

THE 2008 CONSTITUTIONAL MODERNISATION PROPOSALS AND THEIR HUMAN RIGHTS IMPLICATIONS

7 April, 2008

Introduction

On 12 January 2008, the incumbent PPM Government issued a summary of proposals for constitutional modernisation for the Cayman Islands, which the Government intends to be the subject of a referendum vote in May 2008.

Given the import of a constitution to the development, acknowledgement and protection of human rights in the Cayman Islands, the Human Rights Committee ("HRC") considers it essential to provide its comments and views on the summary of proposals being submitted for consideration by the Cayman electorate, along with some suggestions for improvement.

The HRC's views on the Government's constitutional reform proposals can be usefully summarised as follows:

- ***Inclusion of a Bill of Rights:***

The HRC fully endorses the inclusion of a Bill of Rights in the Cayman Islands Constitution. The HRC is therefore pleased that the current constitutional reform proposals support this proposition, as did both the 1991 and the 2001 Constitutional Review Commissions. Indeed, the HRC believes that it is essential that human rights be included in the constitutional arrangements of the Cayman Islands.

- ***Enshrining the Bill of Rights:***

The HRC supports the Government's proposal to enshrine a Bill of Rights directly into the Cayman Islands Constitution, rather than enacting a Bill of Rights in an ordinary law. If the Bill of Rights is simply created as an ordinary law, there is a real danger that it can be altered or repealed relatively easily by the legislature. This means our so-called "rights" might be redefined or changed after every election. Moreover, the rights will also be vulnerable to gradual or potentially inadvertent erosion unless the legislature remains continually vigilant and focused on how new laws impact upon individual rights.

The HRC therefore recommends enshrining the Bill of Rights directly into the Cayman Islands Constitution, to ensure that human rights take precedence over potentially conflicting ordinary laws and to ensure that all future laws take proper account of fundamental human rights before being passed by the legislature.

- ***Direct Enforcement of the Bill of Rights:***

It is the HRC's view that any Bill of Rights should be directly enforceable in the Cayman Islands courts. This would represent an improvement for Cayman over the position in the United Kingdom, which does not have a written Constitution as a source of superior law.

As the United Kingdom does not have a written constitution, the United Kingdom only allows its courts to make a "declaration of incompatibility" against a particular law which breaches individual rights. However, Cayman has a written Constitution, which sits above all other laws; and therefore has the constitutional structure to allow its courts to protect our rights directly by striking down any law which infringes the human rights contained in the Constitution.

The current Government proposals, however, mirror the situation in the United Kingdom and do not take account of Cayman's different constitutional basis. The Government's current proposals anticipate that the local courts will simply make a "declaration of incompatibility" only, and then leave it to the legislature to amend the offending law which breaches human rights. On one view, this method of enforcement has the advantage of leaving the matter with the legislature, who are popularly elected by the people, rather than judges who are appointed.

In practice, in other jurisdictions, once a declaration of incompatibility has been made by the court that a particular law breaches human rights, the legislature will tend to make the relevant amendment to that law, as a matter of course. However, the HRC believes that the size of the jurisdiction, its comparatively small legislature and the development of party politics in the Cayman Islands are further good reasons for removing final compliance with human rights orders from the political arena.

The HRC notes that the distinct disadvantage to the method of enforcement currently proposed by the Government is that enforcement of human rights is left to the vagaries of the political process. Sometimes majorities can opt to restrict the rights of minorities, particularly where there is political capital to be earned, making enforcement of our rights too dependent upon political will.

The HRC therefore believes that rather than the proposed use of a “declaration of incompatibility”, the preferable course for Cayman is for its independent judiciary to be able to directly protect our rights; bearing in mind that Cayman has a more hierarchical constitutional structure than the United Kingdom and is therefore in a position to offer its people greater protection of their fundamental human rights.

- ***Scope of Human Rights:***

The HRC believes that it is fundamentally important that the Bill of Rights should apply to all persons in the Cayman Islands.

The human rights that are enshrined in the Constitution should apply to all persons, irrespective of whether they are Caymanian, reside in Cayman on a work permit or are visitors to the Islands. If they are to be “ours”, they must be all of “ours”. Indeed, it is this that makes them fundamental.

In most cases, human rights are usually enforced against the government - usually referred to as ‘vertical application’ of human rights principles. However, the HRC also considers that horizontal application of human rights principles - that is between one individual and another private body, is desirable, as it would create a more widespread human rights culture and broader appreciation of the importance of human rights. Again, if implemented this would represent an improvement for Cayman to the position in the United Kingdom. In the United Kingdom, the horizontal application of human rights is not clearly dealt

with in its Human Rights Act and this has left both academics and the courts to speculate as to whether private companies, clubs and private schools are bound by human rights principles.

The horizontal application of constitutional rights has been identified as one of the deficits in many Commonwealth Caribbean constitutions and is currently under consideration as part of the reform process in a number of these jurisdictions. The HRC therefore believes that the Cayman Islands would benefit from addressing this point in its Constitution.

- ***Drafting of the Bill of Rights:***

The HRC is of the opinion that the drafting of the Bill of Rights should be guided by the principles of accessibility, positivism and gender equality.

The public input received by the HRC has indicated that there is a desire that both the Constitution and the Bill of Rights be drafted in a manner, which ensures that it can be understood by all persons. The HRC endorses this view and therefore recommends that the Bill of Rights be written in an accessible fashion, and in plain language.

The HRC also received public input suggesting that the human rights in the Constitution should be expressed as positive affirmations. Again, the HRC endorses this view. Although the HRC accepts that many human rights may be limited or restricted in defined circumstances, the HRC notes that these limitations or restrictions must be subservient to the rights themselves. It is therefore the rights that must be the primary focus.

In addition, building upon the fundamental importance of equality and the application of human rights for all persons, the HRC feels that gender-sensitive language should be explicitly used to define the rights in the Bill of Rights. The HRC recommends that the language of the new Constitution should be gender-inclusive, such that whenever a reference is made to a person, the Constitution uses both of the words that account for the entire collective of the population (“he or she”; “his or her”; and “man and woman”).

- ***Rights to be Included in the Bill of Rights:***

The HRC believes that all of the human rights defined in the constitutional modernisation proposals as “rights protecting dignity” and “rights protecting democratic integrity” are essential in any Bill of Rights for the Cayman Islands.

The HRC therefore supports the right to life, the right not to be subjected to cruel or degrading treatment, including torture or slavery; the right to a fair trial; the right to property; the right to freedom of religion; the right to privacy of one’s home and correspondence; along with the right to free speech and the right to lawful and peaceful demonstration. The HRC, however, reiterates that under a constitution such rights must be applicable to all persons and that they should be secured without discrimination on any basis, including sexual orientation.

For clarification, the HRC would also wish to see the right to liberty and security; the right to freedom from retroactive laws and penalties and the right to freedom of thought and conscience included in any Bill of Rights.

In relation to the right to marry and the right to family life, the HRC suggests the following wording: “Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right.” However, if the principle of equality is to be recognized, the HRC advocates that there should not be discrimination against other types of legal union, which may eventually be recognized in Cayman law. Accordingly, any civil rights to be granted to the parties of any form of legal union will remain a matter for the legislators, provided these are not discriminatory. The HRC recognises that the right to marry can be defined under domestic law; but it would be a matter for each individual religion as to which marriage ceremony it chooses to sanction or perform.

The HRC similarly believes that the right to religion must be equally respected for all religions. The right of religious freedom and conscience is an important fundamental human right. Accordingly, all persons will continue to have the right to participate in any religious activities of any faith of which s/he is a member. Equally, however, a person has the right to decline from participating in any religious activities of any faith of which s/he is not a member. In this way, it is possible as a matter of policy, for example, to

continue to hold prayer or devotion in public schools, provided that persons of a different faith are not forced to participate in such activities against their wishes.

In addition to the civil and political rights in the current Government's proposals, the HRC also supports the inclusion of other types of rights.

Where the constitutional modernisation proposals refer to the inclusion of the rights of children, the HRC believes that other economic, social and cultural rights, such as the associated right to education could also be usefully included, as well as rights for the disabled or the elderly.

Other such rights, to which the people of Cayman may wish to aspire, could be rights to health care and housing; the HRC notes these are currently not included in the Government's proposals.

Moreover, other types of rights, referred to as collective people's rights, may also be relevant to the Cayman Islands and therefore merit inclusion in the Bill of Rights. In this context, the right to protection of Cayman's heritage, environment, oceans, wildlife and biodiversity may be particularly relevant.

In addition, it may be appropriate to include other collective rights, such as the right to self-determination. As the government's constitutional modernisation proposals state that the intention is for the Cayman Islands to remain as a United Kingdom Overseas Territory, it may also be prudent for the Cayman Islands to reserve its future position and include the right to self-determination, as set out both in the United Nations International Covenant on Civil and Political Rights and the United Nations International Covenant on Economic, Social and Cultural Rights.

In principle therefore, the HRC supports strengthening and improving the constitution in order to reflect more accurately the range of key international human rights obligations, which are applicable or are about to become applicable to the Cayman Islands; particularly:

- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on the Elimination of Discrimination Against Women;

- the Convention on the Rights of the Child;
- the Convention Against Torture.

- ***Establishment of Human Rights Commission:***

The HRC also supports the establishment of a Human Rights Commission in the Constitution of the Cayman Islands.

In its public debates, the HRC has noticed one overwhelming concern emanating from the people of Cayman that individuals either do not know what their rights are or are unable to access these rights. It is in both of these areas that a Human Rights Commission will assist. Much like the existing HRC, a Human Rights Commission should be charged with the provision of public education, to create a broader understanding and awareness of human rights. In addition, building upon the existing limited remedies that the HRC can currently offer, a Human Rights Commission could be designed to provide a much more effective mechanism to assist individuals in accessing legal remedies and defending their rights.

A separate Special Report on the Establishment of a Human Rights Commission in the New Constitution for the Cayman Islands, which establishes in greater detail the HRC recommendations in this respect will be published alongside this Report.

- ***The Referendum Process***

As noted from the above, the HRC is largely supportive of the human rights proposals currently being advanced by the Government.

However, the HRC is cognizant of the difficulties inherent in any referendum process. In particular, there is a concern if the referendum is framed as a single 'yes/no' question, from which the electorate will indicate their acceptance of the current proposals in their entirety, or otherwise.

The concern is that such an approach may prove to be problematic for a matter as complex as constitutional reform. For instance, if a voter strongly disagrees with any one specific proposal, such a person may then cast a negative vote in the referendum, even if s/he supports the remaining proposals.

If the referendum fails to garner the support of the majority of the electorate, there is a considerable risk that the Government will not be in any position to assess the reason(s) for the negative vote or which proposals the electorate did not wish support, and any meaningful results will be lost. Moreover, there are certain aspects of the constitutional proposals which are non-negotiable and are therefore not appropriate for inclusion in a referendum for the views of the electorate in any event.

Most crucially, the HRC does not wish for the long-standing and widespread support for a Bill of Rights for Cayman to be rendered obsolete by the referendum process, such that the opportunity to finally bring in a Bill of Rights is lost as a result.

Notwithstanding the outcome of the referendum process, the HRC believes the inclusion of a Bill of Rights for Cayman to be of critical importance and must be added to Cayman constitutional arrangements, even if the other proposals do not ultimately find favour.

Conclusions

In conclusion, the HRC believes that:

1. The inclusion of fundamental human rights in the Constitution is essential.
2. Human rights in the Constitution should be accessible and applicable to all, drafted as positive affirmations, in plain and gender-friendly language.
3. There must be an effective remedy where human rights are allegedly infringed. Direct enforcement by the local courts is an available option for the Cayman Islands, given its constitutional structure.
4. The fundamental rights in the Constitution should not necessarily be restricted to only classical civil and political rights, but may also include environmental and aspirational rights, as the Cayman populace deem appropriate or beneficial.

5. The inclusion of relevant economic, social, cultural and people's rights provides an opportunity to ensure that the Bill of Rights reflects both the values and the future aspirations of the people of the Cayman Islands.
6. Upholding the basic principles of equality, the Constitution should not seek to discriminate against any person or group. However, the HRC acknowledges that it may be preferable to leave the definition of marriage to domestic law while accepting that it would be a matter for individual religion as to which marriage ceremony it chooses to sanction and perform. Any civil rights to be granted to any form of legal union to be recognised under Cayman law will remain a matter for the legislature, but should not be discriminatory.
7. The Bill of Rights will set out the fundamental human rights of each citizen and the Government but does not apply 'horizontally' between private individuals. However, horizontal application of rights is an important issue which should be addressed by Cayman, at minimum, to clarify the extent to which private schools, companies or individuals are also to be bound by human rights principles.
8. The right of religious freedom and of conscience is an important fundamental human right. The current proposals for constitutional reform do not remove the right to pray in public or in schools. However, no person should be forced to participate in the religious activities of any faith of which s/he is not a member.
9. The Bill of Rights must not be introduced in isolation. In order to ensure that a Bill of Rights is effective and utilised fully, people will require education, guidance and support.
10. The establishment of a Human Rights Commission for the Cayman Islands will be beneficial to advance public education on human rights and could be designed to provide a much more effective mechanism to assist individuals in accessing legal remedies and defending their rights.