on the executive for legislative improvement and the making of Regulations. Parliament should greatly limit the extent of discretionary powers in the hands of the Executive by making comprehensive arrangements in the enabling Act concerning all imperatives including provisions to give effect to the legislation. (Recently, Dominica’s Parliament in the Public Procurement and Contract Administration Act 2012, No 11 of 2012 found it necessary to provide that if the Minister has not appointed a day for the entry into force of the Act within two years after the day of assent the Act shall automatically come into force on the next days.(s.2(2)&(3))

RECOMMENDATIONS CONT'D

2. Presence of persons with strong and active political affiliation on the Commission.
3. Staff with close political ties: political patronage and institutional loyalty issues.

RECOMMENDATIONS CONT'D

- Under the heading: **“What Works”**? I stated:
 1. “Careful selection of Commission members from professional and experienced persons of high public standing and reputation for integrity and who are not known to have strong and active political affiliations.
 2. Communication/collaboration with other Commissions and oversight bodies strengthens capacity to undertake difficult tasks, especially actions of a highly sensitive political nature.
 3. Access to high level expertise, e.g. legal and forensic, improves capacity to deal with complex cases.
 4. Maintaining independent and even handed administration insulates the institution from unnecessary public controversy.”

RECOMMENDATIONS CONT'D

[I] Establishment and Appointment of an independent Commission

I submit the following for your consideration:

- Civil society – trade unions, commerce/industry and professional bodies, church councils – should be empowered to nominate suitably qualified persons to the Head of Government for appointment to the Commission;
- “suitably qualified persons” to include persons qualified by training and experience in accountancy, law, public management, business management and related disciplines who have a reputation for integrity and who are not known to have strong and active party political affiliation.

RECOMMENDATIONS CONT'D

- The Head of Government after proper consultation with the Leader of the Opposition shall advise the Head of State to appoint three/five members from the persons nominate by civil society to the Commission.

RECOMMENDATIONS CONT'D

[II] Staff “adequate for the prompt and efficient discharge” of the functions of the Commission under the Act. (DOM). s. 49)

- **In the Marlborough House Paper, April 2013, under Staff of the Commission I stated that;**

“The Executive in the OECS has generally failed to comply with the statutory requirements to provide the Commissions “with staff adequate for the prompt and efficient discharge” of the statutory functions. A fundamental pillar for an efficient and effective anti-corruption body is the possession of high level professional staff with loyalty to the Commission and its mandate. The statutory description of the administrative functions to be performed by the Secretariat of the Commission under the current statutes is clearly inadequate.

RECOMMENDATIONS CONT'D

- In a Country Procurement Assessment Report published by the World Bank in June 2003 the Bank recommended that it is critical that high level professional staff with legal and accounting /auditing background be hired and adequately paid and receive substantial training in administrative and enforcement of ethical systems.

RECOMMENDATIONS CONT'D

- So too is the role of the Commission in the selection of and the exercise of disciplinary control over staff. It is critical that the commission be staffed by high level professional staff with legal, accounting and auditing background. It is therefore recommended that the minimum staff complement and accountability to the Commission should be included in the enabling Acts.

RECOMMENDATIONS CONT'D

- I therefore submit the following:
 - [1] **The Belize Prevention of Corruption Act 2007, No. 21 of 2007 enacts:**
- *“7. (1) There is established, for the purposes of this Act, a Secretariat to the Commission which shall consist of the following persons*
- *(a) an Executive Director;*
- *(b) an Administrative Secretary;*
- *(c) a Senior Clerk;*
- *(d) an in-house legal Advisor;*
- *(e) a Special (forensic) Investigator who is highly skilled and experienced to conduct investigations relating to financial crimes; and*
- *(f) any other personnel reasonably necessary to carry out the functions of the Commission.*
- *(2) The Executive Director is accountable and answerable to the Commission and he shall carry out all directions given to him by the Commission in pursuance of its functions.*
- *(3) The Office of the Secretariat is charged with the administrative responsibilities of the Commission and shall perform any duties reasonably incidental to the office of the Commission, and which are assigned to it by the Commission.”*

RECOMMENDATIONS CONT'D

Grenada's Integrity in Public Life Act 2013, No.24 of 2013 provides:

- *Section 19(1) “The Commission shall have the power to appoint an administrative officer and other officers on such terms and conditions as it thinks fit for the proper carrying out of its functions under the Act.*

Barbados's Prevention of Corruption Act 2012 (assented to on 18th December, 2012)

- *Section 6(1) “The Commission shall appoint from among persons who are not public officials or who are no longer public officials adequate staff for the performance of its functions.*
- *(2) The Commission shall, subject to approval of the Minister of Finance, determine the remuneration and other terms and conditions in relation to the employees of the Commission.” (And see section 3 with the First Schedule, para 10(1))*
- [II] See also First Schedule of the Jamaica Corruption (Prevention) Act 2000 Section 13.

RECOMMENDATIONS CONT'D

[III] Finance and Management of the Commission's Funds

- Approved budget to be under the management of the Commission with its own Accounting Officer under the Finance [Administration] Act, and in accordance with the Financial (Stores) Regulations and all applicable laws governing the expenditure of public money.

[IV] Report and Accountability of the Commission to Parliament

- Provisions to be included in the legislation that if the Minister has not submitted the annual report of the Commission to Parliament within the prescribed period then the Commission should submit the report directly to the Speaker of the House of Assembly [and to the Leader of the Opposition]. (c.f. Section 83 (5) of the DOM Constitution).
- Provision for periodic review of the Act by a Committee of the Parliament similar to Section 16 A of the Corruption (Prevention) Act 2001 of Jamaica and in accordance with Article 5 of UNCAC.

Thank You

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