

POSITION PAPER OF THE HUMAN RIGHTS COMMITTEE FOR THE THIRD ROUND OF CONSTITUTIONAL NEGOTIATIONS 3 – 6 FEBRUARY 2009

A Introduction

The HRC is grateful for the opportunity to participate in these talks, particularly in relation to the proposals relating to the Bill of Rights and to the establishment of a Human Rights Commission. Our objective is to seek the best protection of rights for all people in the Cayman Islands and to ensure compliance with universally recognised standards.

B Outstanding issues

There are five outstanding issues of interest to the HRC following the conclusion of the second round of talks:

1. The need to use clear and positive language in drafting the Constitution;
2. The proposal by the Cayman Islands Government to restrict the right of non-discrimination at section 16 so that it is no longer a positive, free standing right;
3. The proposal by the Cayman Islands Government to delay the implementation of section 6(3), which requires segregation of juvenile offenders from adult prisoners and treatment appropriate to their age and legal status, for four rather than two years;
4. Consideration of the inclusion of a right to self-determination; and
5. Consideration of the inclusion of rights to healthcare and housing.

C Language

The HRC has consistently expressed the view that the Constitution, including the Bill of Rights, must be drafted in clear, simple and positive language. Some improvements have already been made to the working draft, notably with regard to section 17 dealing with the rights of children.

However, further work could and should be done to ensure that the Bill of Rights is meaningful and accessible to all persons in the community, including children.

Attached hereto at Appendix 1 is a schedule containing suggested alternative wording for some key sections of the Bill of Rights.

D Section 16: non-discrimination

The Government has submitted a proposal to amend section 16 of the draft Bill of Rights as follows:

- i. To specify that it will apply only in relation to the rights set out in the Bill of Rights. The net effect of the proposal is that there will be no free-standing right not to be discriminated against by the government in relation to social, economic and other matters that are not themselves covered by the Bill of Rights (e.g. healthcare, housing, employment, social services and many others).
- ii. To amend the definition of “discriminatory” under section 16 (2) to mean “different *and unjustifiable* treatment”.
- iii. To amend section 16(3) so as “more faithfully [to] mirror other limitation sections” by introducing the following wording: “*No law or decision of any public official shall contravene this section if it has an objective and reasonable justification and is proportionate to its aim in the interests of defense, public safety, public order, public morality or public health.*”

The HRC has no objection to points (ii) and (iii) above.

However, it is a matter of grave concern that consideration is being given to the significant dilution of section 16. Protection against discrimination and the promotion of equality are important aspects of a Bill of Rights in any modern, civilised democracy. These objectives are no less important for the “full and complete development” of the Cayman Islands as we seek to secure a modern, advanced Constitution. In the light of this, the HRC cannot support a Bill of

Rights which is not built on the principle of equality and equal treatment for all before the law. Building wide ranging protection from discrimination into our Constitution would be a valuable foundation for the promotion of equality. Indeed, in the light of universally accepted standards, we do not see how it could seriously be argued that the government of the Cayman Islands should reject the inclusion of a constitutionally enshrined obligation not to discriminate against the residents of the Islands.

There are two fundamental objections to the Government's proposed amendments, which can be summarised as follows:

1. The most vulnerable groups of the Cayman Islands population, including women, the elderly, children, the mentally ill, physically and mentally disabled persons, gays and lesbians and many others, would be deprived of valuable and necessary constitutional protection as a result of the elimination of the free-standing aspect of the right; and
2. The motivation for the narrowing of section 16 is itself discriminatory. No justification has been put forward apart from the expression of vague concerns by the CMA about conferring rights on gays and lesbians in our community.

The importance and value of a free standing right

These are not merely academic concerns. The restriction of section 16 would be a blow to the cause of promoting a society built on the principles of equality and tolerance in the Cayman Islands. We would lose the opportunity to define the Cayman Islands as a country that considers each of its residents to have their own inherent dignity and value, which is worthy of respect and protection, in relation to all aspects of their daily lives and their interaction with the government. It would send the wrong message to the strong and the weak in future generations; to the former about how they are entitled to behave and to the latter about what they are required to accept. It would seriously erode the practical advantages to be gained from the introduction of the Bill of Rights for the women's groups, children's advocacy groups, disabled rights activists

and other lobbyists whose pleas for the enactment of a comprehensive and effective anti-discrimination legislative package have consistently fallen on deaf ears.

A number of the HRC's reports and recommendations highlight the potential for serious human rights violations to go unchecked in the Cayman Islands. They point out the inefficiencies of the current framework for addressing those violations. The following snapshots are some of the examples of ongoing human rights violations and struggles within the Cayman Islands which underscore the importance of aiming to secure comprehensive and wide ranging protection in the Bill of Rights, rather than leaving vulnerable persons at the mercy of successive governments. For many of those groups, there may never be timely or effective action in the absence of a clear constitutional framework for it.

- **The inordinate delay in implementing CEDAW**

For over ten years, if not more, female members of the Legislative Assembly of the Cayman Islands have been asking for the extension of the Convention for the Elimination of Discrimination Against Women. Their urging fell on deaf ears. The Government announced recently that legislation is being developed for the implementation of CEDAW. The HRC hopes that this will in fact come to fruition. There is no good reason why it has taken so long. The HRC hopes that the process of bringing legislation into force will not take an exceedingly long period of time (as it has with the Children's Law – see below) and that this initiative actually comes to fruition. The fact that the women and girls of our country have waited this long for a human rights instrument that will give them the ability to protect themselves from discrimination, without any legitimate explanation for the delay and the lack of urgency in dealing with the matter, demonstrates the absence of any sense of priority on the part of successive governments to protecting residents of the Cayman Islands from discrimination.

- **Treatment of juvenile offenders**

CIHRC Case 3/07 identified a significant number of human rights concerns arising out of the detention of children (including girls as young as 13 years old) at HMP Fairbanks (an adult facility). The detention of children pending trial, the lack of access to legal advice

at or before trial or at sentencing, the imprisonment of children in an adult facility and the severe lack of appropriate facilities for juveniles accused of crimes, were all areas addressed in this Report. The HRC concluded that these issues gave rise to prima facie breaches of numerous international instruments; namely the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the European Convention on Human Rights and the United Nations Convention on the Rights of the Child. Although this report was published in early 2007 and there has been some acknowledgment by the authorities of the legitimacy of the concerns raised, the HRC has received no substantive response from or on behalf of the Government, despite repeated requests.

- **Inordinate delay in implementing the Children's Law**

In its Report on the Convention on the Rights of the Child and in its Final Report for CIHRC Case 3/07, the HRC identified potential steps to be taken that could improve the rights of the child in the Cayman Islands. The Cayman Islands Government is failing to meet its international obligations in this regard in a number of critical aspects, most notably through its failure to implement the Children Law 2003 which has been sitting on the shelf for more than 5 years since it was passed, without implementation. This piece of legislation would address a significant number of human rights issues and abuses which have been identified and which continue to occur in the Cayman Islands in relation to children. The Cayman Islands Government has not responded to the HRC in relation to those reports.

- **Recent Allegations of a two tier health care system resulting in an investigation by the HRC**

The HRC initiated an investigation of the health care system. The HRC has concluded that the practice of the Cayman Islands Government of providing guarantees for treatment for health care emergencies to Caymanians only is discriminatory as the International Covenant on Economic, Social and Cultural Rights forbids discrimination in respect of the provision of health care on the various prohibited grounds.

- **Petition by Concerned Gays & Lesbians of Cayman**

A petition presented to the HRC on behalf of the Concerned Gays & Lesbians and associated correspondence details significant discrimination and an atmosphere of fear for gays and lesbians in the Cayman Islands. In order to allow this group, for perhaps the first time ever in the Cayman Islands, to have their say in full, a copy of the petition is attached at Appendix 2 with their consent.

- **The Lifers and the inordinate delay in responding to the HRC report**

The HRC report in CIHRC Case 6/06 documents the case of a number of prisoners, who had been sentenced to life imprisonment without the possibility of parole; some of whom have already served in excess of twenty years. The report identified a number of human rights concerns, and made recommendations. Though the HRC has been repeatedly informed that its Report raises legitimate issues and that a response will be forthcoming, none has been received since publication of the report in April 2007.

Finally, as a general point, it should be re-iterated that there has been no response from any government department, save the Immigration Department, to any report or recommendation of the HRC of any kind which demonstrates a willingness to engage in a process of human rights reform. Indeed, the HRC was not invited to be part of these constitutional talks until it protested to the Government that it had not been included in the Cayman delegation in spite of the fact that the Chamber of Commerce, the CMA and the SDA had all been included. With the exception of the Immigration Department, no other government department or agency that has been the subject of a report has been willing to engage with the HRC in relation to any of the issues and areas of concern it has identified relating to potential human rights abuses. The importance of constitutional protection that is as wide ranging as possible is obvious against that background.

The discrimination inherent in the process by which this “compromise” amendment was put forward

Section 16 in its original form was a useful affirmation of the principle of equality advocated in the HRC’s initial position paper submitted prior to the first round. None of the grounds set out therein, apart from that of sexual orientation, generated any controversy or public debate. The HRC has always understood that the reasons for the objections to section 16 by the CMA and the SDA were to ensure that the right to marry would not be conferred on gays or lesbians and that none of the rights would be applied horizontally so as to require private organisations, such as churches and religious schools, to adopt employment or other practices which would conflict with the religious operating principles of those organisations. In order to address those specified concerns, two important concessions were made at the outset of these talks. In the first place, the right to marry has been defined in very clear terms so as to be limited to a right to marry a single member of the opposite sex¹. In addition, the draft excludes the possibility of horizontal application of any of the rights set out in the draft Bill (including the right to non-discrimination).

In the light of those concessions, no identified grounds remained for any lingering concerns on the part of the CMA or the SDA about the potential effects of section 16. Nor have the CMA or the SDA been required to articulate and particularise their continuing concerns in order to assess whether there is any justification for them. The result is the apparently casual abandonment of the opportunity for real and meaningful progress in the protection of rights and the promotion of equality in the Cayman Islands for no clear or apparent reason.

Any attempt to compromise on matters which cannot and should not be the subject of “horse-trading”, such as the dignity and right to equal treatment of the citizens of the Cayman Islands in all areas of their daily life, is regrettable. It is even more so when there is no clear reason for the need to take such a step. In the course of attempting to avoid doing good for the gays and lesbians who visit, reside in or are citizens of the Cayman Islands, the “compromise” solution does harm to many, if not all, of the other vulnerable groups as a result. The motivation for the

¹ The HRC position is that national laws should provide a regime for the recognition of civil partnerships.

compromise (to avoid conferring rights on gays and lesbians) and the unfortunate outcome of the proposal are entirely without merit.

While the HRC is conscious of the importance of this process as a whole, no process is more important than a single vulnerable person living within the Cayman Islands. The mandate of the HRC is to ensure that those persons are not victimised or abused. It should be noted that vulnerable and victimised persons are more likely to be silent than those among us who are fortunate to have power and the ability to speak for ourselves without fear of recrimination. However, their silence should not lull us into the false impression there is no compelling need to tackle serious and harmful discrimination in relation to matters which will fall outside the Constitution and which may never be dealt with by legislation. The conferral of a free-standing right not to be discriminated against will be a real and powerful weapon in the struggles of those groups to hold successive governments to account, to affirm their own dignity and self worth, to acquire and maintain equal legal standing and to live worthwhile and productive lives.

International obligations in relation to discrimination

It should also be noted that a number of treaties, which have been extended to the Cayman Islands, confer obligations on the Cayman Islands Government, which require it to comply with section 16 in its original form. For example:

- Article 26 of the International Covenant on Civil and Political Rights provides that “*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth, property or other status*”
- Pursuant to Article 2 of the International Convention on the Elimination of Discrimination against Women, “*State Parties...agree to pursue by all appropriate means and without*

delay a policy of eliminating discrimination against women and to this end undertake....(a) to embody the principle of the equality of men and women in their national constitutions...or other appropriate legislation and to ensure...the practical realisation of this principle”

- Article 2(1) of the Convention on the Rights of the Child provides that “*State Parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind”*

Finally, we wish to make the point that other overseas territories, such as the BVI, have given their people a constitutional free-standing right of non-discrimination. Indeed, it is our understanding that these rights were proposed to them in the course of their own negotiations with the FCO and, we assume, on the advice of the FCO. The Caymanian people do not deserve lesser protection. We urge the FCO to reject the “compromise” version of section 16 and to ensure that equal protection is enshrined for our citizens and residents as for other territories. We attach at Appendix 3 a sample of provisions for equality and against discrimination from other constitutions and from international treaties.

Suggested wording

For the reasons set out above, the HRC will not support a Bill of Rights which includes the version of section 16 proposed by the Cayman Islands government. As an alternative, the HRC suggests the following wording:

- (1) Everybody has a right not to be discriminated against.
- (2) A person is discriminated against if they are treated differently and unjustifiably to another person or persons in an analogous situation on the grounds of race, sex, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, birth, pregnancy, sexual orientation or other status.

(3) Nothing in subsection (1) requires the legal recognition of same-sex marriages or gender-reassignment, such matters being in the discretion of Parliament.

E Treatment of juvenile offenders

The HRC's position has been stated above. The serious failures in the treatment of juvenile offenders have been identified by the HRC in a report which has been public since 2007. There is no excuse for a further delay of two years as proposed by the Cayman Islands Government (in addition to the two years already proposed for implementation of the Bill of Rights generally) in righting these serious wrongs. The maltreatment of juvenile offenders is among the most egregious of abuses identified by the HRC since its establishment and this should be treated as a priority issue. It would also send entirely the wrong message to these young people for them to know that they are left on the constitutional back burner longer than any of the other issues requiring implementation. In any event, this is a position taken by the current Government as a reflection of its own priorities during the remaining 3 months of its term. We fail to understand how this could translate to a dispensation to successive governments from doing anything at all to tackle this most serious issue for another four years.

F The right to self determination

The HRC believes that all members of the Cayman Islands delegation agree that there is currently no desire for independence. However, we consider it prudent expressly to reserve the right to self determination in the Constitution. This right appears in two treaties which have been extended to the Cayman Islands: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

See the HRC position papers dated 7 April 2008 and 29 September 2008.

G Aspirational rights to health care and housing

See the HRC position papers dated 7 April 2008 and 29 September 2008.

The HRC would be pleased to expand on any aspect of this position paper.

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APPENDIX 1

SUGGESTED ALTERNATIVE WORDING FOR KEY SECTIONS OF THE BILL OF RIGHTS



	Current Working Draft bill of rights	Alternative draft bill of rights
<p>Right to fair trial</p>	<p>Fair trial 7.-(1) Every one has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.</p> <p>(2) Everyone charged with a criminal offence has the following minimum rights –</p> <ul style="list-style-type: none"> (a) to be presumed innocent until proved guilty according to law; (b) to be informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him or her; (c) to have adequate time and the facilities for the preparation of his or her defence; (d) to defend himself or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance and the interests of justice so require, through a legal representative at public expense provided through an established public legal aid scheme as prescribed by law; (e) to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; (f) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court; (g) when charged on indictment in the Grand Court, to have the right to trial by jury; <p>and, except with his or her own consent, the trial shall not take place in his or her absence, unless he or she so behaves in the court as to render the continuance of the proceedings in his or her presence impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence, or unless, having had reasonable notice of the hearing and of the nature of the offence charged, he or she is voluntarily absent from the proceedings.</p> <p>(3) When a person is tried for any criminal offence, the accused person or any person authorised by him or her shall, if he or she so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.</p> <p>(4) No person who shows that he or she has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, save on the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.</p> <p>(5) No person shall be tried for a criminal offence if he or</p>	<p>Right to a fair trial</p> <p>(1) Everybody has the right to a fair and public hearing in the determination of his legal rights and obligations by an independent and impartial tribunal within a reasonable time.</p> <p>Everyone charged with a criminal offence has the following minimum rights:</p> <ul style="list-style-type: none"> (a) to be presumed innocent until proved guilty according to law. (b) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (c) to have adequate time and the facilities for the preparation of his defence; (d) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (e) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;



	<p align="center">Current Working Draft bill of rights</p>	<p align="center">Alternative draft bill of rights</p>
	<p>she shows that he or she has been lawfully pardoned for that offence.</p> <p>(6) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.</p> <p>(7) Every person who has been convicted by a court of a criminal offence shall have the right to appeal to a superior court against his or her conviction or his or her sentence or both as may be prescribed by law; but-</p> <p>(a) nothing in any law shall be held to contravene this subsection –</p> <p>(i) to the extent that it precludes an appeal by a person against his or her conviction of an offence if he or she pleaded guilty to that offence at his or her trial; or</p> <p>(ii) to the extent that it makes reasonable provision with respect to the grounds on which any such appeal may be made or with respect to the practice and procedure to be observed in relation to the making, hearing and disposal of any such appeal; and</p> <p>(b) this subsection shall not apply in relation to the conviction of a person by a superior court, or in relation to his or her sentence on such conviction, if he or she was convicted by that court on an appeal against his or her acquittal by a lower court.</p> <p>(8) When a person has, by a final decision of a court, been convicted of a criminal offence and, subsequently, his or her conviction has been quashed, or he or she has been pardoned, on the ground that a newly-disclosed fact shows that there has been a miscarriage of justice, he or she shall be compensated out of public funds for any punishment that he or she has suffered as a result of the conviction unless it is proved that the non-disclosure in time of that fact was wholly or partly his or her fault.</p> <p>(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.</p> <p>(10) Nothing in subsection (1) or (9) shall prevent the court from excluding from the proceedings persons other than the parties to them and their legal representatives to such extent as the court-</p> <p>(a) may be empowered by law to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of minors or the protection of commercial confidence or of the private lives of persons concerned in the proceedings; or</p> <p>(b) may be empowered or required by law to do in the interests of defence, public safety, or public order.</p> <p>(11) Nothing in any law or done under its authority shall be held to contravene –</p> <p>(a) subsection (2)(a), to the extent that the law in question imposes on any person charged with a</p>	<p>(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.</p> <p>No person shall be tried for an offence in respect of which he has previously been acquitted.</p>



	<p align="center">Current Working Draft bill of rights</p>	<p align="center">Alternative draft bill of rights</p>
	<p>criminal offence the burden of proving particular facts;</p> <p>(b) subsection (2)(d), to the extent that the law in question imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds;</p> <p>(c) subsection (5), to the extent that the law in question authorises a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and</p> <p>conviction or acquittal of that member under the disciplinary law of that force, save that any court so trying such a member and convicting him or her shall in sentencing him or her to any punishment take into account any punishment imposed on him or her under that disciplinary law.</p> <p>(12) In this section, "legal representative" means a person entitled to practise in the Cayman Islands as an attorney.</p>	
<p>Right to personal liberty</p>	<p>Personal liberty 5.-(1) No one shall be deprived by government of liberty and security of the person. (2) The right to liberty does not extend to the following measures taken in accordance with a procedure prescribed by law –</p> <p>(a) in execution of the sentence or order of a court, whether in the Cayman Islands or elsewhere, in respect of a criminal offence under any law of which he or she has been convicted or in consequence of his or her unfitness to plead to a criminal charge;</p> <p>(b) in execution of an order of a court punishing him or her for contempt of that court or of another court;</p> <p>13</p> <p>(c) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him or her by law; but no person shall be deprived of his or her liberty merely on the ground of inability to fulfil a contractual obligation;</p> <p>(d) for the purpose of bringing him or her before a court in execution of the order of a court;</p> <p>(e) on reasonable suspicion that he or she has committed, is committing or is about to commit a criminal offence under any law;</p> <p>(f) in the case of a minor, under the order of a court or with the consent of his or her parent or guardian, for the purpose of his or her education or welfare;</p> <p>(g) for the purpose of preventing the spread of an infectious or contagious disease;</p> <p>(h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his or her care or treatment or the protection of the community;</p> <p>(i) for the purpose of preventing the unlawful entry of that person into the Cayman Islands, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from the Cayman Islands, or for the purpose of restricting that person while he or she is being conveyed through the Cayman Islands in the course of his or her extradition or removal as a convicted person from one country to another;</p> <p>(j) in execution of the order of a court detaining a person charged with a criminal offence in respect of whom a special verdict has been returned that he or she was guilty of the act or omission charged but was insane when he or she did the act or made the omission.</p> <p>(3) Any person who is arrested or detained shall be informed</p>	<p>Right to Liberty</p> <p>5. (1) Everybody has the right to liberty of the person.</p> <p>(2) The right to liberty does not extend to the following measures taken in accordance with a procedure prescribed by law:</p> <p>(a) the detention of a person after conviction by a competent court;</p> <p>(b) the arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;</p> <p>(c) the arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;</p> <p>(d) the detention of a minor by</p>



	<p align="center">Current Working Draft bill of rights</p>	<p align="center">Alternative draft bill of rights</p>
	<p>promptly, in a language that he or she understands, of the reason for his or her arrest or detention and of the right to remain silent.</p> <p>(4) Any person who is arrested or detained shall have the right, at any stage and at his or her own expense, to retain and instruct without delay a legal practitioner of his or her own choice, and to hold private communication with him or her, and in the case of a minor he or she shall also be afforded a reasonable opportunity of communication with his or her parents or guardian; but when a person arrested or detained is unable to retain a legal practitioner of his or her own choice or be represented by a legal practitioner at the public expense as may be prescribed by any law, he or she may be represented, and hold private communication with, such person as the court may approve.</p> <p>(5) Any person who is arrested or detained –</p> <p>(a) for the purpose of bringing him or her before a court in the execution of the order of a court; or</p> <p>(b) on reasonable suspicion of his or her having committed, or being about to commit, a criminal offence,</p> <p>and who is not released, shall be brought promptly before a court; and if any person arrested or detained in such a case as is mentioned in subsection (2)(e) is not tried within a reasonable time he or she shall (without prejudice to any further proceedings that may be brought against him or her) be released either unconditionally or on reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he or she appears at a later date for trial or for proceedings preliminary to trial, and such conditions may include bail.</p> <p>(6) Any person who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his or her detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful, and he or she shall be entitled to compensation if unlawfully arrested or detained; but a judicial officer or an officer of a court or a police officer acting in pursuance of the order of a judicial officer shall not be personally liable to pay compensation under this subsection in respect of anything done by him or her in good faith in the discharge of the functions of his or her office, and any liability to pay any such compensation in respect of that thing shall be a liability of the Crown.</p>	<p>lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;</p> <p>(e) the detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;</p> <p>(f) the arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.</p> <p>(3) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.</p> <p>(4) Everyone arrested or detained in accordance with the provisions of subsection 2(c) shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.</p> <p>(5) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.</p> <p>(6) Everyone who has been arrested</p>



	Current Working Draft bill of rights	Alternative draft bill of rights
		or deprived of his liberty in contravention of the provisions of this article shall have an enforceable right to compensation.
Non-discrimination	<p>Non-discrimination 16.-(1) Subject to subsections (3), (4), (5) and (6), government shall not treat any person in a discriminatory manner.</p> <p>(2) In this section, “discriminatory” means affording different treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.</p> <p>(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it has an objective and reasonable justification and there is a reasonable proportion</p> <p>24</p> <p>between the provision of law in question or, as the case may be, the thing done under it and the aim which that provision or the thing done under it seeks to achieve.</p> <p>(4) Subsection (1) shall not apply to any law so far as that law makes provision-</p> <p>(a) for the appropriation of revenues or other funds of the Cayman Islands or for the imposition of taxation (including the levying of fees for the grants of licences);</p> <p>(b) with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, the Cayman Islands of persons who are not Caymanian or who do not possess Caymanian status;</p> <p>(c) for the application, in the case of persons of any such description of grounds as is mentioned in subsection (2) (or of persons connected with such persons) of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description; or</p> <p>(d) whereby persons of any such description of grounds as is mentioned in subsection (2) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is objectively and reasonably justifiable in a democratic society and there is a reasonable proportionality between the means employed and the purpose sought to be realised.</p> <p>(5) Nothing in any law shall be held to contravene subsection (1) to the extent that it requires a person to be a Caymanian or to possess Caymanian status, or to possess any other qualification (not being a qualification specifically relating to any such description of grounds as is mentioned in subsection (2)) in order to be eligible for</p>	<p>Non-discrimination 15. (1) Everybody has a right not to be discriminated against.</p> <p>(2) A person is discriminated against if they are treated differently to another person or persons in an analogous situation, whether directly or indirectly, or suffer any detriment, on the grounds of their racial or ethnic origin, colour, creed, nationality or place of origin, sex, sexual orientation, pregnancy, mental or physical disability, age or other status.</p> <p>(3) Nothing in subsection (1) requires the legal recognition of same-sex marriages or gender-reassignment, such matters being in the discretion of Parliament.</p>



	Current Working Draft bill of rights	Alternative draft bill of rights
	<p>appointment to any office in the public service or in a disciplined force or any office in the service of a local government authority or of a body corporate established directly by any law for public purposes.</p> <p>(6) Subsection (1) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (3), (4) or (5).</p> <p>(7) Subsection (1) is without prejudice to any restriction on the rights and freedoms guaranteed by section 9, 10, 11, 12, 13 or 14 if that restriction would, in accordance with that section, be a restriction authorised for the purposes of that section on the ground that –</p> <p>(a) the provision by or under which it is imposed is reasonably required in the interests of a matter, or for a purpose, specified in that section; and</p> <p>(b) the provision and the restriction imposed under it are reasonably justifiable in a democratic society.</p> <p><i>[Note. Subsection (2) lists, non-exhaustively, the grounds of discrimination listed in Article 14 of the European Convention on Human Rights, plus age and mental or physical disability. To balance this, subsection (3) introduces a general exception to the prohibition on discrimination, drawing on section 16(6) of the new Falkland Islands Constitution.]</i></p>	
Limitation of rights	<p style="text-align: center;">***</p> <p>[the limitations on each and every right is set out in cumbersome detail within the same section; which leaves more room for confusion, misunderstanding and to legal challenge]</p>	<p>Limitation on rights</p> <p>(1) The rights and freedoms as set out in subparagraph (3) below may be limited by measures that are objectively justified as necessary in an open and democratic society based on human dignity, equality and freedom, such limitations must:</p> <p>(a) be in accordance with the law;</p> <p>(b) pursue a legitimate aim;</p> <p>(c) be proportionate to the legitimate aim taking into account, among other things:</p> <p style="margin-left: 40px;">(i) the importance of the right at stake;</p> <p style="margin-left: 40px;">(ii) any less restrictive alternative measure that could have been taken; and</p> <p>(d) not impair the very essence of the right.</p>



	Current Working Draft bill of rights	Alternative draft bill of rights
		<p>(2) A legitimate aim includes measures taken for the purposes of securing national security, the protection of public safety, public health and morals and the rights of others.</p> <p>(3) The rights referred to in subparagraph (1) are those set out in sections: 2, 8, 9(1), 10(1), 11(1), 12, 13(1) and (2), 14(1), 15(1), 17(1), 18(1).</p> <p>(4) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.</p>



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APPENDIX 2

PETITION RECEIVED FROM CONCERNED GAYS & LESBIANS

1st February 2009

Sara Collins
Chair, Human Rights Committee
1st Floor, Bermuda House, Dr. Roy's Drive
P.O. Box 30664
Grand Cayman KY1-1203

Dear Sara

We are presenting this letter as a follow-up to our previous letter of 30th June 2008 as we are very concerned with the constitution that has been drafted following the two rounds of talks held in the Cayman Islands.

It appears that the constitution as it now stands allows for the continued discrimination of gays and lesbians in these islands (as well as numerous other minorities whose protection and benefits are being sacrificed just to ensure gays and lesbians are discriminated against) and we are fearful as to what could happen to gays and lesbian should such discrimination be allowed to continue.

We applaud the Human Rights Committee ("HRC") for the stance they have taken and confirm our support to ending this discrimination. As Caymanians, we appeal to the HRC to put forth our proposals in the final round of talks to be held in London and to make it known on our behalf, that even as we continue to live in fear and suffer from discrimination, we hope and pray that the UK will see fit to grant us the rights we seek and not to allow those who seek to vilify us to succeed in the unjust treatment of minorities.

We remain concerned gays and lesbians for a fairer, more equal and better Cayman Islands.

30th June 2008

Danielle Coleman
Secretary, Human Rights Committee
1st Floor, Bermuda House, Dr. Roy's Drive
P.O. Box 30664
Grand Cayman KY1-1203

Dear Danielle

We are presenting this letter as representatives of gay and lesbian men and women who reside in the Cayman Islands to make the Human Rights Committee aware of the fact that there are many gays and lesbians in these islands who wish to have gay and lesbian rights included in the proposed Bill of Rights to be enshrined in the new constitution but through fear of victimization cannot speak out publicly.

Gays and lesbians in these Islands have been and continue to be discriminated against in all facets of society in the Cayman Islands and we have lived and continue to live in fear. However, we feel that the time has now come, to speak out through this proposal to put a stop to the injustices which we have all experienced and which we have to live with on a daily basis. We are your Doctors, nurses, lawyers, teachers, bankers, accountants, artists, government servants and the list goes on. We need to have it known that these assaults against us are inhuman. We are not asking for "special rights" but rather are asking to be protected equally by a Bill of Rights just as other groups have asked for protection. After all, a civilization is not measured by its treatment of the powerful and the popular but rather its protection of minorities. We beseech the crown to intervene for our protection.

We appeal to the Human Rights Committee to put forth our proposals and to make it known on our behalf that we continue to suffer from discrimination in our own Islands as people are allowed to continue to vilify us. It is imperative that our rights are enshrined in the new Constitution as this would protect future generations more fully than separate laws could.

We all have stories to tell. However, because of fear, there were only a few who would even meet privately to discuss the issue. Following this private meeting, we arranged to have a meeting with the Constitutional Secretariat to discuss this issue. However, out of those few who initially met privately, there were even fewer who would meet with the Secretariat. We would also like to add that, although, the Secretariat advised us that they would be bringing our views to the public by addressing this issue in meetings and by posting our letter to them on their website, we have seen no evidence of this. This should signal to everyone concerned, the urgent need for our voices to be heard in this discussion of Constitutional reform.

There are many issues and situations on these islands where it is possible to freely discriminate against gays and lesbians. For example, Caymanians who are in a relationship with a foreign national live in fear that our partners' work permits may be denied resulting in the destruction of our homes and domestic happiness. Even when our partners' permits are granted, we live with the fear that our life partner will be rolled over and we will be forced to choose between leaving our country and families to living without our loved one.

In times of medical emergencies, those of us with partners of a foreign nationality fear that if our loved one became ill that we would have no say concerning their care. If our partner's illness prevented them from working, we fear they would lose their job and be forced to leave the Islands and the person they loved.

Most gay and lesbian Caymanians dare not speak out of their sexual orientation as they are afraid their careers/ jobs would be in jeopardy should it be discovered they were gay or lesbian. Although some forward-looking companies on this island contain anti-discrimination clauses in the workplace, it is upsetting to us that these same rights are not afforded to us by our government.

Those of us who own property live in fear that upon the demise of a partner that shared property could be taken away from the remaining partner through lack of estate planning and even if estate planning had taken place that there would be a battle with family members to the right of that property.

Many of our legal problems not shared by married couples would be resolved with protections via civil unions. We realize that it has been proposed the reformed constitution contain a definition of marriage as occurring between members of the opposite sex. We have no quarrel with this traditional definition of marriage. Instead we ask for our particular situation to be acknowledged and provision be made in the Bill of Rights for civil unions to occur as was recently agreed upon in the United Kingdom. Following from this, we would ask that the Human Rights Committee appeal on our behalf to the Governor, to enact legislation to allow for civil unions which would afford same sex couples the same protections and benefits enjoyed by heterosexual couples.

We would like to mention that expatriate gay and lesbian residents face the same fears and to some extent face even greater challenges. To this point in time, Caymanians and expatriates have not spoken out to legislators to seek protection in the form of human rights. In this historic moment of Constitutional reform, we pray that we will have a Bill of Rights in the Cayman Islands that includes rights for gays and lesbians. So we propose the following:

1. For gays and lesbians to be protected against all manner of discrimination.

2. For gays and lesbians to be able to commit to civil unions with the same protections and benefits enjoyed by heterosexual couples.
3. For gays and lesbians to be protected against hate crimes, including the singling out of persons for personal or property crimes based on sexual orientation as such crimes are an attack on humanity.

Although we have made our argument on behalf of the gays and lesbians residing in the Cayman Islands, we believe there are many reasonable and fair-minded heterosexual individuals in our society who would gladly support our proposals. We have chosen to speak our minds at this time since we know complacency and fear will keep our beloved islands from maturing into a welcoming and just nation.

We cannot simply step aside as this Constitutional reform process continues and see our needs excluded from the discussion. As was mentioned earlier, we do exist here, we do contribute to Caymanian society and we feel that we now have to make our voices heard.

Thank you for allowing us to present our proposals and thank you in advance for putting them forward for discussion.

Signed

Concerned gays and lesbians for a fairer, more equal and better Cayman Islands.

APPENDIX 3

SAMPLE OF PROVISIONS FOR EQUALITY AND AGAINST DISCRIMINATION FROM OTHER CONSTITUTIONS AND FROM INTERNATIONAL TREATIES

The Universal Declaration of Human Rights (1948)

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

The International Covenant on Civil and Political Rights (1966)

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The European Convention on Human Rights (1950)

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Constitution of the United States of America (1789)

14th Amendment (1868)

All persons born or naturalised in the United States, and subject to the jurisdictions thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of the Republic of Ireland (1937)

Article 40(1)

All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

The Canadian Charter of Rights and Freedoms (1982)

Section 15

- (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

The Constitution of South Africa (1996)

Section 9

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The Constitution of the British Virgin Islands (2007)

Section 26

- (1) In this section, the expressions –
- (a) “discriminatory” means affording different treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national minority, property, family relations, economic status, disability, age, birth, sexual orientation, marital or other status; and
 - (b) “public authority” means any statutory body or company or association in which the Government of the Virgin Islands has an interest and which performs a public function of duty.
- (2) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.
- (3) Subject to subsections (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting under any written law or performing the functions of any public office or any public authority.

The Constitution of the Turks and Caicos Islands (2006)

Section 15

- (1) Subject to subsections (4), (5) and (8), no law shall make any provision which is discriminatory either of itself or in its effect.

- (2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any public authority.
- (3) In this section, “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions such as by race, national or social origin, political or other opinion, colour, religion, language, creed, association with a national minority, property, sex, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.