

Written Submissions to The Joint Select
Committee of Parliament on the Integrity in
Public Life Bill, 2018

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Executive Summary

The public of Barbados, and those who invest in our economy have a right to expect the highest levels of integrity from public officials. They are also entitled to expect responsible and proper exercise of public power, which is fundamental to the operation of the rule of law.

The Barbados Bar Association sought feedback from its members on the Integrity in Public Life Bill 2018. The Association's Law Reform and Legislation Committee also conducted a comparative review of regional legislation. When the proposed Bill was benchmarked in this manner, it was noted that the Bill proposes a model similar to jurisdictions such as The Turks and Caicos and The Bahamas. In respect of the powers of the Commission, these models go further than earlier legislation enacted in jurisdictions such as Antigua and Barbuda, Trinidad and Tobago and Grenada.

The Barbados Bar Association recognises that it is important to establish a statutory regime and regulatory authority to set and maintain the standard of conduct required and expected of public officials and to which they should aspire and must adhere. It is equally important to demonstrate by legislation a zero tolerance for breaches of that standard and the need for sanctions which clearly indicate the rejection of sub-standard conduct. These standards also serve to determine conduct that merits disciplinary or other sanction.¹ To this extent, the Barbados Bar Association welcomes the introduction of legislation to govern integrity in public life.

This document treats chronologically with each section of the Bill, and reflects and incorporates member feedback thereon. The document includes a number of key recommendations including the following:

¹ Hall, Peter M: Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures p. 5, para 1.10

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1. The Bill seeks to confer wide and coercive powers on the proposed Integrity Commission. A note of caution must be sounded. Coercive powers must only be exercised with the necessary restraints, otherwise the Commission will be open to legal challenges which may encumber its work and effectiveness.
2. Following the model of Turks and Caicos and Bahamas, the Bill proposes to confer the power of arrest on the Commission's investigative officers. The investigative officer has the power of a constable to arrest any person whom he, meaning the investigative officer, reasonably suspects has committed an offence punishable by imprisonment. The view of the Barbados Bar Association is that the power of arrest must be subject to the requirement that an investigative officer obtain a warrant of arrest from a Magistrate. In the alternative, power of arrest set out by the Bill should remain the preserve of the Royal Barbados Police Force, preferably of high rank, as there are constitutional responsibilities concomitant with the role of the police officer and the execution on an arrest.
3. The Bill establishes a number of offences and penalties in the event of an adverse finding of an act of corruption. It is understood that serious offences of extortion, bribery and coercion are criminal in nature and are grounds for prosecution. However, the Bill stops short and fails to propose system for lesser offences. The current structure of the Bill is that, once there is no adverse finding of corruption by the public official, then lesser offences are not captured and there is no system of penalties. If indeed the purpose of the Bill is to maintain highest ethical standards among public officials, there must be provision for lesser breaches of the Code of Conduct.
4. There is support for the inclusion of the office of the Governor General in this Bill, as it speaks to the fact that the proposed Integrity Commission will be operating at the highest level of governance. It is noted that the Bill places a number of responsibilities on the office of the Governor General. The office of the Governor-General must be adequately resourced to carry out the mandates of the Bill when and if called upon to act. These resources must be provided from the highest level, clothed in impartiality and insulated from any possibility of interference or bias. Such resourcing and funding should be established and kept in as independent a manner as possible.

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5. The discussion of the proposed Bill would not be complete without a call for supporting legislation. The provisions of the Bill as it is drafted provides for Whistle Blower protection for public officials. While this is understood within the context of this particular piece of legislation, it gives rise to a much wider, more pressing issue. There is protection for the public official, but what protection exists for a private citizen? If a private citizen, or an employee in a private company wishes to make a disclosure about the actions of a public official, there is no protection for the average Barbadian under this Bill. The right of citizens to report wrongdoing is linked to principles of transparency and integrity. There must be an atmosphere where Barbadians, whether private citizens or public officials, feel free to report wrongdoing. thus a key means of enhancing openness and accountability in government and corporate workplaces and supporting the rule of law. It is recommended that priority be given to providing a comprehensive legislative framework to make all workplaces, including the private sector, accountable to protect whistle-blowers. There should be mandatory provisions for both public and private sector organisations above a certain size to set up whistleblowing mechanisms and we must set minimum standards and protections for such whistleblowing mechanisms.

The Barbados Bar Association will seek to expand on its comments in its oral presentation, through the Clerk of Parliament, before the Joint Select Committee of Parliament on the Integrity in Public Life Bill and is appreciative of the invitation to participate in the crafting of what is a seminal piece of legislation which is integral to and a corner stone of good governance..

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<u>Provision</u>	<u>Comment</u>	<u>Recommendation (where applicable)</u>
General	For such an important, far reaching and potentially draconian piece of legislation, the necessary regulations should be included. The concern is that, if the draft regulations are not included, there is likely to be a lacuna between proclamation and implementation. Furthermore, there needs to be in-depth discussion and clarity on any regulations, and such a discussion should be held in tandem with discussions on the Bill.	Include a draft of the regulations, together with the prescribed forms for comment.
	<u>PART I - PRELIMINARY</u>	
s.2 Interpretation	The Bill may benefit from a definition of the following: 'act of corruption' – this term should be defined with greater specificity-see comments under PART VII herein; 'court' The Bill does not provide a definition of 'court' "conduct" should be considered to include an act as well as an omission to perform an act.	
s.2 'document'	The question is whether this definition sufficiently captures the term 'document' for the purpose of evidence, given today's sophisticated information technology.	

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s.2 “prohibited interest”	Should prohibited interest be limited merely to a contract with the Government? The range of activities in which a public official may act improperly is not limited to merely contract.	
s.2 ‘privileged material’	The Bill utilises the phrase ‘a professional legal adviser’ in respect of legal advice and the claim of privilege. In the context of Barbados law, it is recommended the term be substituted with “attorney-at law” since the privilege only extends to attorney/client relationships and does not include non-attorneys providing “legal advice”.	
Parliamentary privilege	Some jurisdictions provide that parliamentary privilege remains unaffected. The <u>Independent Commissioner Against Corruption Act 2012</u> of South Australia provides: <i>Parliamentary privilege unaffected</i> <i>s.6 Nothing in this Act affects the privileges, immunities or powers of the Legislative Council or House of Assembly or their committees or members.</i>	
s.2 “spouse”	This definition of a spouse is similar to the provisions to the Turks & Caicos Act, and includes a person ‘(b) who is living with the specified person in public life in the circumstances of husband and wife for a continuous period of one year.’ This provision may bring uncertainty into the an otherwise relatively settled ² area of law in Barbados. The Family Law Act Cap 214 and the Succession Act Cap 249 define a spouse as a person who cohabits for a period of five (5) years.	Amendment of section to refer to the definition of spouse as contained in the Family Law Act Cap 214 and the Succession Act Cap 249

² The issue not settled is determining the period when cohabitation commences : Caribbean Court of Justice (CCJ) decision in Katrina Smith v Albert Selby [2017] CCJ 13 (A)

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Further, the definition does not provide for the circumstances which would normally disentitle a spouse from benefitting from the other spouse's assets, such as desertion for a period of 3 years or more, ceased to cohabit for a period of 5 years, or judicial separation / commencement of proceedings for divorce.

The definition of spouse in comparative legislation was useful. In Antigua and Barbuda The Integrity In Public Life Act, No. 23 of 2004:

"spouse" in relation to a person in public life means a person to whom the person in public life is married or who is living with that person in the circumstances of husband and wife for a period of three years but does not include –

(a) a married spouse who is living separate and apart from the person in public life;

(b) a married spouse who has ceased to live with that person and where proceedings have been instituted for a divorce or judicial separation during the period a declaration is required to be filed.

By way of further comparison, the Trinidad and Tobago Integrity in Public Life Act No. 83 of 2000 makes no reference to a term of years and speaks only to a 'conjugal relationship':

"spouse" in relation to a person in public life means a person to whom the person in public life is married or living with in a

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	<p><i>conjugal relationship outside of marriage, but does not include a person with whom the person in public life has made a separation agreement, or if their support obligations and family property have been dealt with by a court order;</i></p>	
	<p><u>PART II - INTEGRITY COMMISSION</u></p>	
<p>s.3(3) Establishment of Integrity Commission</p>	<p>In establishing the Commission, the legislation should provide for its capacity to sue. In certain sections of the Bill, for example Section 16, an investigative officer may make application to a Judge in Chambers for production orders. It is recommended that the legislation gives the duly authorised officer proper standing before the Court to make applications on behalf of the Commission.</p> <p>By way of comparison, the Model Act on Integrity in Public Life © Commonwealth Secretariat, 2017 provides:</p> <p><i>Part III – The Integrity Commission Integrity Commission 7(1) The Integrity Commission is established (2) The Commission is a body corporate that: (a) has a seal; and (b) may sue and be sued and, so far as is possible for a body corporate, may in the carrying out of its functions exercise the rights, powers and privileges, and incur the liabilities and obligations, of a natural person of full age and capacity.</i></p>	<p>Amendment of section</p>

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<p>s.4 (2) Functions of Commission</p>	<p>This section provides that, in the exercise of its functions under this Act, the Commission “may not be” subject to the direction or control of any person or authority. It is recommended that the provision be mandatory.</p>	<p>Amendment of section to replace the term ‘may not’ with ‘shall not’.</p>
<p>s.6 Agreements and exchange of information with law enforcement agencies</p>	<p>The need for a cross-border and multi-jurisdictional approach is understood, however, has a thorough assessment been conducted to evaluate how, if at all, the incorporation of foreign law enforcement agencies may affect Barbados’ treaty or other obligations? If so, the drafters should provide a summary of that assessment. Including, but not limited to, the use of collected information in other unrelated proceedings and/or intended prosecutions.</p> <p>In relation to ss. (3) what protections are put in place by way of regulations or otherwise to avoid procedural breaches, arbitrariness and to ensure due process?</p> <p>In relation to ss. (4), by purporting to treat enforcement and administrative entities as enforcement agencies, the drafters may have muddled an important distinction, especially when it may impact the dissemination of sensitive information. Should there not be some measure and/or accreditation that is clear, to establish what may amount to an enforcement agency? As it stands, the section is dangerously broad on a critical aspect.</p>	<p>This discussion would benefit from an examination of the regulations. Establishing criteria or some form of accreditation to be used in determining what should be treated as a law enforcement agency. State whether any treaty or other obligations may be impacted.</p>
<p>s.7 Funds and Commission and</p>	<p>For the elimination of doubt, avoidance of misuse, undue influence, and political or other influence, it is difficult to understand why salary scales for officers and other support staff are not included in the draft legislation. By way of example, even the remuneration for judges,</p>	<p>The Minister of Finance ought not to have the final say on the remuneration of</p>

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<p>s.8 Officers and other employees of Commission</p>	<p>judicial officers, parliamentarians and other persons purporting to exercise public functions are generally clear and published. What is the rationale/basis for omitting such a critical aspect of the Commission’s establishment? Has a cost assessment been carried out to ascertain the financial and other capacity implications for establishing and efficiently maintaining such a Commission and officers?</p> <p>In respect of s.8(4), this provision potentially opens the challenge for accusation of undue influence since the Minister of Finance must approve the pensions, gratuity and other allowances. Further, the issue of pensions, gratuity and allowances needs to be clearly expressed. Also, in its current form, the section is too broad. What is the term of service by an officer before they can accrue or be entitled to a pension and/or gratuity?</p>	<p>persons who are charged with the responsibility of ensuring the integrity of public officials.</p>
<p>s.9 Investigative officers</p>	<p>This empowers the Commission to appoint investigative officers. It expressly provides that these officers are not members of the Police Force. The rationale for the exclusion of police officers from eligibility to act as investigative officers is unclear.</p> <p>There is no further description of the competencies which persons must have in order to qualify to be investigative officers. There is also no provision for any mandatory forms of training to supplement or ensure the proper execution of the powers with which they are vested in Part III. There should be clarity on the competencies and training of such officers to give the public assurance. Questions surrounding the proper execution of the powers with which they are vested in Part III may hinder the effectiveness of investigations conducted on behalf of the Commission and/or result in allegations of the improper exercise of or abuse of the extensive powers which are vested in such officers.</p>	<p>It may perhaps be useful and expedient to second members of the RBPF of a specified rank to the post of Investigative officers of the Commission as they would be trained in criminal investigations and empowered to arrest detain and charge offenders conduct searches pursuant to warrants etc..</p>

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	<p>The Bill does not clearly define “warrant card”, a term unknown to the law. If it is for the purposes of identifying the investigative officer, it is recommended that a clear simple term such as identification card be used.</p> <p>The Commission should have a general power to revoke the appointment of such officers as they deem fit. By way of comparison, the <u>Independent Commissioner Against Corruption Act 2012</u> of South Australia provides:</p> <p><i>s.14 (2) The Commissioner may, at any time, revoke an appointment of a person or vary or revoke a condition of appointment or impose a further condition of appointment.</i></p>	
<p>s. 10 Commission’s powers to summon and examine</p>	<p>The Commission has the powers of a judge of the Supreme Court by s.10 (1) to summons witnesses, call for the production of documents and to examine witnesses and parties concerned on oath.</p> <p>It is understood that the Commission must be empowered to obtain information, and those powers are supported by sanctions for non-compliance. However, this provision raises the issue of disclosure at law generally and the appropriate test to be made out in the exercise of this power. Care must be taken that the process is not subject to legal challenge as appearing arbitrary or a fishing expedition, which would run counter to its primary purpose. The wide wording and unfettered limitation found in this section must be carefully exercised. The potential for legal challenge seems limitless.</p>	<p>In light of the Commission’s wide and coercive powers, an appropriate tests or thresholds to be met, particularly if the Evidence Act is not applicable to The Commission.</p> <p>Care needs to be taken that where there is sufficient evidence to justify making an</p>

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	<p>s. 10 (2) sets out the provisions for the issuance of the summons. In order to issue the summons, there is no precondition that material exists that is probative of the facts being investigated at the time the summons is issued. That notwithstanding, procedural fairness is important and the Commission ought not be open to potential legal challenges in respect of the same. There should be a stated test, for example, that there is a cogent basis for issuance of the summons, and that the basis relates directly or indirectly to the matter within the terms of the investigation at hand³</p> <p>Ss(3) This section provides that the Commission is not bound by the rules of the Evidence Act Cap 121, and the Commission may take into account opinion evidence and such facts as it considers relevant and material. It is to be noted that the Evidence Act already allows for certain waivers of certain rules. That notwithstanding, while the rationale for this section is understood, there still must be a threshold. The section fails to express an appropriate test or threshold to be met.</p>	<p>adverse finding against an individual or individuals, the Commission must be in a position to provide sufficient evidence that is admissible in the prosecution of corrupt conduct.</p> <p>The regulations in respect of issuance of summons must be carefully considered.</p> <p>It would be useful to examine the regulations to see the prescribed procedures</p>
s.11 Duty of witnesses summoned	<p>s. 11 (2) provides that the procedure for the compensation of a witness for expenses relating to attending any sitting of the Commission ‘shall be paid at such time and in such manner as the Minister of Finance may direct’. The wording of this section is such that, should there be any delays, or disputes in respect of the compensation, this could prompt or opens the gateway for a challenge on the basis of bias, whereby a sitting Minister has the power to grant or pay compensation to a person</p>	<p>Regulations should prescribe a schedule or range for the payment of witnesses.</p>

³ Hall, Peter M: Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures p. 647, para 12.60

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	<p>summoned by the Commission. The payment and its timeframe should be prescribed in a manner that it cannot be seen as subject to any arbitrary exercise of power.</p> <p>Furthermore, in relation to ss. (2), should the Minister of Finance bear this responsibility, when it was the Commission, in the exercise of its function and mandate that required the attendance of a person.</p> <p>s. 11 (5) provides that in respect of evidence given to the Commission pursuant to s. 11 (1), the witness is entitled to all privileges to which a witness giving evidence before the Supreme Court is entitled. This underscores the need for the Commission to ensure</p> <p>In relation to ss.(4)(c) the formulation of the subsection is cumbersome and is susceptible to challenge. Is the phrase “to answer or to answer fully and satisfactorily to the best of his knowledge...” intended to impose an objective test or a subjective one? Or a mixed test? How does one fairly and properly assess that a witness has not answered fairly to the best of his/her knowledge? The test ‘to the best of his knowledge and belief’ in law, is sufficient.</p> <p>In relation to s(4)(e), explanation is needed as to the intent or basis for imposing a penalty for “insults”. Was this subsection intended to address conduct that wilfully obstructs, or threatens the members of the Commission or its Secretary? If so, the drafters should so state. Is this to be an objective or subjective test? Further, is it proportionate for the penalty for an insults or threats to be treated the same as someone who has refused to attend or has refused to produce documents?</p>	
s. 13 False evidence,		

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how punishable	Where a penal sanction is involved, clarity in law is paramount. The phrase “punished accordingly” should be appropriately qualified.	State clearly how the sanction will be enforced.
	<u>PART III - INVESTIGATIONS</u>	
s.15 Power of arrest	<p>Section 15 (1) provides an investigative officer with the powers of a constable to arrest any person whom he “reasonably suspects” has committed an offence under the Act or any other Act that assigns responsibility to the Commission.</p> <p>Section 15 generally:</p> <p>The power to arrest is a coercive one which, of necessity, restricts the liberty of the subject. In order to exercise such a power, an individual wishing to become a member of the Police Force (a constable) must undergo a process of specialist training. This training specifically involves the identification of the circumstances which give rise to a reasonable suspicion as well as the process by which a safe arrest may be effected. Section 8 expressly excludes members of the Police Force from being investigative officers and the Bill makes no alternate provision for such specialist training. Therefore, as currently drafted, this section creates the risk of these coercive powers being improperly exercised and or abused by individuals who have not and are not required to undergo a similar process of specialist training. Given the nature of the offences contemplated under the Act, it is unlikely that an arrest will need to be effected so urgently that there will not be sufficient time for an investigative officer to secure a warrant of arrest from a Magistrate or Judge.</p>	<p>See comment relative to section 9 above.</p> <p>It is further or alternatively recommended that provision be made for investigative officers to undergo such specialist training and that any power of arrest be subject to the requirement that an investigative officer obtain a warrant of arrest from a Magistrate. In the alternative, power of arrest could remain the preserve of members of the RBPF, as there are constitutional responsibilities</p>

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	<p>These arrest provisions are draconian and must only be exercised with the necessary limitation. It would be helpful to understanding the thinking for drafting in such terms. What was the source(s) used to guide such a provision? Drafters to provide a summary of same.</p> <p>The potential for legal and constitutional challenge seems limitless in its current form.</p> <p>This section of the Bill follows the model of Turks and Caicos and Bahamas, and proposes to confer the power of arrest on the Commission’s investigative officers. By way of comparison of similar legislation in the region, it is noted that no similar provision exists earlier legislation, that is, in the respective Antigua and Barbuda, Grenada nor Trinidad & Tobago <u>Integrity in Public Life Acts</u>. No similar provision in contained in the <u>Model Act on Integrity in Public Life</u> © Commonwealth Secretariat, 2017.</p> <p>In the <u>Independent Commissioner Against Corruption Act 2012</u> of South Australia, the power of arrest by the investigating officer of the Commission is limited to the specific case of a person obstructing the course of an investigation. The power of arrest is further qualified because the investigating officer must ‘immediately’ deliver the person into the custody of a police officer. The provisions of this Bill does not use the term ‘immediately’ which of course deals with the issue of deprivation of the liberty once the arrest has been made.</p> <p><i>ICAC Act Section 33 provides:</i> 33 – Obstruction</p>	<p>concomitant with the role of the police officer.</p> <p>Provision should be carefully redrafted.</p>
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	<p>(1) A person must not –</p> <p>(a) refuse or fail to provide a statement of information as required by the person heading an investigation; or</p> <p>(b) include information in a statement of information knowing that it is false or misleading in a material particular; or</p> <p>(c) without lawful excuse, refuse or fail to comply with a requirement or direction of an investigator under this Act; or</p> <p>(d) alter, destroy, conceal or fabricate a document or other thing knowing that it is or is likely to be required by an investigator performing functions under this Act; or</p> <p>(e) otherwise hinder or obstruct an investigator, or a person assisting an investigator, in the performance of his or her functions.</p> <p>Maximum penalty: \$10 000 or imprisonment for 2 years.</p> <p>(2) An investigator may arrest a person without warrant if the investigator reasonably suspects that the person has committed, is committing, or is about to commit, an offence against <u>subsection (1)</u> and –</p> <p>(a) when required to do so by an investigator the person failed to state truthfully his or her personal details or to produce true evidence of those details; or</p> <p>(b) the investigator has reasonable grounds for believing that the person would, if not arrested –</p> <p>(i) fail to attend court in answer to a summons issued in respect of the offence; or</p> <p>(ii) continue the offence or repeat the offence; or</p> <p>(iii) alter, destroy, conceal or fabricate evidence relating to the offence;</p> <p>or</p> <p>(iv) intimidate, harass, threaten or interfere with a person who may provide or produce evidence of the offence.</p> <p>(3) On arresting a person under this section, the investigator must immediately deliver the person, or cause the person to be delivered, into the</p>	
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	<i>custody of a police officer (and the person will, for the purposes of any other law, then be taken to have been apprehended by the police officer without warrant).</i>	
s. 17 Power of search and seizure	<p>Again here, there is potential for legal challenge.</p> <p>The Commission must ensure that it is not faced with legal challenges in the exercise of its powers under this section. The drafters must be mindful of the grounds for challenging search warrants and issues which may arise concerning the validity of search warrants and their legality at each stage:</p> <ul style="list-style-type: none"> • At the initial stage, whether the pre-requisites for the issuance of the warrant contain the safeguards against an allegation of arbitrary interference; • At the stage of the issue of the warrant itself, including the form of the warrant; • At the stage of execution, that the execution of the warrant is lawful <p>The provisions are draconian and wide and require amendment to mitigate arbitrariness. In relation to ss. (3) what practical provisions are in place for the custody, management and/or subsequent production of seized material? Also, the likely chain of custody protections that should be in place.</p>	Provision should be carefully redrafted.
s. 19 to 24 complaints against	These sections provide for a process for the investigation of complaints against investigative officers.	It is recommended that such provision be made.

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investigative officers	The Act makes no provision for the types of recommendations which may be made by the Complaints Panel in the event that the complaint is determined to be meritorious.	
s. 20 Appointment of complaints panel	What is the rationale and/or basis for including the Commissioner of Police to sit on the complaints panel? How practical is this considering the Commissioner's other functions/responsibilities?	
s. 21 (2) Informal Disposal of complaint without investigation	There exist several procedural gaps that are important to ensure a transparent and fair determination of the complaint. The meaning of "informal" is unclear in this subsection. Does it refer to a disposal of the complaint without investigation and with the consent of the complainant and investigative officer? What of the person whose conduct is under investigation?	
s. 24 Implementation of panel's recommendations	How did drafters intend for this provision to operate in practical terms? Is this merely a rubber stamp process where the Commission implements the recommendation(s) made?	
<u>PART IV - DECLARATIONS</u>		
s. 25 Declaration of financial affairs	It is apparent from the wording of the provision that a large part of the information contained in and extracted from the declaration is to be contained in a prescribed form of sort. This emphasizes the need to pass the regulations at the same time.	Submission of regulations together with prescribed forms.

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<p>s. 28 Blind trusts</p>	<p>Section 28 of the Bill introduces the concept of “blind trust” into which a specified person in public life may place his assets or part thereof for the purposes of the Act.</p> <ol style="list-style-type: none">1. The concept of a “blind trust” provided by this section does not, as drafted, exist in Barbados law. It is a concept which exists in other jurisdictions, notably United States law.2. The Bill itself does not define ‘blind trust’;3. The term should not be imported wholesale into our legislature in this manner.4. Under Barbados law, there can be a creation of a simple trust.5. Although not stated, the wording of the section presumes the trust to be revocable trust, as it is created in contemplation of the Act, and is for the term that the Specified Person in Public Life so remains in public life. <p><u>Distinction between ‘blind trust’ and a ‘trust’</u></p> <p>A blind trust is a contractual arrangement in which the trustees have full discretion over the assets, but the assets are not transferred or conveyed into the trust. The trust beneficiaries cannot have any knowledge of the holdings of the trust, and no right to intervene in their handling. That particular model or structure does not exist under Barbados law.</p> <p>With a straightforward trust, the assets are conveyed to the trust company. This is in keeping with section 28(5)(a) of this Bill which provides that the assets are to be ‘conveyed’ to the trust company. This model is a trust under Barbados law. The draft Bill refers to a model that establishes a trust, but describes it as a blind trust. This must be re-visited by the drafters.</p>	<p>The section should be re-drafted to substitute the term ‘blind trust’ with the term ‘trust’. In the alternative, specifically define ‘blind trust’ as, for example, in the <u>Trinidad & Tobago Integrity in Public Life Act</u> which provides: <i>s22(4) A blind trust is created when a person in public life enters into an agreement with a qualified trust company whereby –</i></p> <ol style="list-style-type: none">(a) all or any part of his assets are conveyed to the trust company for its management, administration and control, in its absolute discretion without recourse or report to the persons beneficially entitled to those assets;(b) income derived from the management of the
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	<p>That notwithstanding, it is useful to continue an examination of the section</p> <p>Creation of the trust: section 28 (1) sets up two main mechanisms by which a “blind” trust, or trust may be created. The trust may either be created voluntarily or involuntarily.</p> <p>That is:</p> <p>(1) a specified person in public life may of his or her own volition elect to place his or her assets or part thereof in a trust for the purposes of the Bill (‘voluntary’); or</p> <p>(2) the Commission, where it has reasonable grounds to believe that a specified person in public life is likely to contravene or has contravened the Act, may direct that person to place all or part of his assets in a blind trust on such terms and conditions and the Commission considers appropriate (‘involuntary’).</p> <p>Rationale for Blind Trust:</p> <p>Blind trusts are normally created to eliminate the risk of either real or perceived conflicts of interest which may affect a person in public life. The blind trust is supposed to be operated in such a manner that the grantor and/or beneficiary has no control over or knowledge of the assets in the trust or their management. The theory here is that the person in public life whose assets which are subject to the blind trust would therefore be free to make decisions relating to the area of conflict without fear that he or she is making such a decision for his or her own benefit or reward.</p>	<p><i>assets is to be distributed to him as agreed;</i></p> <p><i>(c) should the assets be converted into other assets, that fact is not to be communicated to him, until he ceases to be a person in public life; and</i></p> <p><i>(d) after he ceases to be a person in public life, proper and full accounting is to be made to him, as the circumstances of the management of the trust require.</i></p> <p>Bearing these concerns in mind, the following are suggested to strengthen section 28.</p> <p>(1) To ensure that the trust is not revoked until after the specified person ceases to be in</p>
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	<p>Criticism Blind Trusts: Generally, the alternative to blind trust is complete divestment of the assets or interests which may give rise to the conflict.⁴ Many critics of the blind trust prefer divestment as they argue that once the assets in questions which may give rise to a conflict are disposed of the conflict of interest is likely to have been resolved. Such critics of blind trusts have raised the following questions about blind trusts:</p> <ol style="list-style-type: none">(1) Will the system of blind trust, with attendant secrecy, affect the framework of disclosure of assets and conflicts of interest?(2) What prevents the abuse of the trust?(3) Are there sufficient safeguards to ensure that there is no breach of the terms of the trust? <p>Arguably, one of the concerns about section 28 is that the way it is structured it appears that persons who may not want to make a full declaration of assets as prescribed in section 25 may simply place their assets in a trust to avoid full scrutiny. This certainly it can be argued that this opens a loop hole in line with the first issue listed above, that is, how does it affect the framework of disclosure of assets and conflicts of interest. Transparency International notes that the reason for declaring interests and assets is the prevention of conflicts of interest and to uncover illicit enrichment.⁵</p> <p>Looking then at the intention, it is reasonable to assert that section 28 does provide for:</p>	<p>public life, the trust company may report annually directly to the Commission confirming that the trust has not been revoked, or the person in public life can be required to make that declaration under oath.</p> <p>Further, the trust company should be liable to the commission for nay breaches. The Trinidad & Tobago Integrity in Public Life Act provides: 22(3) <i>Notwithstanding any other law relating to the duties of trustees, a trust company managing the assets of a person in public life by way of a blind trust</i></p>
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⁴ https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/CIB9697/97cib14
⁵ <https://knowledgehub.transparency.org/helpdesk/declaration-of-interests-and-assets-oversight-mechanisms-disclosure-policy>

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	<p>(1) identification of the assets 28 (3) which would aid in determining illicit enrichment through the requirement to provide the amount and description of the assets placed in the trust in the declaration itself as well as the requirement to file the trust deed;</p> <p>(2) a mechanism (though not without its criticisms as seen above) to prevent conflicts of interest in the form of the trust itself.</p> <p>Therefore, to that extent, it would appear that the creation of a trust would not frustrate the purpose of the section 25 declaration, as they must declare the amount and description of the assets filed in the trust.</p> <p>However, as it concerns the second and third issues raised above, that is, What prevents the abuse of the trust? And Are there sufficient safeguards to ensure that there is no breach of the terms of the trust? the draft bill seems to fail to address these.</p>	<p><i>shall reply fully to any enquiries of the Commission relating to the nature and management of the assets in the blind trust.</i></p> <p>(2) Prescribe specific penalties (outside of the general penalty clause for breaches under the Act not specifically or mentioned) for trust companies who breaches the terms of the trust.</p> <p>(3) These provisions should also apply, where relevant, to the Register of Interests which shall compile the information furnished by members of the House of Assembly pursuant to section 39</p>
s. 29 Receipt and	The wording of the section places equal responsibility on the Commission as it does the office of the Governor General. The office of	Funding and resourcing for the office

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<p>examination declaration s. 30 Commission or Governor General may require further information from declarant</p>	<p>the Governor-General must be adequately resourced to carry out the mandates of the Bill when and if called upon to act. These resources must be provided from the highest level and insulated from any possibility of interference or bias. How can the resourcing and funding be established and kept in as independent a manner as possible?</p>	<p>of the Governor General under this Bill must be non-partisan and must address how it can be established and kept in as independent a manner as possible.</p>
<p>s. 36 Offences and penalties in respect of declarations</p>	<p>The penalties in this section (and throughout the Bill) are generally too low and do not serve as a serious deterrent. By way of comparison, under s. 21 of the Trinidad & Tobago equivalent legislation, the penalty is TT\$250,000.00 (i.e. approximately BBD \$83,000.00) <u>and</u> ten years' imprisonment on conviction.</p>	<p>Fines for breach should be increased commensurate with the importance of this duty.</p>
<p><u>PART V - REGISTER OF INTEREST</u></p>		
<p>s. 39 Register of Interests</p>	<p>See our note under s.28 – Blind Trusts. The reason for declaring interest and assets is the prevention of conflicts of interest and to uncover illicit enrichment.</p> <p>s39(2) permits inspection of the Register by the public. Some are of the view that the Commission should be given the discretion that if the</p>	<p>Model Act on Integrity in Public Life © Commonwealth Secretariat, 2017, Clause 4(2) provides: 'If the Commission is of</p>

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	<p>public official’s personal or family’s security might be put at risk by disclosure of the exact location and street address of their residence, the Commission may, to that extent only, redact the information that gives rise to the security risk⁶ . Others are of the view that the description only needs to be in the nature of the asset, and such details are not necessary to meet the requirements of the Act. It would be useful to have sight of the regulations to assist in the discussion.</p>	<p>the opinion that a public official’s personal security might be put at risk by disclosure of particular information under subsection (1), it may, to that extent only, redact the information disclosed to the public.’</p>
<p>s. 40 Commission may require further information and conduct inquiry regarding statements of registrable interests</p>	<p>In the Trinidad & Tobago <u>Integrity In Public Life Act</u>, the Commission appoints a Tribunal specifically for this purpose. This may be one aspect where the Commission can effectively delegate responsibility to be more efficient in its function, particularly since in many other regards, the proposed/purported responsibilities of the Commission are very far reaching.</p> <p>In relation to subsection (1), at the last line, the term “reasonable opportunity” should be</p>	
<p>s. 41(1) Procedure at inquiry regarding registrable interests</p>	<p>This section provides that the Commission shall not, in the conduct of an inquiry under this Part, issue a determination against a member of the House of Assembly or the Senate without giving the member ‘an opportunity to be heard.’</p>	<p>Amendment of the section is recommended</p>

⁶ Model Act on Integrity in Public Life © Office of Civil and Criminal Justice Reform, Commonwealth Secretariat 2017, Clause 4(2) and footnote 14

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	The term “reasonable opportunity” should be employed instead of merely “an opportunity” to be heard.	
s. 43 Offences and penalties in respect of statements of registrable interests	The penalties are too low and should be revised accordingly to serve as a deterrent.	Penalties for breach should be reviewed.
	<u>PART VI - GIFTS</u>	
s. 48 Limitation on prosecution for section 47 offences	<p>The question is whether the limitation period of five (5) years prescribed for prosecuting an offence pursuant to section 47 is sufficient and proportionate with the infraction. An offence committed while in public office is a serious one and perhaps should not be so restricted.</p> <p>By comparison, for such a serious infraction, the limitation period is even shorter than one for a civil debt which is six (6) years. Furthermore, it may often take several years to discover wrong-doing and investigate all the circumstances.</p>	
	<u>PART VII - ACTS OF CORRUPTION AND OTHER CONTRAVENTIONS OF THIS ACT</u>	
s.51 Acts of corruption generally	Greater attention should be paid to these provisions. It is not clear whether the list of actions amounting to corruption was intended to be	

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<p>s.52 Bribery in procurement s.53 Transnational bribery</p>	<p>exhaustive. However, the range of circumstances giving rise to corruption, coercion and collusion are likely to develop over time and therefore, it may be useful to make it clear that the list is non-exhaustive.</p>	<p>Revision of provisions to provide that the list is not exhaustive</p>
<p>S. 54 Offences and Penalties in respect of acts of corruption</p>	<p>The penalties for committing an act of corruption or bribery as set out in section 54 are wholly inadequate to act as a deterrent, and should be reconsidered accordingly. Fine pursuant to this section must have a dissuasive effect.</p>	<p>Penalties for committing an act of corruption need to be significantly increased.</p>
<p>s. 57 Possession of unaccounted property or pecuniary resource</p>	<p>This section empowers to Commission, if they suspect that a public official is in possession of property or resource which is disproportionate to his known sources of income, to summon said public official to produce “satisfactory evidence” that the possession of property or resource was acquired by lawful means. If he fails to do so, he is subject to a criminal penalty.</p> <p>1. This section fails to qualify the extent of the suspicion which is required to summon the public official. There is potential for legal challenges. In light of the criminal penalties which may flow from a finding of guilt, it is recommended that at least a “reasonable” suspicion be required.</p> <p>2. This section permits the Commission to presume the guilt of the subject by making no reference to the production of and right to challenge the validity of the “evidence” which gave rise to the suspicion</p>	<p>It is recommended that at least a “reasonable” suspicion be required.</p> <p>It is recommended that the drafters reframe this section to allow the evidence which gave rise to the suspicion of the Commission be produced in the presence of the public official and only thereafter shall he be obligated to produce contrary evidence.</p>

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	<p>of the Commission. There is potential for legal challenge. It is recommended that this be clearly stated.</p> <p>3. The term “satisfactory evidence” is one which is unknown to law as a general standard of proof as well as one based upon which criminal penalties may be imposed. It appears to be a nebulous concept which may give rise to varied and potentially unfair outcomes. It is proposed that the common standard of “on a balance of probabilities” be expressed as the standard of proof which is to be met by the public official.</p>	
	<p><u>PART VIII - CONDUCT IN PUBLIC LIFE</u></p>	
<p>s.65 Formulation of a Code of Conduct</p>	<p>Section 65(1) provides that the Commission shall by Order, after public consultation, establish a code to be called the Code of Conduct for Persons in Public Life, to govern the conduct of public officials.</p> <p>In addition to appointed public officials, the Commission has jurisdiction in respect of the conduct of elected public officials, namely Ministers of the House of Assembly and the Senate (clause 1) and Members of Cabinet (clause 2) by virtue of the definition of ‘public official’ and ‘public body’ as contained in the Interpretation (section 2) of the Bill.</p> <p>It is to be expected that there will be several codes of conduct to reflect the classes of persons set out in the Second Schedule ‘Specified Persons</p>	<p>The Code of Conduct should reflect the various codes of conduct expected for the respective classes of persons set out in the Second Schedule ‘Specified Persons in Public Life’</p>

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	<p>in Public Life” This section is framed to cover both appointed as well as elected officials and it can be argued that there is no one code of conduct to cover both. Similarly, it is expected that consultations with the public on the same will also take the respective classes of person into account.</p> <p>By way of comparison, it was noted that the <u>Model Act on Integrity in Public Life</u>⁷ proposes a model that the requires the public official to sign the Code of Conduct, along with the declaration. Both the Code of Conduct and the declarations must be renewed annually. Others argue that signing the Code of Conduct should be limited to elected public officials. Requiring a public officer to sign the Code of Conduct could potentially be considered as forming a part of, or altering, the contract of employment for a public officer.</p> <p>Section 3 of the Model Law provides: <i>Codes of Conduct and declarations of private interests and liabilities</i> 3(1) <i>A public official must abide by the relevant Code of Conduct in Schedule III, and within the prescribed period of taking office:</i> <i>(a) sign a copy of the Code relevant to him or her; and</i> <i>(b) make and sign a written declaration in the prescribed form of his or her private interests and liabilities.</i> <i>(2) In the case of a senior public official, the written declaration under subsection (1) (b) must be renewed annually.</i></p>	
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⁷ Model Act on Integrity in Public Life © Commonwealth Secretariat, 2017, and footnote 11 A failure to abide would not automatically subject the official concerned to criminal proceedings (for those to be considered the conduct would have to come within the relevant section), although it might of course subject the individual to disciplinary proceedings

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<p>s.66 Commission may request further information and conduct formal inquiry</p>	<p>An examination of this section would be more complete if the accompanying regulations were available to understand the proposed conduct of a formal inquiry.</p> <p>It has been found that the use of public hearings as an investigative tool is limited and of declining value⁸. The preferred model is to conduct all initial investigations, including hearings, in private, before making the report of adverse findings public⁹. This satisfies a number of objectives, i.e.:</p> <ol style="list-style-type: none">1. Need to protect the identity of informants;2. Need to protect a witness who may not fall to be protected under the Whistle Blower provisions of Part IX from detriment in their employment;3. Where in the public interest there is a need to maintain confidentiality, for example, in an ongoing tender process¹⁰4. limiting risk of unnecessary damage to reputation,5. protects the integrity of the investigation, in particular, where premature disclosure of evidence may alert other individuals involved in corrupt who have yet to be investigated;6. preserves Commission's role in publicly exposing corrupt conduct once findings are concluded, and allows for the strategic use of investigative methodologies in the confidential investigation stage.¹¹	<p>Regulations accompanying the Bill should be made available for further comment</p>
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⁸ Recommendations of the Parliamentary Joint Committee on the ICAC (Independent Commission Against Corruption) www.icac.nsw.gov.au 'The conduct of ICAC Hearings' (June 2002) Chapter 8, page 44

⁹ *Investigation into Tendering for Vinyl Floor Products*, p.4

¹⁰ *Sydney Water Board and Sludge Tendering Investigation Report*, p.2

¹¹ *Ibid*, at p. 44

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	<p style="text-align: center;"><u>PART IX - WHISTLE BLOWER PROTECTION</u></p>	
<p>s.68 to 77</p>	<p>The provisions of the Bill as it is drafted provides for Whistle Blower protection for public officials. While this is understood within the context of this particular piece of legislation, it gives rise to a much wider, more pressing issue. There is protection for the public official, but what protection exists for a private citizen?</p> <p>It is therefore contemplated that if a private citizen, or an employee in a private company wishes to make a disclosure about a public official, there is no protection for the average Barbadian under this Bill. The right of citizens to report wrongdoing is part of the right of freedom of expression, and is linked to principles of transparency and integrity.</p> <p>There must be an atmosphere where Barbadians, whether private citizens or public officials, feel free to report wrongdoing. thus a key means of enhancing openness and accountability in government and corporate workplaces.</p> <p>Whistle-blowers play an essential role in exposing corruption, fraud, and mismanagement that threatens financial integrity and the rule of law. The time has also come for a comprehensive legislative framework to make all workplaces, including the private sector, accountable to protect whistle-blowers. There should be mandatory provisions for both public and private sector organisations above a certain size to set up whistleblowing mechanisms and we must set minimum standards and protections for such whistleblowing mechanisms.</p>	<p>This gives rise to the recommendation that priority be given to establishing separate, comprehensive Whistle-blower legislation to support the provisions of this Bill and the work of the Commission in general.</p>

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	<p>Transparency International in its 2018 Best Practice Guide for Whistle blower legislation¹² recommends:</p> <ul style="list-style-type: none">• Provide wide-ranging protections from all unfair treatments, including more discrete forms such as ostracising;• Confidentiality should cover all information identifying the whistle-blower.• Consider allowing anonymous disclosures.• Mandatory provisions for both public and private sector organisations above a certain size to set up whistleblowing mechanisms• Set out minimum standards for whistleblowing mechanisms.	
	<u>PART X - MISCELLANEOUS PROVISIONS</u>	
	<u>SECOND SCHEDULE</u>	
Specified persons in Public Life	There is a need for much greater clarity on the ‘Specified Persons in Public Life.’”	Amendment of the schedule to provide greater clarity to the

¹² Transparency International Report - 2018 Best Practice Guide for Whistleblowing legislation
https://www.transparency.org/whatwedo/publication/best_practice_guide_for_whistleblowing_legislation

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	<p>In clauses 3 and 4 the terms ‘...and Officers of Related Grades’ and ‘Heads of Departments in Public Service’ requires greater specificity in identifying those persons. Once identified, the list should be subject to regular review.</p> <p>The phrase in ss.6 speaks to Chief Executive Officers and to ‘...or other Entities established by Statute’ Is the provision too wide or does it capture , for example, the Principal of a School, or its Deputy Principal- after all, a school is established by statute. Is that the drafters’ intention?</p> <p>By way of comparison, the Trinidad & Tobago <u>Integrity In Public Life Act</u> has a short but specific list: <i>SCHEDULE</i> <i>(Section 2)</i> <i>PERSONS IN PUBLIC LIFE</i> <i>1. Members of the House of Representatives</i> <i>2. Ministers of Government</i> <i>3. Parliamentary Secretaries</i> <i>4. Members of the Tobago House of Assembly</i> <i>5. Members of Municipalities</i> <i>6. Members of Local Government Authorities</i> <i>7. Members of the Boards of Statutory Bodies and State Enterprises as prescribed in accordance with section 138(2) of the Constitution.</i></p> <p>Grenada 2013 Integrity in Public Life Act 24 341 <i>FIRST SCHEDULE INTEGRITY IN PUBLIC LIFE ACT (Section 2)</i> <i>List of persons in Public Life</i> <i>1. Members of the Commission</i></p>	<p>classes of persons who are ‘Specified Persons in Public Life.’”</p>
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	<ol style="list-style-type: none">2. <i>Members of the House of Representatives</i>3. <i>Members of the Senate</i>4. <i>President of the Senate</i>5. <i>Speaker of the House of Representatives</i>6. <i>Parliamentary Secretaries</i>7. <i>Secretary to the Cabinet</i>8. <i>Permanent Secretaries, Deputy Permanent Secretaries</i>9. <i>Senior Administrative Officers</i>10. <i>Chief Budget Officer</i>11. <i>Accountant-General and Deputy Accountant-General</i>12. <i>Attorney-General</i>13. <i>Clerk of Parliament</i>14. <i>Commissioner of Police and Deputy Commissioner of Police</i>15. <i>All police officers</i>16. <i>Chief Immigration Officer, Deputy Chief Immigration Officer and all other immigration officers</i>17. <i>Commissioner of Prisons and all prison officers</i>18. <i>Comptroller of Customs, Deputy Comptroller of Customs and all customs officers</i>19. <i>Comptroller of Inland Revenue, Deputy Comptroller of Inland Revenue and all Inland Revenue officers</i>20. <i>Chief Personnel Officer</i>21. <i>Legal Officers employed by the State</i>22. <i>Director of the Financial Intelligence Unit and all the employees of the Financial Intelligence Unit</i>23. <i>Director of Public Prosecutions</i>24. <i>Director of Audit</i>25. <i>Magistrates</i>26. <i>Labour Commissioner, Deputy Labour Commissioner and all labour officers</i>27. <i>Chief Technical Officers of Ministries</i>	
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28. *Members of Public Service Commission*
29. *Members of Public Service Board of Appeal*
30. *Chairperson and Deputy Chairperson of statutory bodies*
31. *Chief Executives Officers and Deputy Chief Executives Officers, by whatever name known, of statutory bodies*
32. *Members of the Tenders Board*
33. *All Public Officers including non-established officers receiving a salary in excess of two thousand dollars per month*

Antigua and Barbuda Integrity in Public Life Act the Schedule is also quite specific:

FIRST SCHEDULE (Section 2)

PERSONS IN PUBLIC LIFE

1. *Member of the Commission and the Secretary to the Commission*
2. *Members of the House of Representatives*
3. *Members of the Senate*
4. *President of the Senate*
5. *Speaker of the House of Representatives*
6. *Parliamentary Secretaries*
7. *Secretary to the Cabinet*
8. *Members of the Barbuda Council*
9. *Members of the Electoral Commission*
10. *Financial Secretary and Deputy Financial Secretary*
11. *Budget Director and Deputy Budget Director*
12. *Permanent Secretaries and Principal Assistant Secretaries*
13. *Heads and Deputy Heads of Diplomatic Missions*
14. *Solicitor General*
15. *Clerk to Parliament*

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<p>16. Chief Establishment Officer 17. Accountant General and Deputy Accountant General 18. Managers, Heads and Deputy Heads of Departments and Divisions 19. Commander and Deputy Commander of the Defence Force 20. Commissioner and Deputy Commissioner of the Police Force 21. Police Officers of the rank of Inspector and above 22. Chief Immigration Officer, Deputy Chief Immigration Officer and Senior Immigration Officers 23. Superintendent of Prison and the Chief Officer 24. All commissioned and warrant officers of the Antigua and Barbuda Defence Force 25. Comptroller of Customs, Deputy Comptroller of Customs and Senior Customs Officers 26. Commissioner of Inland Revenue, Deputy Commissioners, Senior Inland Revenue Officers and Auditors of Inland Revenue 27. Legal Officers employed by the Government of Antigua and Barbuda 28. Director of Public Prosecutions 29. Magistrates 30. Labour Commissioner and Deputy Labour Commissioner 31. Chief Technical Officers of Ministries 32. Members of the Public Service Commission 33. Members of the Police Service Commission 34. Member of the Public Service Board of Appeal 35. Chairman, Deputy Chairman and Secretary of the Boards or governing bodies of statutory bodies 36. Chief Executives and deputy chief executives, by whatever name known, of statutory bodies 37. Heads and Deputy Heads of Divisions of statutory bodies 38. Members of the Tenders Board 39. Tax Compliance Officers 40. Director of Audit and Deputy Director of Audit</p>	
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	<p>41. <i>Members of the Tax Appeal Board</i> 42. <i>Property Evaluation Officers</i> 43. <i>Senior Casino Inspectors</i></p>	
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