

OPENING STATEMENT OF THE HUMAN RIGHTS COMMITTEE ON THE 2008 CONSTITUTIONAL MODERNIZATION PROPOSALS

29 September 2008

Mr. Ian Hendry, Chairman of the Foreign & Commonwealth delegation and his delegates
His Excellency the Governor, Mr. Stuart Jack
Hon. Edna Moyle, Speaker of the House
Honourable Kurt Tibbetts, Leader of Government Business and his delegation
Honourable Samuel Bulgin, Attorney General
Honourable McKeeva Bush, Leader of the Opposition and his delegation
Representative of the Chamber of Commerce, Mr. Wil Pineau
Representative of the Cayman Ministers Association, Pastor Al Ebanks
and
Representative of the Seventh Day Adventist (CI) Conference, Pastor Shian O'Connor,
Observers and our listening audience,

Introduction

May I first extend formal apologies of the HRC Chair, Mrs. Sara Collins, who is returning today from business travel overseas.

By way of background: the HRC is the national institution vested with competence to promote and protect human rights in the Cayman Islands. The HRC is a non-aligned body, committed to objectivity and impartiality in its work. Our membership consists of a wide cross-section of the Caymanian community, including Caymanian and expatriate attorneys, a physician, a reverend, women's rights advocates and prominent businesspersons.

Although it does not provide a formal legal remedy, the HRC is able to receive, investigate and seek remedies to complaints on human rights issues. In the absence of constitutionally enshrined rights, the HRC therefore provides a useful, inexpensive means for resolution of human rights issues. Additionally, the HRC reviews existing and new legislation to provide input on whether its provisions conform to fundamental human rights principles. The HRC also advises the Government on Cayman's compliance with various international treaties, which have been extended to us.

Input on constitutional modernization

Against that background, the HRC considered it essential to provide its comments and views on the certain aspects of the constitutional reforms, given the importance of a constitution to the development and protection of human rights.

The HRC is grateful for the opportunity to participate in these talks and to outline the HRC's position on the Government's constitutional reform proposals, most particularly those relating to the bill of rights and on Proposal 17 relating to the establishment of a human rights commission.

While there are some areas which give us pause, the HRC is largely supportive of most of the Government's proposals in relation to human rights. Our position may be summarized as follows:

Inclusion and enshrinement of bill of rights

1. The HRC fully supports the inclusion of a bill of rights in the Constitution. Moreover, the bill of rights should be enshrined in the Constitution, rather than in ordinary legislation which can be amended or repealed more easily by the legislature; otherwise, our "rights" may be changed after each election.

Scope and drafting of bill of rights

2. The bill of rights should be accessible and applicable to all persons in our Islands. The bill of rights should be drafted in plain English, rights phrased as positive affirmations (rather than as

a residual right). The bill of rights and Constitution should be drafted in gender-friendly language (“he or she”, “his or her”) that accounts for the entire collective of our population, both male and female.

Enforcement of rights

3. As Cayman has a written constitution, direct enforcement by the local courts is an available option for the Cayman Islands. However, the Government’s proposal is for the courts to only be able to make a “declaration of incompatibility” that a law conflicts with the constitution and the legislature be left to amend the offending law.

The disadvantage to this method is that enforcement of our “rights” will be left to the vagaries of the political process.

On the other hand, the advantage is that it leaves the matter in the hands of the elected legislature, rather than with judges, who are appointed. The HRC is also mindful of the concerns relating to upholding the principles of parliamentary sovereignty and of “judicial activism”.

The HRC would prefer direct enforcement of rights by the courts. However, if the declaration of incompatibility option is to be used, careful consideration will need to be had to the practical implications and workings of such system for Cayman.

Application of rights

4. The current proposals seek vertical application of rights only. However, the HRC believes that direct horizontal application to private bodies should also be considered **at a later stage** for Cayman, in order to develop a full human rights culture.

5. Indirect horizontal application of rights will likely flow through the obligation of the legislature to consider human rights principles when passing new laws, including those which impact private businesses and individuals. Accordingly, considerable care will therefore have to be taken in relation to the definition of "government" to which the bill of rights will apply, particularly in relation to quasi-public bodies, associations and entities which receive Government funding.

The HRC therefore believes that the Cayman Islands would benefit from clearly addressing the issue of horizontal application of rights in its Constitution. This is 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. It is most sensible for this issue to be properly addressed for Cayman to learn from those experiences.

Rights to be included in bill of rights

6. The HRC supports and agrees with the inclusion of all of the human rights listed in the constitutional modernisation proposals, such as: the right to fair trial, to privacy, to marriage between a man and a woman, the right to life, freedom from torture or slavery, free speech, freedom of conscience and religion and the right not to be discriminated against on the basis of race, creed, colour or gender.
7. In addition, the Constitution could also usefully include aspirational rights which relevant to Cayman: such as right to education, housing and healthcare for all.
8. Further, having stated there is no desire for independence, it is nonetheless prudent to expressly reserve the right to self-determination.
9. Upholding the basic principles of equality, the Constitution should not seek to discriminate against any person or group on any basis, including sexual orientation. Human rights are based on the notion that all human beings have dignity and value. Accordingly, rights should be secured without discrimination.

10. In relation to the right to marry, if the principle of equality is to be recognized, the HRC takes the view that there should not be discrimination against other types of legal union, which may eventually be recognized in Cayman law. Any civil rights (such as healthcare benefits, inheritance) 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.

Lastly,

Establishment of a human rights commission

11. The HRC supports the establishment of a human rights commission in the new Constitution to formally establish a national body to be responsible for the promotion and protection of human rights.

The establishment of a Human Rights Commission for the Cayman Islands with a similar mandate to the existing HRC will be beneficial. (For ease of reference, the delegation has been provided with copies of the Terms of Reference of the existing HRC.)

12. However, 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. This is one of the roles which a human rights commission could also usefully undertake.

The HRC remains on hand to explain its position in further detail in relation to each of the foregoing points. For completeness, I can confirm that the HRC does not have a formal position in relation to the remaining constitution proposals, which are outside our mandate.

Thank you.