

# THE ESTABLISHMENT OF A HUMAN RIGHTS COMMISSION IN THE NEW CONSTITUTION FOR THE CAYMAN ISLANDS

## 1. Establishment of a Human Rights Institution in the Constitution

1.1 In addition to advocating for the inclusion of a comprehensive Bill of Rights in any new Constitution for the Cayman Islands, the Cayman Islands Human Rights Committee (HRC), as the national institution responsible for the promotion and protection of human rights in Cayman, believes that this national body ought to be formally established by the Constitution. Such a step would mean that in addition to identifying the rights given to the people and setting out the mechanism for protection of these rights Cayman's new constitution would also establish a national body responsible for the promotion and protection of human rights.

## 2. Commission or Committee

2.1 If this institution is to be formally enshrined in the Constitution, it may be more appropriate to designate it as a Commission, as opposed to a Committee. A change in terminology may also be appropriate depending upon the range of functions which are given to the institution.

## 3. Location in the Constitution

3.1 A new Human Rights Commission could be established in the Constitution's Chapter of Fundamental Rights side-by-side with the substantive rights. Alternatively, taking an example from Chapter 9 of the South African Constitution, Cayman's Human Rights Commission could be located alongside other institutions such as the Office of the Complaints Commissioner, the Auditor-General or any Electoral Commission, in a separate

chapter identifying a range of State institutions intended to support constitutional democracy.

#### 4. Framework

4.1 By way of example, the Constitution of the Republic of South Africa also sets out both the functions and the governing principles of its Human Rights Commission. It would seem appropriate for the Cayman Islands Constitution to mirror this two-stage approach, beginning with the general objectives of the new Commission as its framework, which is then supplemented by the functions assigned to achieve these objectives.

4.2 By way of further example, section 184 of The Constitution of the Republic of South Africa lays these out as follows:

(1) The Human Rights Commission must-

- (a) promote respect for human rights and a culture of human rights;
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in the Republic.

(2) The Human Rights Commission has the power, as regulated by national legislation, necessary to perform its functions, including the power

- (a) to investigate and to report on the observance of human rights;
- (b) to take steps to secure appropriate redress where human rights have been violated;
- (c) to carry out research; and
- (d) to educate.

(3) Each year, the Human Rights Commission must require relevant organs of State to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food,

water, social security, education and the environment.

(4) The Human Rights Commission has additional powers and functions prescribed by national legislation.

4.3 The HRC proposes that this model should be adapted for the Cayman Islands context. It approves of the obligation placed upon the Commission in sub-section 1 and the reciprocal burden also placed on State Institutions in sub-section 3. Sub-sections 2 and 4 are discussed in further detail below. In terms of refining this approach for the Cayman Islands, the second function established by the Human Rights Act 1993 in New Zealand for its Commission might also be worth considering. This charges the New Zealand Human Rights Commission with responsibility to:

- Encourage the maintenance and development of harmonious relationships between individuals and amongst diverse groups in New Zealand society.

While this terminology may not be completely transferable, the sentiment conveyed could be translated for the Cayman Islands.

## 5. Functions

5.1 While it would be both necessary and appropriate to establish the new Commission's main functions in the Constitution, as an alternative, the functions of a human rights commission could be elaborated on or extended as necessary, in a separate Human Rights Commission law. Furthermore, a Human Rights Commission could be empowered by various other laws to provide administrative, investigative and conciliation functions, usually enacted to address various forms of discrimination, as noted above in the South African Constitution. By way of another example, the Human Rights and Equal Opportunity Commission of Australia, was set up under a specific law, The Human Rights and Equal Opportunity Commission Act 1986, and also has specified responsibilities



under various other federal laws, such as the Age Discrimination Act 2004, the Disability Discrimination Act 1992, the Race Discrimination Act 1975 and the Sex Discrimination Act 1984.

5.2 The HRC's current Terms of Reference provide a good indication of the types of functions that any human rights institution in the Cayman Islands needs to be engaged in. However, in the interests of constitutional brevity, these could be summarized into the following:

- Education and public awareness;
- Investigation and wherever possible resolution of human rights complaints;
- Compliance with international human rights treaties;
- Informing policy and legislative development.

5.3 The extent to which a Human Rights Commission is expected to resolve disputes will depend on the type of enforcement powers it is given under Cayman's new Constitution. Nonetheless, whatever legal remedy is provided, this would not necessarily prevent the new Commission having a role in receiving and publicizing human rights complaints that it receives; mediating in human rights disputes for prompter and cheaper resolution; and intervening in legal proceedings where its expertise could prove beneficial to the interpretation of human rights in the Constitution.

## **6. Scope of Rights**

6.1 In its Terms of Reference, the HRC is specifically empowered to refer to the rights contained in any international human rights treaty which has been extended to the Cayman Islands. Once a Bill of Rights finds its way into the Constitution of the Cayman Islands, this should become the primary reference point for the human rights institution established in the Constitution. Indeed, the Chapter of Fundamental Rights in the Constitution should become the touchstone for the proposed new Commission when working towards the resolution of human rights complaints. However, this ought not to

preclude the new institution from referring to international human rights treaties both for guidance on the definition of rights included in any new Constitution and when providing education on broader human rights issues, which extend beyond the rights that are ultimately enshrined in the Constitution. To this end, it may be worthwhile identifying the various international treaties that the new institution may draw upon for inspiration and enlightenment in the enabling legislation.

- 6.2 It is also worth noting here that it is the preliminary view of the existing HRC that the new Constitution for the Cayman Islands should consider incorporating more than just the European Convention on Human Rights into its Bill of Rights and that Cayman's new Constitution could be usefully informed by more recent international human rights treaties and domestic constitutions.

## **7. Appointments**

- 7.1 It is important that the Constitution provide an independent method for appointing and removing members to the new Human Rights Commission to ensure security of tenure and independence.