



## INTEGRITY COMMISSION

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### **Position Statement of the Integrity Commission of Jamaica Regarding Section 53 (3) of the Integrity Commission Act – the ‘Gag Clause’ Submitted to the Integrity Commission Parliament Oversight Committee on November 24, 2021**

During the proceedings of the Integrity Commission Parliament Oversight Committee of October 14, 2021, certain issues concerning Section 53(3) of the Integrity Commission Act (ICA) were raised for discussion.

Section 53(3) of the ICA provides as follows:

“Until the tabling in Parliament of a report under Section 36, all matters under investigation by the Director of investigation or any other person involved in such investigation shall be kept confidential, and no report or public statement shall be made by the Commission or any other person in relation to the initiation or conduct of an investigation under this Act.”

The primary justification that has been advanced for imposing and retaining the Section 53(3) ‘gag’ is that it prevents the Integrity Commission (IC) from injuring the reputation of public officials, when it makes an announcement of its commencement of an investigation into allegations of corruption, misconduct, impropriety and/or irregularity which may directly or indirectly implicate a public official.

The proponents of the ‘gag’ generally contend that a person is presumed innocent until proven guilty and that this presumption is undermined, to the detriment of the implicated public official, when an investigation is announced or otherwise commented upon.

The IC does not share these views. It has, by way of its three (3) Annual Reports, to date, tabled the following recommendations in Parliament regarding Section 53(3):

#### **Recommendation in First Annual Report 2018/2019 (Pages 7-8)**

"With respect to Section 53(3), which deals with the confidentiality of investigations and reports, it is widely believed that the present provision is “inconsistent with the objective of transparency in the functioning of the commission”. It is our view, that the Commissioners should be given the option of reporting in general terms the stage of an investigation, without commenting specifically on the individuals being investigated or what they are being investigated for. We are further of the view that such disclosure should be restricted to the Government entity that is involved and the cause of the Commission's interest if the Commissioners deem such disclosure appropriate and taking into account the need for the protection of the reputations of individuals and institutions whose culpability have not been established to the satisfaction of the Commission."

### **Recommendation in Second Annual Report 2019/2020 (Page 24)**

“With respect to Section 53(3), which addresses confidentiality regarding all matters under investigation, it is recommended that the Commission be vested with the authority to comment on investigations as deemed necessary and appropriate.”

### **Recommendation in Third Annual Report 2020/2021 (Page 17)**

“With respect to Section 53(3), which addresses confidentiality regarding all matters under investigation, it is recommended that the Commission be vested with the authority to comment on the initiation of investigations and on aspects of an on-going investigation as deemed necessary and appropriate.”

The IC reiterates the foregoing recommendations and, in addition, now wishes to place the following positions on the record:

(1) The IC believes that the maintenance of the ‘gag’ is inimical to the public interest and the public good. Considering that Jamaica is perceived to be highly corrupt, the ‘gag’ only serves to further undermine public confidence and trust in the country’s institutions and leaders. Corruption loathes transparency. It thrives in the dark. The ‘gag’, because it suppresses information is, therefore, self-defeating.

(2) The IC is not aware of any similar statutory ‘gag’ being imposed upon any other law enforcement agency in Jamaica. The IC, therefore, believes that the ‘gag’ should be cause for significant public alarm and concern.

(3) The announcement of an investigation by the IC, it being a law enforcement agency, does not, *ipso facto*, undermine the presumption of innocence.

(4) More particularly, the announcement of an investigation by the IC, into an allegation, cannot logically undermine the presumption of innocence, or tarnish someone’s reputation, when the announcement follows an allegation that has already been introduced into the public domain by a 3rd party.

(5) The IC does not make allegations against persons or entities, nor does it tarnish or impugn their reputations. Rather, the IC, as a quasi-judicial body, seeks to unearth or to determine, via its investigations, the veracity of the inferences or allegations of misconduct that have already been made by 3rd parties against public officials. This is a statutory mandate of the IC.

(6) Public allegations or inferences of corruption, misconduct, impropriety or irregularity that implicate public officials, typically arise from proceedings of the Committees of Parliament, published reports of agencies of the state, media reports, or public statements or requests made by Parliamentarians and politicians, or by others, to have said allegations or inferences investigated.

(7) The Office of the Contractor General (OCG), an IC legacy agency, in its 24th and 2010 Annual Report to Parliament, at pages 37 to 41, lists a matrix of twenty-one (21) major OCG Investigations that were initiated and/or completed by it during the 4 1/2 year period which preceded February 2011.

In all 21 instances, announcements of the investigations were made.

Committee members, as well as members of the public, are encouraged to review the referenced pages of the OCG's 2010 Annual Report which can be found on the IC's website.

The matrix clearly establishes what is a glaring double-standard on the issue regarding, (a) the making of allegations, and (b) what has been deemed by some to be damage done to the reputation of the persons who were implicated by the announcements that were subsequently made by the OCG of the commencement of its investigations into the allegations.

The matrix discloses that it was Parliamentarians and politicians themselves, and not the OCG, that had made the initial public allegations which, in turn, had prompted eight (8) of the referenced OCG Special Investigations, and the making of the subsequent public announcements regarding the commencement of the investigations.

It is also noteworthy that in eight (8) of the remaining 13 instances, the allegations that led to the OCG's Investigations were allegations that were first publicly made in the print and electronic media by 3rd parties.

To say, therefore, that in such circumstances the OCG or the IC has tarnished someone's reputation by its mere announcement of an investigation is not only misleading, but raises the following germane questions:

(a) When a public allegation which implicates someone has been made by a 3rd party, in what way does a subsequent announcement by the IC of its commencement of an investigation into that allegation, injure the reputation of the individual concerned?

(b) What good purpose is served by hiding from the public the fact that the IC has commenced an investigation into said allegations?

(c) When a public request is made by a 3rd party for an investigation to be conducted by the IC into a specific allegation which implicates someone, is the making of that request viewed as tarnishing the reputation of the person who is implicated by the allegation? If no, then why should a subsequent announcement by the IC that it has acceded to the request be regarded as tarnishing the person's reputation?

(8) Government members of the Integrity Commission Parliament Oversight Committee have reasoned that, instead of seeking to remove the Section 53(3) 'gag', the IC should utilize the facility of a Special Report to Parliament under Section 36(3) of the ICA, to make announcements of its commencement of investigations. The argument suggests that once the report is tabled in the Houses of Parliament, the announcement of the IC's investigation would thereby become public.

However, if the mischief that the 'gag' is seeking to cure is to prevent the tarnishing of the reputations of public officials by prohibiting the IC from making a public announcement of its investigations, then how is that mischief cured when the IC is allowed to make the same public announcement via the tabling of a report in Parliament? Is not the presumed offending public announcement made in either case?

(9) Of even greater concern is the fact that the IC was upbraided by the Parliament Oversight Committee 'for not following the law', by its failure to use the facility of Section 36(3) to announce its investigations. A proper construction of Section 36(3), however, discloses that the Section was never intended for that purpose.

Section 36(3) of the ICA provides as follows:

“The Commission may, at any time, submit a report relating to any particular matter which, in the opinion of the Commission, requires the specific attention of the Parliament.”

The qualifying words are “*which, in the opinion of the Commission, requires the specific attention of the Parliament.*” However, the IC’s announcement of an investigation is not something which “requires the specific attention of Parliament.”

Section 36(3) cannot, therefore, in the IC’s view, be lawfully used in such circumstances.

(10) The recommended authority of the IC to make an announcement of the commencement of its investigations, or to otherwise make guarded comments concerning its investigations, is something that is intended for the benefit of the public, primarily to inform it of matters that are under consideration by the IC.

(11) The IC’s making of such announcements will, among other things, ensure that members of the public, who are in a position to assist the IC in its investigations, can come forward and do so. This serves the public interest, for if the public is not aware of what the IC is doing, its capacity to effectively function is thereby undermined.

(12) Unlike the IC, law enforcement agencies in Jamaica and in other countries do have the discretionary power to make public announcements about their investigations. They are not gagged. This suggests that blanket statutory gags are unusual and do raise curious questions.

(13) The IC’s UK counterpart, the UK’s Serious Fraud Office (SFO), presents an eloquent example of the foregoing. In its guidance, given in its “policy on making information about our cases public,” it states the following as circumstances in which it will exercise its discretionary authority to make announcements about its investigations:

(a) When “there are operational reasons for announcing the investigation (such as a call for witnesses);” or

(b) When “there is some other substantial reason why the announcement of the investigation would be in the public interest.”

There is no gag!

(14) Further, a vivid and recent example of one the Commonwealth’s leading anti-corruption law enforcement agencies exercising its discretionary authority to make public statements about its investigations, occurred on October 1, 2021.

On that day, Australia’s New South Wales (NSW) Independent Commission Against Corruption (ICAC) confirmed that it was investigating whether the NSW Premier ‘breached public trust by exercising public functions in circumstances where she was in a position of conflict between her public duties and her private interest, or encouraged corrupt conduct.’

**(15) Having regard to all of the foregoing, the IC respectfully calls upon the Parliament of Jamaica to repeal Section 53(3) of the ICA, and to reserve to the IC the discretionary authority to make statements about its investigations as it sees fit.**

The five (5) member panel of Jamaica's IC is required by law to include two (2) retired Appellate or Supreme Court Judges, one of whom must sit as the Chairman of the Commission.

The IC currently has, as its Chair, a distinguished retired President of Jamaica's Court of Appeal. On the panel also sits another eminent retired Justice of Jamaica's Supreme Court. As experienced judicial luminaries, and arbiters of justice, they, more than anyone else, would be seized with the need, as well as the 'know-how', to balance the public interest in being informed about the IC's investigations, against the individual's right to being presumed innocent until proven guilty.

Surely, public confidence can be reposed in the IC to exercise the discretionary authority to comment on the IC's investigations in a responsible and judicious manner, and in a way that best serves the interest of the Jamaican state, the Jamaican public and the Jamaican taxpayer.

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### **Position Statement of the Chairman of the Integrity Commission of Jamaica Regarding the Auditor General as a Member of the Commission Submitted to the Integrity Commission Parliament Oversight Committee on November 24, 2021**

“The Integrity Commission Act was signed by His Excellency the Governor-General on 23 October 2017, and came into operation in February 2018. It provides for the appointment of the Auditor-General as a member of the Commission.

In order to be eligible for appointment, the Commissioners must be persons of “integrity, capable of exercising competence, diligence, sound judgment and impartiality” in fulfilling their functions under the Act.

The Constitution of Jamaica, which provides for the appointment of the Auditor-General, requires that officer to audit and report on the accounts of all Government departments at least once per year. Reports of such audits are to be submitted to the Speaker for laying before the House of Representatives.

The Auditor-General’s Department is to be audited by the Minister of Finance, and a report of such audit submitted by the Minister to the Speaker.

There has been some adverse comment as regards the appointment of the Auditor-General as a Commissioner. Such comment may be due to a lack of knowledge of the historical context, as well as of the existing legislation and other arrangements that are in place for the auditing of the accounts of the Integrity Commission, and the reporting of the results. This conclusion seems appropriate as no valid reason has been advanced by the few critics for the position they have taken.

**It needs to be pointed out that the presence of the Auditor-General on the Integrity Commission is not a recent occurrence. For nearly fifty (50) years, the Auditor-General has been a member of Jamaica’s Commissions dealing with integrity, and there has not been a dissenting voice as to that situation until recently. It would be good to know what, if anything, has happened in recent times to bring into question the Auditor-General’s membership of the Commission.**

From as long ago as 1973 when the Parliament (Integrity of Members) Act became operational, the Auditor-General has been named as the first member of the Commission. When the Corruption (Prevention) Act became operational on 1 May 2001, the Auditor-General was again named as the first member of the Commission. The tradition has continued with the present legislation which came into effect in 2018.

The Integrity Commission is mandated to promote ethical and fair conduct among public officials and others in respect of matters such as the awarding and execution of contracts, the maintenance of accurate records as regards the expenditure of public funds, and to prosecute those who behave corruptly in the discharge of their duties – so far as the legislation provides for prosecution.

In view of the role of the Auditor-General, as stated in the Constitution, it is very clear that the role of the Auditor-General complements that of the Integrity Commission.

As regards the auditing of the accounts of the Integrity Commission, the Integrity Commission Act requires that such accounts be audited by an auditor appointed in each year by the Commission “with the approval of the Minister”; and for a statement of the audited accounts to form part of the annual report that the Chairman shall submit to the Minister each year. Where any other audit or accounts may be required of the Commission, arrangements are in place for such to be done by independent auditors. That has been the practice, and the Ministry of Finance is informed. There is solid legal opinion in support of this process.

It has been said that the Auditor-General’s presence on the Commission amounts to a conflict of interest. That is not so. There has even been the suggestion that there has been a breach of the Constitution. That is also not so.

Jamaica has had excellent legal drafters over the years. They comb the Constitution before settling on the draft of a law. Those of us who are trained in the drafting of laws know that that is standard procedure. Jamaica’s Constitution has been in existence for nearly sixty (60) years; and for nearly fifty (50) of those years, the Auditor-General has been a part of the Integrity Commission, without any of our distinguished legal scholars detecting any constitutional problem.

In law, a conflict of interest arises when someone (for example, a public official) has a competing professional or personal obligation, or a personal or financial interest, that would make it difficult for that person to fulfil his or her duties fairly. That situation does not exist in the circumstances being discussed. However, assuming that there is a perception of a conflict of interest (which is definitely not admitted), the situation has been managed effectively and efficiently by the arrangements that have been made.

The Auditor-General has been a very valuable member of the Commission contributing the expertise of the office as well as of the individual. The Commission is the better for the presence of such an informed individual who is committed, as the rest of the Commissioners are, to the full execution of the mandate set out in the legislation.

**The Hon. Mr. Justice (Ret’d) Seymour Panton, OJ, OD  
Chairman”**

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