Appendices
Appendix 1: Human Rights Commission Members

Mr Richard Coles – Chairman

Mr Coles is an experienced lawyer both in England and in the Cayman Islands, Solicitor admitted in England and Wales, a Cayman Islands Attorney-at-law and former Attorney General for the Cayman Islands. He is a member of the Law Society of England, the Caymanian Bar Association, the Commonwealth Lawyers Association, the Commonwealth Parliamentary Association, a Fellow of the Caribbean Law Institute and the Institute of Advanced Legal Studies in London. He is the Immediate Past Chairman of Cayman Finance who has the distinction of being a Freeman of the City of London.

Miss Sara Collins

Miss Sara Collins is a retired partner of Conyers Dill & Pearman in the Cayman Islands. As a graduate of the London School of Economics she was admitted as a barrister of England & Wales (not currently practicing) as well as an attorney at law in the Cayman Islands.

Mr Alistair Walters

Alistair Walters is an attorney at law and has been practicing for over 20 years. He is the managing partner of Campbell's Attorney at Law and has been with the firm for 13 years, prior to working in London, England. Alistair is a member of The Rotary Club of Grand Cayman, Chairman of the Association of Cayman Mediators and Arbitrators (certified by the London School of Mediation), and former member of the Board of Governors of Saint Ignatius Catholic School.

Bishop Nicholas JG Sykes, B Sc., Dip Ed., MTS

Bishop Sykes has taught science, mathematics and religious education for over 20 years in public schools and a teachers' college throughout Jamaica, the Cayman Islands and the United Kingdom. In 1979 he became Chairman of the Association of Science Teachers of Jamaica. Ordained as a priest since 1976, Bishop Sykes is currently the Rector of St. Alban's Anglican Church in George Town and Treasurer of the Cayman Ministers' Association. He has authored the book "The Dependency Question" and numerous other articles.

Appendix 2: Cayman Islands Bill of Rights, Freedoms and Responsibilities (BoR)

1. Guarantee of Rights, Freedoms and Responsibilities
2. Life
3. Torture and inhuman treatment
4. Slavery or forced or compulsory labour
5. Personal liberty
6. Treatment of prisoners
7. Fair trial
8. No punishment without law
9. Private and family life
10. Conscience and religion
11. Expression
12. Assembly and association
13. Movement
14. Marriage
15. Property
16. Non-discrimination
17. Protection of children
18. Protection of the environment
19. Lawful administrative action
20. Education
21. Public emergencies
22. Protection of persons detained under emergency laws
23. Declaration of incompatibility
24. Duty of public officials
25. Interpretive obligation
26. Enforcement of rights and freedoms
27. Remedies
28. Interpretation of the Bill of Rights

Appendix 3: International Human Rights Treaties Extended to the Cayman Islands

(as at 1 May, 2010 based on information provided to the HRC by outside sources)

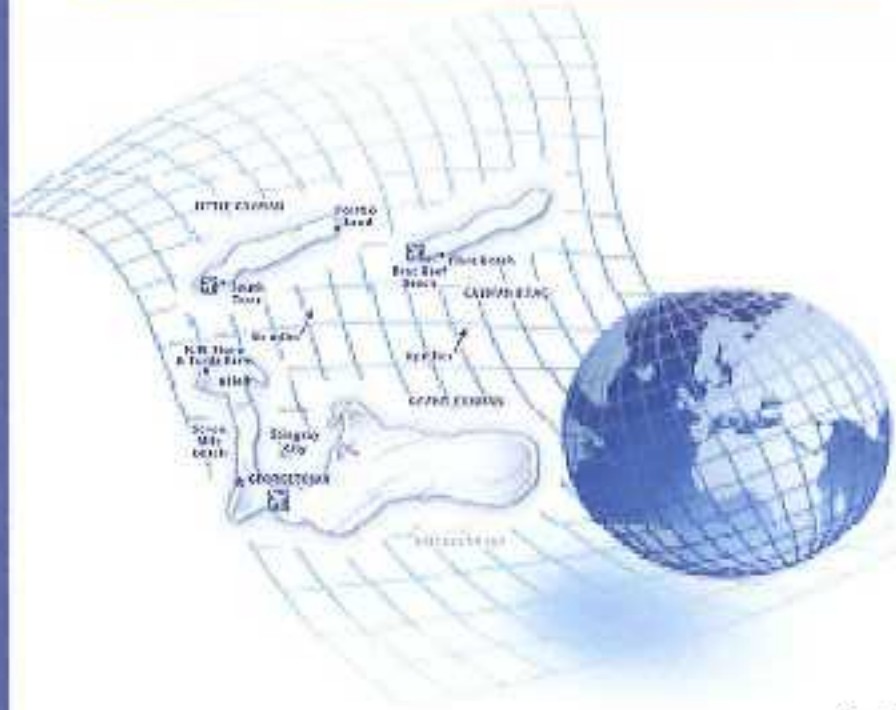
- European Convention on Human Rights
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on Consent to Marriage, Minimum Age and Registration
- Convention on the Abolition of Slavery
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Rights of the Child
- Convention relating to the Status of Stateless Persons
- Convention on the Political Rights of Women
- Registry of the European Court of Human Rights September 2003
- International Labour Organisation Convention 29
- International Labour Organisation Convention 87
- International Labour Organisation Convention 98
- International Labour Organisation Convention No. 105
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education

2013

Cayman Islands
Human Rights Commission

Report on Cuban Migrants

A review of Policy, Legislation, and Practice



Summary of Complaint

The Human Rights Commission ("Commission") received a complaint on 22 February 2011 from a member of the public indicating that in his opinion the Cayman Islands Government was breaching s.1 (Guarantee of Rights, Freedoms and Responsibilities) and s.3 (Torture and Inhuman Treatment) of Part One of the Cayman Islands Constitution Order – the Bill of Rights, Freedoms and Responsibilities.

The complainant alleged that; "*it is my view that the restrictions that the Cayman Islands Government has placed on residents of the Cayman Islands to not allow them to assist Cubans who land in Cayman with the basic necessities of life – food, water, medical aid, and fuel, before sending them off to sea is against international rules for Human Rights. I believe that if a complaint was made to the United Nations and the EU that Cayman would be severely criticised.*

Let us say that a group, including women and children, had to stop in Cayman in their boat due to bad weather. They obviously needed fuel, water, food and perhaps some medical aid. However, individual Caymanians wanted to offer such help, at their cost, but officials stopped them. The boat then left and all persons subsequently died from lack of water, food, and fuel. This then was reported to the international press, United Nations, and the EU. Cayman would be in serious trouble, in my view.

I urge you to investigate this with Government, reminding them that their policy, in that regard, greatly exposes the Cayman Islands. It especially looks bad (and would allow the international press to write a colourful negative report in it), as Cayman's heritage is that of a seafaring nation and Cayman should therefore be much more sympathetic to persons in a boat exposed to the dangers of the open sea.

I appreciate that a small country such as Cayman must ensure that it is not attractive to huge numbers of persons wanting to come here and claim refugee status, but the Cubans coming here are usually on their way to, directly or indirectly, the U.S.A. This method of not offering humanitarian assistance is not necessary to discourage Cubans from trying to come to the Cayman Islands."

The complaint further indicated that as a result of his complaint he would like "*for Government to allow private citizens to provide basic necessities of life – food, water, fuel and medical aid – to Cubans passing by Cayman by boat on their wait to other destinations.*"

After reviewing the complaint the Human Rights Commission agreed to conduct an investigation into the matter and ultimately considered whether there is any justification under international law for the Cayman Islands Government's policy of preventing anyone within the Cayman Islands from assisting Cuban migrants who come ashore or are found within the territorial limits by providing them with the basic necessities of life.

Terms of Reference

Following discussion of the complaint, the Commission decided of its own motion to undertake a review of the following matters:

1. To conduct a review of the Memorandum of Understanding ("MOU") between the governments of Cuba and the Cayman Islands dated 15 April 1999;
2. To ensure that the Commission has complete information about the procedures for screening irregular migrants after disembarkation and ensuring that legitimate asylum claims are brought forward and dealt with appropriately;
3. To conduct an inquiry into the scope of Section 109 of the Immigration Law (2011 Revision) and how it is applied in practice; and
4. To determine how the Marine Unit assesses and determines whether to bring ashore migrants found within the territorial waters of the Cayman Islands

In order to engage effectively in as comprehensive a review as possible a sub-committee was established and during the course of the inquiry, members of the sub-committee met with various government agencies. Those meetings took place on the following dates:

1. On 26th April 2012, members of the Sub-Committee met with the Chief Immigration Officer and Mr Gary Wong;
2. On 23 January 2013, representatives of the Commission met with the Honourable Deputy Governor and a representative of the Attorney General;
3. On 30 January 2013, representatives of the Commission met with the Chief Immigration Officer and the Director of Public Prosecutions
4. On 6 February 2013, representatives of the Commission met with the Commissioner of Police and Police Superintendent Kurt Walton.

While the Human Rights Commission examined the issues herein generally with regard to migrants originating from Cuba, it is noted that the Cayman Islands Government's practices, processes, and procedures for handling irregular immigration apply to all migrants regardless of jurisdiction of origin.

Section 1
Background

1.1 Illegal Migration

Every country has the sovereign right to protect its borders and regulate entry by making it a criminal offence to enter the country without the legitimate means or documentation or at unauthorised points of entry. The Cayman Islands, like any other country, should not facilitate irregular migration, and there is an obligation to balance migrant control with ensuring fair and appropriate asylum processes. The Cayman Islands do not support or condone illegal migration. This intention is embodied in the Memorandum of Understanding ("MOU") between the Cayman Islands Government and the Republic of Cuba accompanied by the Internal Guidelines of July 2008 and local Immigration laws.

Serious ramifications could also arise from providing assistance for irregular migration. The past Chief Immigration Officer Franz Manderson stated, on 2 April, 2007 in a press release by the Cayman Islands Government, "For example, terrorists could travel under the guise of illegal Cubans and, with our assistance, enter nearby countries and eventually enter the U.S."[1] The aforementioned press release further reiterated that the Cayman Islands Government has a responsibility to do everything possible to prevent illegal migration, whether it is in relation to economic migrants, the smuggling of people, the threat of terrorism, or the sad story of human trafficking that affects many countries today.

1.2 What is a "Refugee"?

The perception by the public is that the Cayman Islands Government refuses to provide assistance, or allow the provision of assistance, to "Cuban Refugees". This is a misunderstanding. The term "Refugee" has a very specific meaning. A person fleeing a developing country to look for a better life elsewhere is not automatically a "refugee" under international law. To be classified as a refugee, such a person must satisfy the requirements of the 1951 United Nations Convention on Refugees and its subsequent Protocol.

The 1951 Convention on Refugees describes a refugee as: "A person who is outside his/ her country of nationality or habitual residence; has a well-founded fear of persecution because of his/ her race, religion, nationality, membership in a particular social group or political opinion; and is unable or unwilling to avail himself/ herself of the protection of that country, or to return there, for fear of persecution." This is a very specific definition and is different from someone who goes to a new country because living conditions or opportunities for jobs are not ideal in their own country. Such individuals have been termed "Economic Migrants". In the light of the Cayman Islands' legitimate best interests to comply with international law and adhere strictly to such a definition of "refugee", "economic migrants" are not to be classified as or assumed to be refugees.

1.3 The Memorandum of Understanding ("MOU")

The MOU was signed on 15 April 1999 between the governments of the Republic of Cuba and the Cayman Islands. So far as the Commission is aware, it is the only MOU of its kind entered into by the Government of the Cayman Islands; while Cuba may not be the only country which

[1] Cuban Migrant Policy. CIG Press Release. 2 April, 2007
http://www.gov.ky/portal/page?_pageid=1142,1940980&_dad=portal&_schema=PORTAL

is a source of irregular migration to, or through, the Cayman Islands, it is the most significant source of this type of migration by far. The MOU sets out a protocol for the return of all Cuban citizens who seek to migrate illegally to, or through, the Cayman Islands, including time frames for the reporting of any such arrivals to the Cuban government and the process for repatriation.

Following the meeting with the Chief Immigration Officer, Linda Evans, and Deputy Chief Immigration Officer Gary Wong on the 26th April 2012, the Commission received and reviewed the Immigration Detention Centre Operational Manual, a Cuban Migration Information Form required to be completed by migrants, a general statement on Migrant Arrival into the Cayman Islands, and the Asylum Policy and Procedure. Statistics on Cuban arrivals, repatriations and other departures from 2006 to 2012 were also provided. The Commission is satisfied that the asylum screening procedures have been adequately explained and documented by the Immigration Department in compliance with international human rights standards. It should be stressed that the Commission was not in a position to assess how the procedures have been, or are being, applied in practice and therefore cannot in this report comment on the adequacy of implementation of those procedures.

At the meeting with the Honourable Deputy Governor on 23 January 2013, the Commission agreed that it would look into the possibility of conducting an audit of the procedures for notifying irregular migrants about their rights, and for screening any claimants for asylum. The matter will be placed on the Commission's agenda for follow up action.

The Honourable Deputy Governor was also advised at that meeting that work should be done to ensure that timelines set out in the MOU are complied with and to ensure that screening of asylum claimants takes place within a reasonable period of time in order to avoid the prospect that unreasonable delays which could lead to potential claims under the Bill of Rights, Freedoms and Responsibilities.

The Commission accepts that it would not be helpful or appropriate for the MOU to be amended to refer specifically to asylum screening procedures; it is implied that any claimant who succeeds in claiming asylum must by virtue of that fact be exempt from the obligation to repatriate irregular migrants. Furthermore, specific references to asylum, in particular when lists identifying illegal migrants are to be sent to the government of Cuba under the terms of the MOU may result in breaches of privacy for those seeking asylum and cause difficulty in conducting the asylum screening confidentially and comprehensively. The language of the MOU should, however, be more flexible so that it does not appear that repatriation is the default option.

It is noted, however, that paragraph 2 of the MOU requires the Cayman Islands Government to provide a list of all irregular migrants within 7 days of their arrival. The Commission was informed that this timeframe is unrealistic, not least because it does not allow sufficient time for legitimate asylum claimants to be identified and dealt with confidentially. The Honourable Deputy Governor informed the Commission that this timeframe will be re-considered.

Since meeting with the Human Rights Commission the Honourable Deputy Governor has had initial discussions with the Cuban Ambassador regarding guidance and assistance on the protocols required to amend the MOU in order to address the concerns detailed above. These discussions are on-going and the Honourable Deputy Governor has agreed to keep the Commission informed of any developments.

1.4 Options Given to Migrants

Any migrant who enters the territorial waters of the Cayman Islands will be subject to domestic laws, regulations and policies. The first point of contact for arrivals by sea will be with the Marine Unit, who will conduct an assessment in the manner summarised below (page 7). A migrant may either choose to continue on his or her journey or to come ashore. If the migrant chooses to continue on his or her journey, he or she must leave the territorial waters of the Cayman Islands within a reasonable time and accept that he or she will receive no assistance in any form from the Cayman Islands Government. If he or she chooses to come ashore, he or she must accept that he or she will be subject to the laws of the Cayman Islands and will be processed in accordance with those laws. These matters must be explained to the migrants when the options are presented.

There are circumstances in which the Cayman Islands Government may take action when it is absolutely necessary to avoid possible liability, regardless of the wishes of the migrants. These include[2]:

a. Cuban migrants cannot opt to continue with their journey if weather conditions are unfavourable in the opinion of the Cayman Islands Meteorological Department. They will be taken ashore and processed;
b. Where a vessel carrying Cuban migrants is threatened by grave and imminent danger every effort will be made to prevent the loss of life. Anyone rescued will be taken ashore and processed;
c. When an assessment is made by the Marine Unit that a boat is not seaworthy; *"Seaworthy" is defined in the 6th edition of Hill's "Maritime Law" as the "fitness of a ship to withstand the expected hazards of the contemplated voyage with cargo."* and/or
d. If a vessel does not leave Cayman Islands territorial waters within a reasonable time after the migrants aboard elect to continue their journey, the relevant Cayman Islands authorities may seize their vessel and inform them that they have entered illegally into the Cayman Islands. They will be taken ashore and processed[3].

If the migrant decides to come ashore, he or she will be provided with food and water accommodation, legal advice, medical care and any other necessary assistance and will be processed by the Immigration Department in accordance with Cayman Islands law. The applicable internal guidelines require that Immigration Officers explain the options to the migrant in a language known to him/her, including the procedure for applying for asylum, immediately or as soon as possible after he or she is detained. All irregular migrants will be interviewed by an Immigration Officer who will determine whether a claim for asylum arises. Unless the migrant is found to qualify for refugee status under the 1951 convention, he or she will be repatriated to Cuba in accordance with the terms of the MOU.

Section 84 (12) of the Immigration Law (2012) Revision states: "*Where a person who has applied for or intends to apply for asylum is desirous of voluntarily leaving the Islands for a country in which he hopes to take up residence, the Chief Immigration Officer may render to him-*

(a) Advice and other help in relation to his proposed journey; and
(b) Financial assistance to defray the cost of his travel and upkeep."

[2] Cayman Islands Immigration Department. Cuban Migrants Internal Guidelines. July 2008.

Thus if the person qualifies as a refugee under international law and has obtained permission from a third country to enter and be processed for asylum, he or she may be granted appropriate assistance from the CIO in accordance with section 84(12) of the Immigration Law.

The Cayman Islands are party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 3 of this convention states: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

The Cayman Islands Immigration Department must consider the implications of Article 3 as outlined above during the repatriation process.

A press article describing the 2007 visit to the Cayman Islands by Senior Protection Officer for the United Nations High Commissioner for Refugees (UNHCR) Grainne O'Hara, noted that "In general, she said, the treatment of the Cuban migrants currently housed at the facility meets international human rights standards."[3]

1.5 Section 109 of the Immigration Law (2011 Revision)

Section 109 provides that: *"A person who, in contravention of this Law and whether for financial or material benefit or not, assists or facilitates the transportation, harbouring or movement into or out of the Islands, of an individual commits an offence and is liable on summary conviction to a fine of fifty thousand dollars and to imprisonment for seven years".*

The scope of this provision was discussed during the meeting with the Director of Public Prosecution and the Chief Immigration Officer on 30 January 2013. The rationale behind this section is clearly to discourage assistance of illegal migration into the Cayman Islands, or through the Cayman Islands to another country. It is clear that it would be illegal to assist any person in entering the territorial waters of the Cayman Islands (within 12 miles from shore) and this kind of activity should and would be prosecuted. Members of the public should also report to the relevant authorities any irregular migrants seen within this radius or any activity that may involve irregular migration. It is clear that the section is aimed at preventing complicit dishonesty, i.e. human smuggling. It was noted at the meeting that no one has been prosecuted to date simply for providing food and water to someone who is or may be in peril at sea.

The Commission pointed out that members of the public should be educated about these obligations and the proper method for reporting illegal activity of this kind. There appears to be some lingering confusion about what section 109 means.

1.6 The role of the Marine Unit

The Commission met with the Commissioner of Police and Superintendent Kurt Walton of the RCIPS on 6 February 2013. The RCIPS representatives explained that the task of the Marine

[3] Discussing Migrant Policies. CIG Press Release. 6 July, 2007
http://www.gov.ky/portal/page?_pageid=1142,2133526&_dad=portal&_schema=PORTAL

Unit is to protect life and that their primary duty is to ensure the safety of the inhabitants of any vessel encountered at sea within the 12 mile jurisdiction of the Cayman Islands.

The Unit will first assess the sea worthiness of the vessel, determine whether any persons on board require immediate medical treatment, take note of whether any minors are on board, and assess the prevailing weather conditions which are likely to impact on the journey. Under the Port Authority Regulations, the RCIPS is empowered to seize any vessel which is not seaworthy. Following their assessment, the officers will determine whether to prevent the onward passage of the vessel; this assessment is of necessity a judgment call, made on the spot, taking into account all of the factors set out above. There may not always be an immigration official present when this assessment is made and/or there may be language barriers which mean that information about asylum screening procedures cannot be given until the occupants of the vessel are brought ashore.

Section 2
Human Rights in Question

2.1 European Convention on Human Rights ("ECHR")

At date of the original complaint Part One of the Cayman Islands Constitution Order, namely the Bill of Rights, Freedoms and Responsibilities ("BoRFR") had not yet come into force. The Commission therefore considered Article 1 and Article 3 (Torture) of the "ECHR" in preparing its response to that complaint.

Article 1 of the ECHR states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

2.2 Bill of Rights, Freedoms and Responsibilities (BoRFR)

S. 1 of the BoRFR – Guarantee of rights, freedoms, and responsibilities says

Whereas all peoples have the right of self-determination and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development and may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law;

***1.**—(1) This Bill of Rights, Freedoms and Responsibilities is a cornerstone of democracy in the Cayman Islands.*

(2) This Part of the Constitution—

(a) recognises the distinct history, culture, Christian values and socio-economic Framework of the Cayman Islands and it affirms the rule of law and the democratic values of human dignity, equality and freedom;

(b) confirms or creates certain responsibilities of the government and corresponding rights of every person against the government; and

(c) does not affect, directly or indirectly, rights against anyone other than the government except as expressly stated.

(3) In this Part "government" shall include public officials (as defined in section 28) and the Legislature, but shall not include the courts (except in respect of sections 5, 7, 19 and 23 to 27 inclusive).

S. 3 of the BoRFR – Torture says

***3.** No person shall be subjected to torture or inhuman or degrading treatment or punishment.*

2.3 Applicability

Any persons, including Cuban migrants, are considered to be within the Cayman Islands' jurisdiction upon entering territorial waters, which according to the Port Authority Law (1999 Revision) is "that part of the sea adjacent to the Islands being within 12 miles of the coast at low tide."

The provisions of the ECHR and the BoRFR referred to above will apply to any person within those territorial limits. Section 5 of the BoRFR sets out the right to liberty and security: "Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country..."

Whether or not a person is lawfully detained under the Constitution, under section 3 of the BoRFR there is an absolute prohibition against torture.

Section 3
Conclusion

It is in the best interests of the Cayman Islands to adhere strictly to the definition of a refugee under international law. During Ms O'Hara's visit she stated "It is unreasonable for the Cayman Islands, like any other state, to facilitate irregular migration; there is an obligation to balance migrant control with asylum processes." Because the three Cayman Islands are on a direct migration route for Cuban refugees, there are various issues that have to be tackled within the context of fair policies.

It seems unlikely that acts such as providing food and/or water or any other humane assistance to Cuban migrants encountered at sea or after having recently come ashore could or should be prosecuted under the Immigration Law. However, this is simply the view of the Commission and does not constitute legal advice or a binding ruling on the matter. There is a clear prohibition against any act which would constitute aiding and abetting illegal entry into, or exit from, the Cayman Islands. This suggests that there is an obligation to report to the relevant authorities every incident occurring in circumstances that suggest that an illegal entry has occurred or is being attempted.

The Commission reiterates its view that there should be more public education undertaken about the scope of section 109 of the Immigration Law.

The Commission undertakes the following action points:

- to report to the Honourable Deputy Governor as to the feasibility of conducting an audit of the asylum screening procedures in practice; and
- to follow up with the Honourable Deputy Governor periodically to check the status of any updates to the MOU.

The Commission would like to thank the persons named in this report for their co-operation in providing documentation and meeting with members of the Sub-Committee. Their assistance has been invaluable.

Section Four
Appendix

4.1 Memorandum of Understanding between the Government of the Cayman Islands and the Government of the Republic of Cuba

MEMORANDUM OF UNDERSTANDING

BETWEEN THE GOVERNMENT
OF THE CAYMAN ISLANDS
AND THE GOVERNMENT
OF THE REPUBLIC OF CUBA

SIGNED ON 15th DAY OF APRIL 1999

BY: HIS EXCELLENCY MR JAMES M RYAN, MBE, JP
ON BEHALF OF THE CAYMAN ISLANDS GOVERNMENT

AND

DR JOSE PERAZA CHAPEAU
ON BEHALF OF THE OF GOVERNMENT OF THE REPUBLIC OF CUBA

MEMORANDUM OF UNDERSTANDING

BETWEEN THE GOVERNMENT OF THE CAYMAN ISLANDS AND THE GOVERNMENT OF THE REPUBLIC OF CUBA

Taking into account that, on various occasions, citizens of the Republic of Cuba have arrived directly and illegally in the territory of the Cayman Islands using various routes, but in particular by sea.

Considering the wish of the Government of the Cayman Islands and the Government of Cuba that these Cuban citizens be repatriated immediately to the Republic of Cuba.

The two Governments have reached the following understanding:

1. The Government of the Republic of Cuba shall accept the return of all Cuban citizens who left Cuban territory and illegally reached the territory of the Cayman Islands as from the entry into force of the present Memorandum of Understanding.

2. The Government of the Cayman Islands shall inform the Government of the Republic of Cuba, in no more than 7 days, of the illegal arrival of Cuban citizens from Cuban territory. This information shall consist of a list of the persons with their names, two surnames and alleged addresses.

   This shall thereafter be completed, in as short a time as possible with details of sex, date of birth, their most recent address in Cuba to include street name, house number, flat number, municipality and province, as well as a photograph of each person and the place and date of their illegal arrival in the Cayman Islands.

3. In the interests of their security, the Cuban citizens repatriated to Cuba should be escorted by officials from the Government of the Cayman Islands.

4. The Government of the Republic of Cuba shall reply to the Government of the Cayman Islands, in no more than 20 days from the date of receipt of the information provided by the Government of the Cayman Islands, referred to in the above paragraph 2 item 2, its authorization to accept the return of the Cuban citizens to be repatriated.

5. Once the agreement from the Cuban Government has been obtained, the Government of the Cayman Islands shall inform the Cuban Government, at least 7 days notice, the date of repatriation to Cuba of the Cuban citizens, their names, as well as those of the officials of the Government of the Cayman Islands who shall accompany them.

6. The Government of the Cayman Islands shall repatriate those Cuban citizens who arrive illegally in the Cayman Islands and directly from Cuba and have been submitted to the procedures provided for in this Memorandum of Understanding and accepted by the Government of the Republic of Cuba. These citizens shall be repatriated by air via "José Martí" International Airport in Havana.

7. The Government of Cuba agrees not to charge arrival tax or any other tax related to the repatriation of these Cuban citizens.

8. The persons repatriated to the Republic of Cuba shall be able to bring with them only the belongings, which they had on their illegal arrival in the Cayman Islands directly from Cuba. They shall not be able to return with any money from other countries or other effects of any kind.

9. The Government of the Republic of Cuba shall facilitate the entry to Cuba of the officials from the Government of the Cayman Islands mentioned above in Article 3 of this Memorandum.

10. The present Memorandum of Understanding shall take effect from the date of signature.

Signed in the City of George Town this 15th day of April 1997 in two copies, one in English and one in Spanish, both texts having equal legal validity.

For the Government of the Cayman Islands

For the Government of the Republic of Cuba

Cayman Islands
Human Rights Commission
promoting, protecting and preserving human rights

WHOLE-LIFE SENTENCES

The Impact of Human Rights and the Need for a New Model

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MESSAGE FROM THE HUMAN RIGHTS COMMISSION

Human rights are the essential rights and freedoms that belong to all individuals regardless of their nationality and citizenship, age, gender, or social status. These rights are considered fundamental to maintaining a fair and just society. Fundamentally, human rights are about the balance of rights, freedoms, and responsibilities; treating individuals fairly, with dignity and respect – while still safeguarding the rights of the wider community.

All across the world, many countries are learning to 'take human rights home' by introducing constitutions or human rights laws and commissions to safeguard the rights of their citizens. The Cayman Islands has sought to do this by the inclusion of Part 1 in the Cayman Islands Constitution Order 2009 – the Bill of Rights, Freedoms and Responsibilities (BoR).

The BoR is the cornerstone of democracy for the Cayman Islands. It embeds protection for fundamental rights, tailors to local needs and values, includes extra rights in other treaties like the International Covenant on Civil and Political Rights as well as the Universal Declaration on Human Rights; details standards in service, and promotes a culture for the respect of rights.

The Human Rights Commission (HRC) was established under section 116 of the 2009 Constitution as an independent body and has a number of constitutional mandates, including promoting understanding and observance of human rights in the Cayman Islands and providing advice to persons who consider that their rights or freedoms have been infringed. In line with those mandates the Commission receives and considers complaints from members of the public.

Several such complaints have been received over the life of the Commission that relate to alleged breaches of human rights due to the complainant having been sentenced to the mandatory punishment for a murder conviction – life imprisonment without the possibility of release or parole, otherwise known as a whole life sentence. Such complaints remind us that the question of how societies should respond to their most serious crimes, if not with the death penalty, is perhaps the oldest and most sensitive issue underpinning the topic of crime control.

With the introduction of the BoR and that key question in mind, the HRC sought to produce this report in order to provide the people of the Cayman Islands with the information necessary to have constructive dialogue during the search to an answer that is appropriate to the situation in our islands.

13 November, 2013

LOCAL BACKGROUND

After discussions between the British Government and Governors of five British dependent territories the Cayman Islands abolished the death penalty for those convicted of murder in 1991. Persons sentenced to death prior to 1991 had their sentences commuted to life sentences. Today, the Penal Code (2013 Revision) s.182 makes it clear that: *any person convicted of murder shall be sentenced to imprisonment for life.* Trial judges, therefore, have no discretion to hand down any other sentence to persons convicted of murder.

In 2006, the Cayman Islands Human Rights Committee (now defunct) published a report, The Lifers Case[1], detailing the Committee's position in relation to international human rights standards, treaties, and obligations of the Cayman Islands. In its report, the Committee recommended that Cayman's legislators examine developments in the U.K. legal regime including the tariff system (minimum terms) to ensure Cayman's compliance with United Nations human rights obligations as it relates to mandatory life sentences.

In response to that report in 2006, the Honourable Attorney General indicated that the (then) administration would work toward reviewing the relevant laws underpinning mandatory life sentences for all murder convictions, and drew attention to the fact that jurisdictions across the world were at various stages in the process of moving away from the use of mandatory life sentences that do not include a review mechanism. The Attorney General further stated that "there's a social element, there's a political element, and there's a wider issue of how the perception [of] a government would be dealing with the people who have committed the most heinous crimes."[2] Seemingly, there appeared to be an acceptance in 2006 that all murders do not weigh the same in the scales of human wickedness; yet we discover in present-day that all murders continue to be equal before the law wherein judges have no option other than to impose mandatory life sentences (whole life – no release) for any person convicted of murder regardless of the circumstances surrounding the crime.

As early as 2010, the Human Rights Commission stated that the blanket mandatory whole life sentence for murder would conflict with the Government's BoR positive obligation to ensure that no person is subjected to torture or inhuman or degrading treatment or punishment.[3] The Commission, therefore, reiterated the Human Rights Committee's recommendation from four years earlier in stating that legislation will need to be changed in order to establish tariffs that empower judges to proportionately respond to the circumstances of each particular murder conviction when handing down a sentence.

As reported in the media, following the implementation of the Cayman Islands Constitution at the end of 2009, a number of laws have needed to be changed and, according to the Attorney General,

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[1] Cayman Islands Human Rights Committee (2006). Final Case Report – 6/06: The "Lifers" Case (Bruce, Dixon B, Dixon L, Powell, Roper & Thomas)

[2] Caymanian Compass (27 December 2006), Published Article - "Gov't Eyes Life Sentence".

[3] Cayman News Service (18 March 2013), Published Article – Human Rights Chair raises question of mandatory life.

the Government working to amend them to meet the requirements of country's highest law[4]. Naturally, the Human Rights Commission anticipates that any such review process would have considered reforming the Penal Code's legal framework and sentencing guidelines in relation to mandatory whole life sentencing for murder convictions. As the BoR is now a legitimate mechanism of local human rights protection, the reality exists that prisoners sentenced under section 182 of the Penal Code (2007 Revision) – *Any person convicted of murder shall be sentenced to imprisonment for life*[5] – may, if compelled to do so, challenge its constitutionality.

Without that review, the only mechanism that exists for 'lifers' to be released from prison is s.39 of the Constitution Order (2009), which entrenches the Powers of Pardon granted to the Governor, after having taken advice from the Advisory Committee on the Prerogative of Mercy (s.40).

CAYMAN ISLANDS CONSTITUTION ORDER (2009)

Over recent years, however, a number of international developments have placed limitations on the introduction and blanket use of 'Life without Parole' as an alternative to the death penalty. Locally, the implementation of Part One of the Cayman Islands Constitution Order – the Bill of Rights, Freedoms and Responsibilities (BoR) has highlighted the need to review the current legislation which governs the handing down of whole life sentences for murder convictions. The relevant sections of the BoR to this topic are as follows:

Torture or Inhuman Treatment

3. No person shall be subjected to torture or inhuman or degrading treatment or punishment.

Powers of Pardon

39. (1) The Governor may, in Her Majesty's name and on Her Majesty's behalf—

a. grant to any person concerned in or convicted of any offence against any law in force in the Cayman Islands a pardon, either free or subject to lawful conditions;
b. grant to any person a respite, either indefinite or for a specified period, from the execution of any sentence passed on that person for such an offence;
c. substitute a less severe form of punishment for that imposed by any sentence for such an offence; or
d. remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to Her Majesty on account of such an offence.

(2) In the exercise of his or her powers under this section the Governor shall consult the Committee established by section 40, but he or she shall decide whether to exercise any of those powers in any case in his or her discretion, whether the members of the Committee concur in his or her decision or otherwise.

Advisory Committee on the Prerogative of Mercy

[4] Cayman News Service. (14 January 2011), Published Article – Legal preps for human rights writs
[5] Cayman Islands Penal Code (2007 Revision). Section 182. Punishment of Murder.

40. (1) There shall be in and for the Cayman Islands an Advisory Committee on the Prerogative of Mercy, which shall consist of the Attorney General, the Chief Medical Officer and four other members, of which two shall be appointed by the Governor acting after consultation with the Premier and two shall be appointed by the Governor acting after consultation with the Leader of the Opposition.

(2) The Committee shall not be summoned except by the authority of the Governor, acting in his or her discretion; and the Governor shall preside at all meetings of the Committee.

(3) No business shall be transacted at any meeting of the Committee unless there are at least three members present, of whom one shall be the Attorney General.

(4) The office as a member of the Committee of any member appointed by the Governor under subsection (1) shall become vacant if the Governor, acting after consultation with the Premier and the Leader of the Opposition, revokes his or her appointment as a member of the Committee.

(5) Subject to subsection (3), the Committee shall not be disqualified for the transaction of business by reason of any vacancy in its membership, and the validity of the transaction of any business by the Committee shall not be affected by reason only of the fact that some person who was not entitled to do so took part in the proceedings.

(6) Subject to this section the Committee may regulate its own proceedings.

Due to the relatively small size of the Cayman Islands jurisdiction, local jurisprudence has not been developed to an extensive degree with respect to human rights. For this reason, it is rational to expect that influential decisions of the English courts would be regularly relied upon by Grand Court judges in the Cayman Islands. Traditionally, this has been the case in other areas of law wherein such decisions have been regarded as highly persuasive by the Cayman courts where they deal with common law principles (or statutes where the relevant Cayman Islands statute has the same or similar wording).[6] The significance here is twofold – (1) the European Convention on Human Rights is much the same as the Cayman Islands BoR, with a few exceptions, and (2) UK courts take account of rulings by the European Court of Human Rights on matters related to human rights. Notably, a declaration of incompatibility by our Grand Court would not affect the continuation in force and operation of the legislation or section(s) in question.[7] Rather, in the event of a declaration of incompatibility, the Legislature – which remains independent of the Judiciary, shall decide how to remedy the incompatibility.[8]

BRIEF HISTORY OF THE UK MODEL

The formal setting of punitive periods for lifers, within life sentences, was introduced in 1983 by the then Home Secretary, Leon Brittan. Under those arrangements, Home Office Ministers set a minimum period of imprisonment – known as the 'tariff' – to satisfy the requirements of retribution and deterrence and to specify that period which had to be served in full before a lifer's release could be considered by the Parole Board. However, this period did not provide an automatic release date,

[6] Appleby (2012). Guide to the Legal System of the Cayman Islands

[7] Cayman Islands Constitution Order. Section 23(2). Declaration of Incompatibility.

[8] Cayman Islands Constitution Order. Section 23(3). Declaration of Incompatibility.

as lifers could be detained beyond the tariff expiry date, for as long as necessary, on grounds of his or her risk to the community. Therefore, life sentences normally contain a 'punitive' period, represented by the tariff length and a 'preventative' period during which an individual's release on licence is dependent on an assessment of his or her risk.
Over the years, the Ministerial power to set punitive periods has gradually passed to the courts and is announced by the trial judge in open court. As a result, judges can now set a minimum term for all life sentence prisoners to reflect the appropriate punitive period to be served from the date of sentence. Under the Criminal Justice Act 2003, the trial judges became responsible for setting the minimum term for adult mandatory lifers. Transitional arrangements in the 2003 Act allowed those adult mandatory lifers whose tariffs had either been set previously by Ministers, or had not been set when the relevant provisions of the Act came into force on 18 December 2003, to apply to have the minimum term set or re-set by a High Court judge.

Recently, the path was paved for further changes to the UK's life imprisonment sentencing regime. On 9 July, 2013, UK prisoner Jeremy Bamber and two other prisoners successfully won an appeal to the European Court of Human Rights. The court concluded that whole life imprisonment (with no chance of parole) was in contravention of Article 3 of the European Convention on Human Rights – the right not to be subjected to torture, and inhuman or degrading treatment or punishment. The court ruled there was ambiguity in the UK law on the tariffs – or minimum prison terms – concerning whole life sentences. Specifically, the court found that "there is a lack of clarity as to the current law concerning the prospect of release of life prisoners" in the UK, under section 30 of the Crime (Sentences) Act 1997.[9] Given this lack of clarity and the absence of a dedicated review mechanism for whole life orders, the court was not persuaded that, at the present time, the applicant's life sentences were compatible with Article 3. The Grand Chamber of the European Court on Human Rights voted overwhelmingly in favour of the decision by 16-1, wherein it was determined that whole life orders must contain a review at some stage; however, the court has left it to the national authorities to determine the structure of such reviews In the UK there are 49 instances of prisoners serving whole life sentences without the requirement for any such review.

Of utmost importance with respect to the impact of the Grand Chamber's ruling in the Jeremy Bamber case is that the decision "does not mean that the applicants in the present case must be released in the near future and it offers no guarantee that they will ever be released."[10] The ruling indicated that "the balance between justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence." In essence therefore the ruling indicates that prisoners sentenced to life in prison should have the possibility of arguing at some point, even if after a lengthy period in prison, that their detention is no longer necessary in the interests of punishment, deterrence and protection of the public and that their release would be justified on grounds of rehabilitation.

[9] East Law (2013). Jeremy Bamber's Whole-Life Tariff Breaches Human Rights, European Court of Human Rights Holds.
[10] The Guardian (2013). Whole-life jail sentences: what are the government's options?

DERIVING A MINIMUM TERM

While the calculation of punitive periods differs by jurisdiction, the generic term 'tariff' is common language as representing the punitive period of a sentence. In the context of legislating for a new model by which to sentence persons convicted of murder, the 'tariff' may be understood as the minimum term of imprisonment before an application for parole can be considered, which is an amount of time set by a trial judge. In some jurisdictions the tariff period runs from the date of first remand in custody and includes all periods spent in custody on remand. The minimum term set, therefore, represents the full punitive period to be served by the prisoner prior to having his or her opportunity to apply for release through the grant of parole. It does not take into account any concerns over the prisoner's potential risk.

A judge, in the UK for example in accordance with the Criminal Justice Act 2003 (s.270), must state reasons in open court for the minimum term imposed, explain why a particular starting point has been chosen, and give reasons for any departure from the principles.[11] As such, to set a minimum term the trial judge must first be informed on the broad circumstances of the particular murder. In this sense, jurisdictions with minimum terms for life sentences recognise that not all murders are inherently the same, which provides room for the use of sentencing guidelines or tariffs that reflect characteristics of the particular murder. Those jurisdictions, therefore, empower judges to engage in a decision-making process to ensure proportionality is reached in relation to the punitive period. When setting the minimum term component of a mandatory life sentence, the court must select one of the 'starting points', typically specified in legislation. In accordance with the Criminal Justice Act 2003 (s.269) the appropriate starting point (in years) will depend on the seriousness of the offence and the age of the offender.[12]

While it is not the intention of the HRC to suggest starting points or minimum terms as it relates to life sentences for murder in the Cayman Islands, the following is a list of varying circumstances, as detailed in the UK Criminal Justice Act 2003 (Schedule 21) that demonstrate categorical differences that can lead to starting point groupings:

- the murder of two or more persons where each murder involved a substantial degree of premeditation, the abduction of the victim prior to the killing, or sexual or sadistic conduct;
- the murder of two or more persons (other than circumstance above);
- the murder of a child following abduction or involving sexual or sadistic motivation;
- murder committed for the purpose of advancing a political, religious, racial or ideological cause;
- murder by an offender who has previously been convicted of murder.
- murder of a law enforcement officer in the course of his duty;
- murder involving the use of a firearm or explosive;
- murder for gain (e.g. a contract killing or murder during the course of a theft, burglary, or robbery);

[11] Sally Lipscombe (2012). UK Home Affairs: Mandatory Life Sentences for Murder
[12] Ibid

- murder intended to obstruct the course of justice (e.g. murder of a witness);
- murder involving sexual or sadistic conduct;
- murder motivated by race, religion, nationality, sexual orientation, disability, or transgender identity;

Once the court has determined the appropriate starting point it may take into account any aggravating factors as a means of adding to the starting point or mitigating factors as a means of subtracting from the starting point to arrive at the appropriate minimum term for the particular offender being sentenced. The following is a list of aggravating factors and mitigating factors that may be considered by a trial judge:

AGGRAVATING FACTORS

- a significant degree of planning or premeditation;
- the fact that the victim was particularly vulnerable because of age or disability;
- mental or physical suffering inflicted on the victim before death;
- abuse of a position of trust;
- use of duress or threats against another person to facilitate commission of the offence;
- the fact that the victim was providing a public service or performing a public duty; or
- concealment, destruction or dismemberment of body.

MITIGATING FACTORS

- an intention to cause serious bodily harm rather than to kill;
- lack of premeditation;
- the fact that the offender was suffering a mental disorder or disability which lowered his degree of culpability (falling short of a defence of diminished responsibility);
- the fact that offender was provoked (for example by prolonged stress);
- the fact that the offender acted to any extent in self-defence or in fear of violence;
- a belief by the offender that the murder was an act of mercy; and
- the age of the offender.

Finally, the court may take into account factors pertaining to the defendant's previous convictions, offences committed while on bail, and guilty pleas. In this sense previous convictions and offences committed while on bail may be treated as aggravating factors resulting in an increased minimum term, while a guilty plea may (in certain circumstances) result in a reduced minimum term.[13]

In some jurisdictions including the UK, the court must treat each previous conviction of the offender as an aggravating factor if the court considers that it is reasonable to do so.[14] In determining whether it is reasonable to treat a previous conviction as an aggravating factor, the court is required to give particular regard the nature of the offence for which the previous conviction

[13] Ibid
[14] UK Criminal Justice Act 2003, s143(2)

relates as well as its relevance to the current offence, and the time that has elapsed since the previous conviction.

In the case that the murder was committed while the offender was on bail, the court, in some jurisdictions, is authorised to treat the fact that it was committed in those circumstances as an aggravating factor.[15]

As it relates to persons who plead guilty, the court must take into account the stage in proceedings at which the offender indicated his or her intention to plead guilty, and the circumstances in which this indication was given.[16] To facilitate this particular decision of trial judges, sentencing guidelines have been published setting out how the courts should take guilty pleas into account when setting the minimum term for offenders convicted of murder. Jurisdictions such as the UK rely on an independent body – the Sentencing Council – which issues sentencing guidelines for courts in England and Wales. Such guidelines are intended to aid the sentencing decision-making process and to encourage consistency in sentencing.[17]

PROBATION VERSUS PAROLE

For the sake of clarity, probation is not the same as parole. Rather, probation is a type of criminal sentence that permits the offender to remain in the community setting in lieu of serving time in a jail environment.[18] As such, the defendant remains free so long as the terms of the probation are being met. Parole, on the other hand, is the supervised release of an inmate from a prison sentence. In this sense, the prisoner is released into the community before the natural conclusion of the original prison term as sentenced.[19] Accordingly, the minimum term or 'tariff' refers to the amount of time an offender must spend in prison before becoming eligible to apply for parole.[20] For example, in the case of murder, the original prison term may be life imprisonment; however, based on the circumstances of the particular case, the prisoner may have been given a tariff of 30 years at which time he or she will be eligible to apply for parole. It is at this stage that the Parole Board would consider, asses and weigh various factors compiled from other parties such as clinical professionals, law enforcement representatives, community representatives and the family of victims (dependent on the underpinning laws, regulations, and policies) as a means of determining the potential risks for the community as it regards the prisoner's release. Generally, the power to grant the release of a person imprisoned for having committed murder typically rests with an independent Parole Board established in law.

The Cayman Islands the Parole Board is not based in statute and instead serves as an advisory board to Her Excellency the Governor. The Board reviews the information and interviews the prisoner eligible for parole before making a recommendation for the Governor to consider and accept, reject,

[15] Ibid, s143(3)
[16] Ibid, s144(1)
[17] Sally Lipscombe (2012). UK Home Affairs: Mandatory Life Sentences for Murder
[18] LexisNexis (2013). Legal Articles – Probation and Parole
[19] Ibid
[20] UK Sentencing Council (2013). Life Sentences.

and/or substitute. Persons released on parole in the Cayman Islands are supervised by the Department of Community Rehabilitation. Being released on parole entails agreeing to conditions detailed in a Parole Licence, some of which are standard conditions such as curfew; while others are specific to the risk factors of the individual prisoner such as the requirement to undertake further rehabilitation programmes or conditions to exclude the individual from certain places in order to protect the victim, the victim's family, or others as the case may be. It is not uncommon in a tariff system jurisdiction that such persons are subject to a life licence which remains in force for the duration of their natural life; nor is it uncommon that such persons may be recalled to prison at any time to continue serving their life sentence if it is considered necessary to protect the public.

INTERNATIONAL AND COMPARATIVE LAW ON LIFE SENTENCES

COUNCIL OF EUROPE

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") prepared a report on "Actual/Real Life Sentences" dated 27 June 2007.[21] The report reviewed various Council of Europe texts on life sentences, including recommendations, and stated that the principle of making conditional release available is relevant to all prisoners, "even to life prisoners"; and all Council of Europe member States had provision for compassionate release but that this "special form of release" was distinct from conditional release. The report recommended that no category of prisoners should be "stamped" as likely to spend their natural life in prison; no denial of release should ever be final; and not even recalled prisoners should be deprived of hope of release.

THE INTERNATIONAL CRIMINAL COURT

Article 77 of the Rome Statute of the International Criminal Court allows for the imposition of a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. Such a sentence, however, must be reviewed after twenty-five years to determine whether it should be reduced (Article 110).

THE EUROPEAN UNION

Article 5(2) of Council Framework Decision of 13 June 2002 on the European arrest warrant provides: "if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the

[21] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2007). http://www.cpt.coe.int/en/working-documents/cpt-2007-55-eng.pdf

law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure..."[22]

LIFE SENTENCES IN THE EU CONTRACTING STATES

According to a comparative study[23] the majority of European countries do not have irreducible life sentences. These countries either have no life sentences at all or have a statutory provision requiring that all individuals who are sentenced to life imprisonment must be considered for release after having served a fixed period.

Countries that have no life sentences at all include Portugal, where life sentences are prohibited by the constitution, and in Norway and Spain, where the criminal codes do not provide for them. Until 2008, Slovenia had no life sentences either, however, in that year the law was amended, following a public controversy, to provide for life sentences that could be reconsidered after twenty-five years. Countries that have fixed periods after which individuals sentenced to life imprisonment must be considered for release include Belgium, with a ten-year period; Austria, Germany, Luxemburg, and Switzerland with fifteen years; the Czech Republic, Romania, and Turkey with twenty years; Poland, Russia, and Slovakia with twenty-five years; Lithuania with twenty-six years; and Estonia with thirty years.

In Switzerland there are provisions for indeterminate sentences for dangerous offenders where release can only follow new scientific evidence that the prisoner was not dangerous.

The study concluded that only the Netherlands and England and Wales have irreducible life sentences.

LIFE SENTENCES AROUND THE WORLD

A number of European countries have abolished all forms of indefinite imprisonment, thus setting out clearly the maximum time that an individual can be imprisoned without the opportunity to apply for parole. For example, Serbia and Croatia, which set the maximum sentence at 40 years, Bosnia and Herzegovina which sets the maximum sentence at 45 years, and Portugal, which sets the maximum sentence at 25 years.

The only country in Asia to have abolished all forms of indefinite imprisonment is the Chinese dependency (Special Administrative Region) and former Portuguese colony of Macau, which also maintains a mandatory cap on prison sentences at 30 years, having inherited the law from Portuguese rule.

[22] Council Framework Decision (2002). European arrest warrant and the surrender procedures between Member States http://db.eurocrim.org/db/en/doc/1197.pdf

[23] D. Van Zyl Smit (2010). "Outlawing Irreducible Life Sentences: Europe on the Brink?" Federal Sentencing Reporter Vol 23, No 1

Three African countries, the Republic of the Congo, Mozambique, and Cape Verde have abolished life imprisonment. The maximum sentence in Mozambique and Republic of the Congo is 30 years, and 25 years in Cape Verde.

In South and Central America, Honduras, Nicaragua, El Salvador, Costa Rica, Venezuela, Colombia, Uruguay, Bolivia, Ecuador, and the Dominican Republic have all abolished life imprisonment. The maximum sentence in Honduras is 40 years, in El Salvador is 75 years, 50 years in Costa Rica and Panama, 60 years in Colombia, 35 years in Ecuador, 30 years in Nicaragua, Bolivia, Uruguay, and Venezuela, and 25 years in Paraguay.

In Canada, murder is either first or second degree. Persons convicted of either must be sentenced to imprisonment for life. Generally, persons convicted of first-degree murder are not eligible for parole until they have served at least 25 years of their sentence. Persons convicted of second degree murder are not eligible for parole until they have served between 10 and 25 years, as determined by the courts.

In the United States, a 2009 report by the Sentencing Project suggested that life imprisonment without parole should be abolished, a suggestion that was met with opposition from law enforcement officials.[24]

CONCLUDING REMARKS

On the surface, 'life without parole' as a sentence for murder seems to be an attractive and logical punishment under the modern coercive crime-control principles of general deterrence and incapacitation. Yet, there is increasing evidence to doubt the efficacy of using such principles of distributive punishment.[25] The HRC is of the view that moral claims about a penal system's punishment can be reduced to two propositions: (1) punishment should be imposed because defendants deserve it, and (2) punishment should be imposed because it makes society safer.[26]

The HRC is concerned that a lack of willingness by the Legislature to grapple with this serious and sensitive issue will lead to the Cayman Islands being forced to adopt system from another jurisdiction; foregoing the opportunity to tailor a system to the unique circumstances of our jurisdiction. The HRC therefore encourages a proactive approach to this exercise and as such the HRC has reached out to the past and current Government in an effort to bring attention to the fact that the Cayman Islands is at a point in time whereby, although limited, a window of opportunity is still available to find an appropriate balance and construct a human-rights-compliant life sentence tariff system that protects the rights and freedoms of the community while protecting the inherent dignity of the individual in accordance with the BoR..

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[24] Kevin Johnson (22 July 2009). "Report wants life without parole abolished". *USA Today*.

[25] Robinson, Paul H. (2012). "Life Without Parole" Under Modern Theories of Punishment. Faculty Scholarship. Paper 333. http://scholarship.law.upenn.edu/faculty_scholarship/333

[26] Aya Gruber, A Distributive Theory of Criminal Law, 52 William & Mary Law Review. (2010), http://scholarship.law.wm.edu/wmlr/vol52/iss1/2

The HRC reminds the public that the concept of introducing a minimum tariff for lifers will serve to satisfy the (1) requirements of retribution and deterrence, and (2) human rights requirements by providing those sentenced with a minimum period which must be served in full before a 'lifer" is given the opportunity to apply and be considered for release on parole. Further, it should be noted that this opportunity is just that – an opportunity -- not an automatic release date as the system would allow for a 'lifer to be detained beyond the tariff expiry date, if it was reasonably justifiable in a democratic society. A regime such as this one would go beyond our current regime so as to not compromise principles of universal human rights and inherent human dignity, ignore the capacity for redemption and rehabilitation, or deny individuals of the opportunity to be considered for release.

Perhaps the strongest objection to mandatory whole-life sentencing is that it is a blunt sentencing tool, which applies the same sentence to all offenders who have committed the same crime without due regard to the principle of proportionality; a necessary consideration in human rights law. The Cayman Islands can ill-afford, as a jurisdiction party to the European Convention on Human Rights, and a country with a Bill of Rights built on the aforementioned convention, to ignore the reality that our system of whole life sentencing is by all indications violating persons' fundamental human rights.[27] In other words, it is apparent that when the defendant's continued imprisonment can no longer be justified under any legitimate penal rationales, there is a violation of an individual's right not to be subjected to torture, inhuman and degrading treatment or punishment as provided for in Section 3 of the Constitution Order (2009) and Article 3 of the European Convention on Human Rights.

The HRC hopes that the preceding report, and the accompanying appendices, has shed light on the increasing overlap between punishment and human rights concerns and that the most appropriate response is to progressively reform our existing mandatory whole life sentencing system with the support of evidence-led policies and legislation that facilitate human rights compliance.

[27] See European Court of Human Rights Grand Chamber (2013). Vinter and Others versus the UK. Full Judgement - http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122664&utm_source=buffer&utm_campaign=Buffer&utm_content=buffer4da76&utm_medium=twitter#{"itemid":["001-122664"]}

APPENDIX 1: LOCAL CONSULTATION & STATISTICS

Her Majesty's Prison Service Deputy Director (Operations), Daniel Greaves was contacted on 13 November, 2013 and asked for a breakdown of the number of prisoners serving a sentence of life without parole, the crime(s) convicted of in relation to the mandatory whole life sentence, and the date in which the sentence was imposed. The breakdown received by the HRC is as follows:

Prisoner	Offence	Nationality	Date Sentenced
Prisoner 1	Murder	Caymanian	20/01/1986
Prisoner 2	Murder	Caymanian	21/01/1986
Prisoner 3	Murder	Jamaican	14/08/1986
Prisoner 4	Murder x 2	Caymanian	31/07/1987
Prisoner 5	Murder	Caymanian	15/05/1991
Prisoner 6	Murder	Caymanian	15/03/1996
Prisoner 7	Murder	Caymanian	15/03/1996
Prisoner 8	Murder	Caymanian	13/03/2000
Prisoner 9	Murder	Caymanian	26/01/2001
Prisoner 10	Murder	Caymanian	9/06/2006
Prisoner 11	Murder x 2	Caymanian	6/11/2007
Prisoner 12	Murder	Caymanian	26/01/2010
Prisoner 13	Murder	Jamaican	22/02/2010
Prisoner 14	Murder	Jamaican	22/02/2010
Prisoner 15	Murder	Caymanian	30/09/2011
Prisoner 16	Murder	Caymanian	20/01/2012
Prisoner 17	Murder	Caymanian	23/02/2012
Prisoner 18	Murder	Caymanian	12/06/2012
Prisoner 19	Rape, Aggravated Burglary	Caymanian	23/09/2013

APPENDIX 2: LIFE SENTENCE REGIMES IN OTHER JURISDICTIONS[28]

Jurisdiction	Life imprisonment	Minimum to serve before eligibility for requesting parole	Maximum length of sentence (under life)	Indefinite sentence (excl. preventive or psychiatric detainment)	Mandatory sentence
Afghanistan	Yes	Never	None	Yes	Murder, terrorism, violation of Islamic law
Argentina	Yes	20 years, or never	None	Yes	Murder with aggravating circumstances; murder of a relative; murder of and/or by a police officer; treason
Armenia	Yes, but only for men	20 years or never	Maximum 30 years for all women	No	Murder, terrorism
Austria	Yes	15 years (Imprisonment for a definite period) or never (Imprisonment for lifetime, when clemency is rejected by President)	None	Yes	Genocide
Australia	Yes	10 years, 20 years, 25 years, or never; individually set by judge	None	Yes	Murder of police officer or other public official, murder in South Australia, Queensland, Northern Territory, aircraft hijacking.
Azerbaijan	Yes	Never	None	No	Murder, terrorism
Belgium	Yes	10 years, or 16 years for recidivism	None	No	None

[28] Oxford Dictionary of Law Enforcement (2007) The Oxford Dictionary of Law Enforcement. Oxford University Press. http://www.answers.com/topic/life-sentence#ixzz2gVMyVoZJ. [*This information is not exhaustive of all countries. Laws may have changed since the information was originally sourced.*]

Jurisdiction	Life imprisonment	Minimum to serve before eligibility for requesting parole	Maximum length of sentence (under life)	Indefinite sentence (excl. preventive or psychiatric detainment)	Mandatory sentence
Bolivia	No (Except in Wartime)	Varies, depending on sentence	30 years	No	No life imprisonment sentence
Bosnia and Herzegovina	No	Varies, depending on sentence	45 years	No	No life imprisonment sentence
Brazil	No (except in wartime)	Varies, depending on sentence	30 years	No	No life imprisonment sentence
Bulgaria	Yes	Never	None	Yes	None
Canada	Yes	between 7 to 25 years	None	Yes	High treason, murder, crimes against humanity
Cape Verde	No	Varies, depending on sentence	25 years	No	No life imprisonment sentence
Colombia	No	Varies, depending on sentence	60 years	No	No life imprisonment sentence
Costa Rica	No	Varies, depending on sentence	50 years	No	No life imprisonment sentence
Chile	Yes	40 years or Never	None	Yes	None
People's Republic of China	Yes	10 years for non-violent crimes. Never for murder, rape, kidnap, arson, explosion, putting hazardous materials or other organized violent crimes.	None	No	No

Jurisdiction	Life imprisonment	Minimum to serve before eligibility for requesting parole	Maximum length of sentence (under life)	Indefinite sentence (excl. preventive or psychiatric detainment)	Mandatory sentence
Croatia	No	Varies, depending on sentence	40 years	No	No life imprisonment sentence
Cuba	Yes	Never; only pardon by president	None	No	Murder, Drug trafficking
Czech Republic	Yes	20 years	None	No	None
Dominican Republic	No	Varies, depending on sentence	30 years	No	No life imprisonment sentence
Ecuador	No	Varies, depending on sentence	35 years	No	No life imprisonment sentence
El Salvador	No (Except in wartime)	Varies, depending on sentence	75 years	No	No life imprisonment sentence
Egypt	Yes	Never	None	No	Murder, Rape, Kidnapping, Terrorism
Finland	Yes	12 years for court release, any time for presidential pardon	None	Yes	Murder, purposefully killing police officer
France	Yes	18–22 years, 30 years, or never	None	Yes, but only if decided by court at sentencing	None
Germany	Yes	15 years	None	Yes, but only if decided by court at sentencing	Murder, genocide, crimes against humanity, war crimes
Greece	Yes	16 years, or 20 years in cases of multiple life sentences	None	Yes	Murder, terrorism
Hungary	Yes	20-40 years or never	None	Yes	Murder, after 3 violent crimes

Jurisdiction	Life imprisonment	Minimum to serve before eligibility for requesting parole	Maximum length of sentence (under life)	Indefinite sentence (excl. preventive or psychiatric detainment)	Mandatory sentence
Honduras	No	Varies, depending on sentence	40 years	No	No life imprisonment sentence
Hong Kong	Yes	Individually set by judge	None	Yes	Murder
Iceland	Yes	16 years	None	No	None
India	Yes	14 years or never; individually set by judge	None	Yes	Murder, rape, robbery
Indonesia	Yes	Never	None	Yes	Murder, terrorism, kidnapping, rape, treason
Iraq	Yes	Never	None	No	Murder, terrorism
Ireland	Yes	12–30 years or never; individually set by judge	None	Yes	Murder, treason, some serious injuries, etc. see details
Israel	Yes	Never	None	Yes	Murder, terrorism
Italy	Yes	21 years, 26 years, or never	None	Yes	Murder, terrorism, mafia association, drug trafficking, human trafficking, treason
Jamaica	Yes	10–30 years or never; individually set by judge	None	Yes	Murder
Japan	Yes	10 years or never	None	Yes	Varies by prefecture (Murder)
Jordan	Yes	Never	None	No	Murder, terrorism, espionage
Kazakhstan	Yes	25 years or never	None	Yes	Murder, terrorism

Jurisdiction	Life imprisonment	Minimum to serve before eligibility for requesting parole	Maximum length of sentence (under life)	Indefinite sentence (excl. preventive or psychiatric detainment)	Mandatory sentence
Kyrgyzstan	Yes	Never	None	Yes	Murder, terrorism
Kosovo	No	Varies, depending on sentence	40 years	No	No life imprisonment sentence
Latvia	25 years	None	Yes	Murder, treason, terrorism, war crimes	25 years
Lebanon	Yes	Never	None	No	Murder, terrorism, treason
Lithuania	Yes	25 years	None	Yes	Murder, terrorism
Luxemburg	Yes	15 years	None	Yes	Murder, treason
Macau	No	Varies, depending on sentence	25 years (30 in exceptional circumstances)	No	No life imprisonment sentence
Macedonia	Yes	15 years	None	Yes	Murder, terrorism
Malaysia	Yes	20 years or never	None	Yes	Murder, drug offenses, serious firearms/ammunition/explosive offenses, terrorism, rape, sodomy, attack on monarch, violence to parliament, treason
Mexico	No (exception of Chihuahua)	Varies, depending on sentence	60 years (70 years if murder involves kidnapping)	No	No life imprisonment sentence
Morocco	Yes	Never	None	No	Murder, terrorism, treason

Jurisdiction	Life imprisonment	Minimum to serve before eligibility for requesting parole	Maximum length of sentence (under life)	Indefinite sentence (excl. preventive or psychiatric detainment)	Mandatory sentence
Netherlands	Yes	Never	None	Yes (de facto)	None
Nepal	Yes	20 years	None	No	Murder, terrorism
New Zealand	Yes	10 years, 17 years, 20 years, 30 years or never; individually set by judge	None	Yes	Treason
Nicaragua	No	Varies, depending on sentence	30 years	No	No life imprisonment sentence
North Korea	Yes	Never	None	Yes (de facto and de jure)	Murder, espionage, treason
Northern Cyprus	Yes	Never; Only pardon by President	None	Yes	Murder, Drug trafficking, terrorism, treason
Norway	No	Varies, depending on sentence	21 years (can be extended indefinitely if the criminal poses a danger to society at the end of served time), 30 years for genocide, war crimes and crimes against humanity	Yes	No life imprisonment sentence
Panama	No	Varies, depending on sentence	50 years	No	No life imprisonment sentence
Paraguay	No	Varies, depending on sentence	25 years	No	No life imprisonment sentence

Jurisdiction	Life imprisonment	Minimum to serve before eligibility for requesting parole	Maximum length of sentence (under life)	Indefinite sentence (excl. preventive or psychiatric detainment)	Mandatory sentence
Peru	Yes	35 years or never	None	Yes	Murder with aggravated circumstances, terrorism, treason
Poland	Yes	25 years or more—individually set by judge	None	No	None
Portugal	No	Varies, depending on sentence	25 years	No	No life imprisonment sentence
Romania	Yes	20 years	None	No; replaced by 25 years imprisonment at age 60.	Genocide during wartime, inhumane treatment during wartime
Republic of the Congo	No	Varies, depending on sentence	30 years	No	No life imprisonment sentence
Russia	Yes, but only for man between 18 and 65 years.	25 years	25 year imprisonment or 30 years in special circumstances for all women and men above age 65	No	No
Saudi Arabia	Yes	Never	None	No	Apostasy
Serbia	No	Varies, depending on sentence	40 years	No	No life imprisonment sentence
Singapore	Yes	20 years	None	Yes	Kidnapping for ransom
Slovakia	Yes	25 years	None	Yes	Murder, terrorism, treason
Slovenia	Yes	25 years	None	Yes	Murder, treason
Somalia	Yes	Never	None	No	Murder, rape, robbery

Jurisdiction	Life imprisonment	Minimum to serve before eligibility for requesting parole	Maximum length of sentence (under life)	Indefinite sentence (excl. preventive or psychiatric detainment)	Mandatory sentence
South Africa	Yes	10, 15, or 25 years	None	No	Certain murder, rape and robbery
Spain	No	Varies, depending on sentence	40 years	No	No life imprisonment sent
Syria	Yes	Never	None	No	Murder, political crimes, terrorism, treason
Sweden	Yes	18 years or never, but parole hearing may be held after 10 years served, thus fixing a much later date for release on parole	None	Yes	None
Switzerland	Yes	10 years or 15 years; individually set by judge	None	Yes	None
Republic of China (Taiwan)	Yes	25 years 10–20 years before 30 June 2006	None	Third violent crime	Aggravated murder, drug trafficking
Tajikistan	Yes	Never	None	No	Murder, terrorism
Tunisia	Yes	Never	None	No	Murder, terrorism
Turkey	Yes	24 years (life imprisonment) or 30 years (for aggravated life imprisonment)	None	Yes	Murder, treason, terrorism, military offenses
Turkmenistan	Yes	Never	None	No	Murder, terrorism

Jurisdiction	Life imprisonment	Minimum to serve before eligibility for requesting parole	Maximum length of sentence (under life)	Indefinite sentence (excl. preventive or psychiatric detainment)	Mandatory sentence
UK: England and Wales	Yes	5, 7, 8, 10, 15, 18, 20 and 25 - 40 years or never; individually set by judge	None	Yes	Murder
UK: Scotland	Yes	15–35 years; individually set by judge	None	Yes	Murder
UK: Northern Ireland	Yes	15–35 years; individually set by judge	None	No	Murder Rape
Uzbekistan	Yes, but only for man between 18 and 60 years.	25 years or never	None	No	None
Vatican City	Yes	21 years, 26 years, or never	None	No	Murder, Assassination of the pope, attempted assassination of the pope, terrorism
Venezuela	No	Varies, depending on sentence	30 years	No	No life imprisonment sent

Cayman Islands
Human Rights Commission
promoting, protecting and preserving human rights

Interception of Telecommunications

The Impact of Human Rights and the Need for an Oversight Mechanism

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INTRODUCTION

The ability to intercept messages wherein 'messages' include a communication sent, delivered to, received or transmitted, or intended to be sent, delivered, received or transmitted by telecommunication, is amongst a range of investigative techniques which may be used by the Royal Cayman Islands Police Service under the Information Communications Technology Authority Law (2006 Revision) and the Terrorism law (2009 Revision) for the prevention and detection of criminal acts as well as counter terrorism. However, the ability to use this technique must be balanced against the need to safeguard the human rights of people within the Cayman Islands. Part 1 of the Cayman Islands Constitution Order 2009 – the Bill of Rights, Freedoms and Responsibilities (BoR) sets out those relevant rights and freedoms.

Human rights are the essential rights and freedoms that belong to all individuals regardless of their nationality and citizenship, age, gender, or social status. They are considered fundamental to maintaining a fair and just society; and in the Cayman Islands they are enshrined in our BoR.

Associated with the lawful interception of telecommunication messages is the potential of intrusion into an individual's private life. One way of mitigating this potential intrusion is the requirement within the Information Communications Technology Authority (ICTA) Law that the interception of communications can only be authorised by a warrant signed by the Governor to fulfill statutory objectives.

A second way of mitigating potential intrusion is the oversight safeguard provided by the creation of an Interception of Communications Audit Committee. It is a matter of concern that, although required by the Information Communications Technology Authority (Interception of Telecommunication Messages) Regulations, 2011 which have been in force since 2011, such a Committee has not been established by the Governor-in-Cabinet.

PART ONE: BACKGROUND

While the topic of telecommunication message interception by the Royal Cayman Islands Police Service has recently been a topical issue for the community, the Human Rights Commission (HRC) first looked into the issue in 2011. During that time the Commission collected, from Mr. David Archbold, Chairman, ICTA, a historical perspective of legislative developments that highlights concerns by Members of the Legislative Assembly related to vesting power to issue a communication interception warrant exclusively with the Governor rather than a judge of the Grand Court. That history has been reproduced here in Part Two below.

Following a review of the information received from Mr. Archbold the Commission corresponded with former Governor Taylor, CBE, on various points relative to the ICTA. As a result of this communication former Governor Taylor arranged for the Commissioner of Police to authorise representatives of the Human Rights Commission to meet with officials from the Royal Cayman Islands Police Service (RCIPS) in order to review the RCIPS Classified Interception of Communication Policy.

Having reviewed the policy the Commission followed up with former Governor Taylor expressing its satisfaction that the RCIPS policy dictated appropriate procedural safeguards but specifically urged that the Interception of Communications Audit Committee as legislated for under s. 17 of the Interception of Telecommunication Messages Regulations, 2011 (see Annex C) should be created as a matter of urgency.

The Commission further indicated that it wished to make it clear that while comprehensive, the policy in no way replaces an Audit Committee whose function is to conduct an audit of all interception equipment and data records at least once every six months to determine whether interceptions were conducted in accordance with the relevant Regulations.

Further, the Commission expressed concern that without the Committee there was a substantial lack of structural oversight making it impossible for the general public to be assured that the use of interception and communications data would be properly authorised as an investigative technique.

While the HRC published all of the correspondence related to the review on its website at the conclusion of the review in 2012, it has been amalgamated in this report for ease of reference for the reader.

PART TWO: LEGISLATIVE DEVELOPMENT

ICTA Bill, 2002

In February 2002, the Legislative Sub-Committee of the E-Business Advisory Board produced what it considered to be the final draft of the ICTA Bill which contained three sections with references to the interception of communications and the privacy of subscriber personal data.

The first, section 53, specified that it would be an offence to intentionally intercept, alter, replicate, monitor or interrupt any message transmitted over an ICT network or by means of an ICT service. Exceptions were provided where, *inter alia*, the action was taken by order of a judge or the Court (see the emphasised text in the extract below].

Section 53 –

(1) Subject to the provisions of subsection (2), a person who intentionally intercepts, alters, replicates, monitors or interrupts any message (whether in whole or in part) during its transmission over an ICT network or by means of an ICT service by any means is guilty of an offence and liable for each such message-

(a) on summary conviction, to a fine not exceeding $10,000;

(b) on conviction on indictment to a fine not exceeding $20,000 or to imprisonment for a term not exceeding two years or both.

(2) A person shall not be guilty of an offence under this section if-

(a) **the message is intercepted, monitored or interrupted in obedience to a warrant issued by a Judge under section 55;**

(b) **the message is required to be intercepted, monitored or interrupted pursuant to a Court order;**

(c) the person by whom the message is sent or to whom the message is sent has expressly consented to the interception, monitoring or interruption;

(d) the message is intercepted, monitored or interrupted by the Authority for purposes connected with the execution of its functions under this Law;

(e) the message is intercepted, monitored or interrupted solely for the purpose of preserving the technical integrity of an ICT service or ICT network; or

(f) the message is intended to be received by the public.

Secondly, section 54 specified that it was an offence for a licensee to disclose any personal data of a subscriber or end user. Limited exceptions included disclosures made in compliance with a warrant issued by a judge.

Section 54 –

(1) For the purposes of this section, "subscriber" shall not include an end user.

(2) Subject to the provisions of subsection (3), a licensee which intentionally discloses any personal data of a subscriber or end user is guilty of an offence and liable for each such disclosure-

(a) on summary conviction, to a fine not exceeding $10,000; or

(b) on conviction on indictment to a fine not exceeding $20,000 or to imprisonment for a term not exceeding two years or both.

(3) Subsection (1) does not apply to

(a) any disclosure which is made to a constable for the prevention or detection of crime or for the purposes of any criminal proceedings;

(b) any disclosure pursuant to the provisions of any Law for the time being which requires such disclosure;

(c) any disclosure which is made with the written consent of the subscriber or end user as the case may be;

(d) **any disclosure which is made pursuant to a Court order;**

(e) **any disclosure which is made in obedience to a warrant issued by a Judge under section 55; or**

(f) any disclosure which is made to the Authority for purposes connected with the execution of its functions under this Law.

(4) A licensee shall not be liable for any action or suit for any injury, loss or damage resulting from disclosure of information made pursuant to subsection (3).

Finally, section 55 enabled a judge to issue a warrant authorising the interception of a message transmitted by means of an ICT service.

Section 55 –

(1) Subject to the provisions of this section, a Judge may issue a warrant requiring the person to whom it is addressed to intercept, in the course of their transmission by means of an ICT service, such messages as are described in the warrant; and such a warrant may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as are described in the warrant.

(2) A Judge shall not issue a warrant under this section unless he considers that the information sought could not reasonably be acquired by other means and the warrant is necessary-

(a) in the interests of the security of the Islands;

(b) for the purpose of preventing or detecting an indictable offence; or

(c) for the purpose of safeguarding the economic well-being of the Islands.

Direction by the Governor

After being alerted to the wording of the sections by the Attorney General the (then) Governor of the Cayman Islands, Mr Peter Smith, CBE reviewed the draft Bill and prior to it being placed before the Executive Council (now Cabinet), he consulted with the Foreign and Commonwealth Office. The consultation came about due to the view that the issuing of warrants for the interception of telecommunications fell under the Reserved Powers of the Governor in accordance with the (1972) Constitution. After review and consultation Governor Smith directed that all references in the Bill to warrants being issued by a judge should be changed to read that warrants were to be issued exclusively by the Governor. The version considered by the Executive Council and subsequently submitted to the Legislative Assembly contained the following revisions:

Section 53 (as was revised) –

(1) Subject to the provisions of subsection (2), a person who intentionally intercepts, alters, replicates, monitors or interrupts any message (whether in whole or in part) during its transmission over an ICT network or by means of an ICT service by any means is guilty of an offence and liable for each such message-

(a) on summary conviction, to a fine not exceeding $10,000;

(b) on conviction on indictment to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 2 years or both.

(2) A person shall not be guilty of an offence under this section if-

(a) the message is intercepted, monitored or interrupted in obedience to a warrant issued by the **Governor** under section 55;

(b) the message is required to be intercepted, monitored or interrupted pursuant to a court order;

(c) the person by whom the message is sent or to whom the message is sent has expressly consented to the interception, monitoring or interruption;

(d) the message is intercepted, monitored or interrupted by the Authority for purposes connected with the execution of its functions under this Law;

(e) the message is intercepted, monitored or interrupted solely for the purpose of preserving the technical integrity of an ICT service or ICT network; or

(f) the message is intended to be received by the public.

Section 54 (as was revised) –

(1) For the purposes of this section, "subscriber" shall not include an end user.

(2) Subject to the provisions of subsection (3), a licensee which intentionally discloses any personal data of a subscriber or end user is guilty of an offence and liable for each such disclosure-

(a) on summary conviction, to a fine not exceeding $10,000; or

(b) on conviction on indictment to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 2 years or both.

(3) Subsection (1) does not apply to-

(a) any disclosure which is made to a constable for the prevention or detection of crime or for the purposes of any criminal proceedings;

(b) any disclosure pursuant to the provisions of any Law for the time being which requires such disclosure;

(c) any disclosure which is made with the written consent of the subscriber or end user as the case may be;

(d) any disclosure which is made pursuant to a court order;

(e) **any disclosure which is made in obedience to a warrant issued by the Governor under section 55**; or

(f) any disclosure which is made to the Authority for purposes connected with the execution of its functions under this Law.

(4) A licensee shall not be liable for any action or suit for any injury, loss or damage resulting from disclosure of information made pursuant to subsection (3).

Section 55 (As was revised) –

(1) Subject to the provisions of this section, **the Governor** may issue a warrant requiring the person to whom it is addressed to intercept, in the course of their transmission by means of an ICT service, such messages as are described in the warrant; and such a warrant may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as are described in the warrant.

(2) **The Governor** shall not issue a warrant under this section unless he considers that the information sought could not reasonably be acquired by other means and the warrant is necessary-

(a) in the interests of the security of the Islands;

(b) for the purpose of preventing or detecting an indictable offence; or

(c) for the purpose of safeguarding the economic well-being of the Islands.

Decisions of the Legislative Assembly

Prior to the revised Bill being tabled, members on both sides of the House expressed considerable concern about the revised wording of sections 53 through 55. During prolonged discussions, the majority of the Members of the Legislative Assembly (MLA) made it clear that they would not vote for a Bill that authorised the Governor rather than a judge to issue interception warrants. A common view within the Legislative Assembly was that if Governor Smith felt that the Constitution authorised him to issue interception warrants, there was no need for such authorisation to be repeated in section 55 of the ICTA Law. As a result, it was decided that section 55 should be deleted as part of a Committee stage amendment. *An extract from Hansard detailing part of the Minister's introduction to the Bill is at section 1 of Annex A.* As a result of this and other Committee stage amendments (see section 2 of Annex A), the Law which was passed by the House in March 2002, and subsequently assented to by the Governor, contained only two sections concerning interception and privacy of subscriber information. These were:

Section 53 –

(1) Subject to the provisions of subsection (2), a person who intentionally intercepts, alters, replicates, monitors or interrupts any message (whether in whole or in part) during its transmission over an ICT network or by means of an ICT service by any means is guilty of an offence and liable for each such message-

(a) on summary conviction, to a fine not exceeding $10,000;

(b) on conviction on indictment to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 2 years or both.

(2) A person shall not be guilty of an offence under this section if-

(a) **the message is intercepted, monitored or interrupted in obedience to a warrant or order issued by the Governor;**

(b) the person by whom the message is sent or to whom the message is sent has expressly or impliedly consented to the interception, monitoring or interruption;

(c) the message is intercepted, monitored or interrupted by the Authority or on the written instructions of the Authority for purposes connected with the execution of its functions under this Law;

(d) the message is intercepted, monitored or interrupted by the ICT network provider or ICT service provider over whose network or service the message is being transmitted for the purposes of-

i. providing or billing for that ICT network or ICT service;

ii. preventing the illegal use of the ICT network or ICT service; or

iii. preserving the technical integrity of an ICT network or ICT service; or

(e) the message is intended to be received by the public.

Section 54 –

(1) For the purposes of this section, "subscriber" shall not include an end user.

(2) Subject to the provisions of subsection (3), a licensee which intentionally discloses any personal data of a subscriber or end user is guilty of an offence and liable for each such disclosure-

(a) on summary conviction, to a fine not exceeding $10,000; or

(b) on conviction on indictment to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 2 years or both.

(3) Subsection (1) does not apply to-

(a) any disclosure which is made to a constable for the prevention or detection of crime or for the purposes of any criminal proceedings;

(b) any disclosure pursuant to the provisions of any Law for the time being which requires such disclosure;

(c) any disclosure which is made with the written consent of the subscriber or end user as the case may be;

(d) any disclosure which is made pursuant to a court order;

(e) **any disclosure which is made in obedience to a warrant or order issued by the Governor; or**

(f) any disclosure which is made to the Authority for purposes connected with the execution of its functions under this Law.

(4) A licensee shall not be liable for any action or suit for any injury, loss or damage resulting from disclosure of information made pursuant to subsection (3).

Attempts to Grant Judges Power to Issue Warrants

In July 2003, during the Second Reading of the Terrorism Bill, 2003 in the Legislative Assembly concerns again arose regarding the authorisation of telecommunication interception warrants by the (then) Honourable Minister for Communications Linford Pierson. *A copy of his statement is at section 3 of Annex A.*

Subsequently, in October 2003 during the debate on the ICTA (Amendment) Bill 2003, Mr. Pierson brought a Committee Stage amendment that sought to change all references to "the Governor" in

sections 53 and 54 to references to "a judge of the Grand Court". The amended Bill was unanimously approved in the Legislative Assembly. *Section 4 of Annex A is an extract of the Minister's comments in the House.*

However, in December 2003, the Legislative Assembly reconsidered two bills, the Terrorism Bill 2003 and the ICTA (Amendment) Bill 2003, which had been returned to the House by the (then) Governor Mr. Bruce Dinwiddy as he was not prepared to assent to the changes in the provisions concerning telecommunication interception warrants. As can be seen from the Hansard extract at section 5 of Annex A, both bills were approved without amendment and returned to the Governor.

In addition to the amendments to sections 53 and 54 of the Law, the ICTA (Amendment) Bill 2003 contained a number of new provisions concerning anti-competitive conduct that were urgently required by the ICT Authority to deal with matters arising from the launch of competitive mobile telephony services. According to the Information Communications and Technology Authority, at some stage (there is no record of the Law having been considered by the Legislative Assembly later than December 2003), the provisions amending sections 53 and 54 were deleted from the Bill and the Governor gave his assent on 31 Mar 2004; the Law was published in the Gazette on 1 Apr 2004.[1]

[1] ICTA (Amendment) Law 2003. See http://www.icta.ky/docs/Laws/ICTA%202003%20Amendments.pdf

PART THREE: CONCERNS OF THE HUMAN RIGHTS COMMISSION

The Bill of Rights (BoR) – Right to Private and Family Life and Freedom of Expression

The right to Private and Family Life is found in s.9 of the BoR and states:

> *(1) Government shall respect every person's private and family life, his or her home and his or her correspondence.*
>
> *(2) Except with his or her own consent or as permitted under subsection (3), no person shall be subjected to the search of his or her person or his or her property or the entry of persons on his or her premises.*
>
> *(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society –*
>
> *(a) in the interests of defence, public safety, public order, public morality, public health, town and country planning, or the development or utilization of any other property in such a manner as to promote the public benefit;*
>
> *(b) for the purpose of protecting the rights and freedoms of other persons;*
>
> *(c) to enable an agent of the Government or a public body established by law to enter on the premises of any person in order to inspect those premises or anything on them for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government or that public body;*
>
> *(d) to authorise, for the purpose of enforcing the judgment or order of a court, the search of any person or property by order of a court or the entry on any premises by such order; or*
>
> *(e) to regulate the right to enter or remain in the Cayman Islands.*

The right to freedom of Expression is found in s.11 of the BoR and states:

> *(1) No person shall be hindered by government in the enjoyment of his or her freedom of expression, which includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his or her correspondence or other means of communication.*
>
> *(2) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society –*
>
> *(a) in the interests of defence, public safety, public order, public morality or public health;*
>
> *(b) for the purpose of protecting the rights, reputations and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telecommunications, posts, broadcasting or other means of communication, or public shows or entertainments; or*
>
> *(c) for the imposition of restrictions on public officers in the interests of the proper performance of their functions.*

As it pertains to the human rights implications related to communications interception, s.9 of the BoR provides that the CI Government is required to respect every person's private and family life, his or her home and his or her correspondence. These four aspects of privacy are not mutually exclusive, and a measure undertaken by a public authority can simultaneously interfere with one or more of them. The concept of "private life" is broad. In general, it would mean you have the right to live your own life, with reasonable personal privacy in a democratic society, taking into account the rights and freedoms of others.

In the same manner s.11 of the BoR provides that the CI Government is required to refrain from interfering with a number of ways in which a person may express themselves but specific to this scenario – with a person's correspondence or other means of communication. In general this means that you have the right to voice opinions and express your views subject to the rights of other persons.

The rights conferred by s.9 and s.11 are qualified rights. S.9(3) and s.11(2) (as detailed above) sets out the grounds on which the rights may be contravened, without the interference constituting a breach of either section. If a member of the public alleges that his or her right under s.9 or s.11 has been breached, the relevant government entity or department or public official will bear the burden of proving that the measure which is being challenged is reasonably justifiable in a democratic society. The European Court of Human Rights has held that an action will be considered necessary in a democratic society if it meets a pressing social need and corresponds to shared values[2].

The concept of 'reasonably justifiable in a democratic society' has been interpreted by the United Nations Human Rights Committee in this context to imply that any interference with privacy must be proportional to the end sought as well as necessary in the circumstances of any given case. As such, interceptions of telecommunications will limit the right to protection from arbitrary and unlawful interference under the right to private and family life.

Correspondence with the Governor

During the said review of the Interception of Telecommunication Messages Regulations, 2011 and the Terrorism Law, 2009, the Commission noted differences with respect to the role of the Attorney General concerning the issuance of telecommunication message interception warrants; namely –

(1) ICTA Regulations (Section 7): The Governor may consult the Attorney General; and
(2) Terrorism Law (Section 55): A Constable may apply to the Governor with prior written consent of the Attorney General.

As a result of the observations noted above the HRC, on 8 November, wrote to former Governor Duncan Taylor, CBE making four specific enquiries as follows –

[2] Ivana Roagna (2012). Council of Europe Human Rights Handbooks. Protecting the right to respect for private and family life under the European Convention on Human Rights. See http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/documentation/hb11_privatelife_en.pdf

(1) the reasoning behind an inconsistent process regarding applications for telecommunication message interception warrants;
(2) whether there is any intention to draw the public's attention to the aforementioned differences;
(3) whether the Government or the Royal Cayman Islands Police Service have established the necessary "safeguards" referred to in Section 8(f) of the ICTA Interception of Telecommunication Message Regulations, 2011; and
(4) the justification for vesting power to issue telecommunication interception warrants solely in the Governor rather than a judge of the Grand Court (following a review by HRC of Hansard records, there does not appear to have been any contribution to the debates from the Deputy Governor or the Attorney General offering an explanation or justification).

On 16 January, 2012, the HRC received a response from former Governor Taylor wherein the following information was offered in response to the Commission's enquiries –

(1) The ICTA Law 2011 and the Terrorism Law, 2009 are two very different laws. An example of how they differ is that the provisions in the Terrorism Law expressly allow for intercepted material to be used in court proceedings, whereas the ICTA Regulations prohibit the use of such material in court proceedings.
(2) With specific regard to the Governor's remit to issue warrants, there is nothing to prevent him or her from consulting the Attorney General whether he is exercising his powers pursuant to the ICTA Regulations or the Terrorism Law. Accordingly, in circumstances where the Governor deems it necessary in order to help him assess the need for a warrant, it is open to him to seek legal advice.
(3) On the matter of establishing the necessary "safeguards" as contemplated by Regulation 8(f) of the ICTA Interception of Telecommunication Message Regulations, 2011, these "safeguards" are contained in an internal and classified RCIPS Intercept Policy and Standard Operating Procedures document. Although not in the public domain, this document will be available to the designated Audit Committee.
(4) On the general question on why the Governor instead of a judge of the Grand Court is issuing interception warrants, this approach mirrors that of the UK where under the Regulations of Investigatory Powers Act (RIPA) and the Intelligence Services Act such warrants are issued by the Secretary of State; it also reflects the Governor's special responsibility under the Constitution for internal security.
(5) The interception of suspected criminals' communications is an essential covert law enforcement technique in combatting serious and organised crime. However, in putting these provisions in place, every effort has to be made to ensure compliance with human rights obligations which includes not only that such a framework be clearly established by legislation but also that such interceptions should only be carried out where to do so is proportionate to the threat in question and where there are sufficient safeguards.

In light of the response received to the HRC's query (made to former Governor Taylor on 8 November, 2011) – "what is the justification for vesting power to issue telecommunication interception warrants solely in the Governor rather than a judge of the Grand Court?" – the HRC believes that the fact that Cayman follows the UK with the Governor having the same powers as the Home Secretary does not of itself explain why there is no judicial oversight. Further, this was never justified by the Honourable Attorney General or anyone else on behalf of the Governor during the various debates of the Bill in the Legislative Assembly. Indeed there are now concerns in the UK on this very point and prior to forming a firm view on the matter the HRC would request that a properly reasoned justification be provided.

The Cayman Islands Constitution Order 2009 (the Constitution) – s.55 Special Responsibilities of the Governor and s.58 National Security Council

The Special Responsibilities of the Governor are found in s.55 of the Constitution which states:

> *(1) The Governor shall be responsible for the conduct, subject to this Constitution and any other law, of any business of the Government with respect to the following matters – inter alia –*
>
> *(c) internal security including the police, without prejudice to section 58;*

The establishment of a National Security Council (NSC) is detailed in s.58 of the Constitution and s.58(4) states:

> *(4) The National Security Council shall advise the Governor on matters relating to internal security, with the exception of operational and staffing matters, and the Governor shall be obliged to act in accordance with the advice of the Council, unless he or she considers that giving effect to the advice would adversely affect Her Majesty's interest (whether in respect of the United Kingdom or the Cayman Islands); and where the Governor has acted otherwise than in accordance with the advice of the Council, he or she shall report to the Council at its next meeting.*

In view of the NSC's constitutional mandate it seems arguable that the Governor should be consulting with the NSC as a matter of course on any applications for an intercept warrant on matters relating to internal security.

Review of RCIPS Communications Interception Policy

During the review the Commission had the opportunity, at the arrangement of former Governor Taylor, to review the RCIPS Classified Communications Interception Policy and on 22 March, 2012 subsequently expressed its satisfaction (to former Governor Taylor and copied to the Deputy Governor Franz Manderson and Commissioner of Police David Baines) with the contents of the document, with particular acknowledgment of the anticipated role of an Audit Committee under the ICTA Regulations.

The Commission further indicated that it wished to make it clear that while comprehensive, the policy in no way replaces an Audit Committee whose function is to conduct an audit of all interception equipment and data records at least once every six months to determine whether interceptions were conducted in accordance with the relevant Regulations. It expressed concern that

without the Committee there was a substantial lack of structural oversight making it impossible for the general public to be assured that the use of interception and communications data is properly authorised as an investigative technique.

Moreover, the HRC noted explicitly to former Governor Taylor that telecommunication message interception carries the potential for human rights infringements and indicated that it considered the Audit Committee to be one of the most important checks and balances in the process. For this reason, the HRC stated in its letter to former Governor Taylor that the appointment of members to the Audit Committee by the Governor-in-Cabinet, as per s.17 of the ICTA Law (Interception of Telecommunication Messages Regulations), 2011, should be considered a priority by the Government as a means to providing a necessary layer of oversight to the process of telecommunication interception by the police service.

On 22 March, 2012 the Deputy Governor responded to the HRC confirming that the (then) Portfolio of Internal and External Affairs was in the final stages of identifying members of the Audit Committee and indicated that the matter would go before Cabinet within the next thirty (30) days.

Over the past eighteen months the HRC has made repeated enquiries regarding the status of the appointment of members to no avail.

Regulations of Investigatory Powers Act (RIPA) and the Intelligence Services Act

In responding to the general question from the HRC as to why the Governor instead of a judge of the Grand Court is responsible for the issuing of interception warrants, former Governor Taylor informed the HRC that this approach mirrors that of the UK where under the Regulations of Investigatory Powers Act (RIPA) and the Intelligence Services Act such warrants are issued by the Secretary of State. Further, he added, it reflects the Governor's special responsibility under the Constitution for internal security.

If this was the reasoning during the drafting stage of ICTA Law, 2011 consideration should have also been given to the fact that it would be logical to conclude that if Cayman's legislation followed the same process as the UK legislation in issuing the warrants then it would also be necessary to build in similar 'safeguards' as those in UK legislation with respect to RIPA. Such 'safeguards' in the UK, for example, include provisions under the Interception of Communications Act which provides for the appointment, by the Prime Minister, of a Commissioner. The Commissioner is a person who holds or has held high judicial office and is independent of Government and of the intercepting Agencies. The Commissioner's function is to oversee the exercise of the Secretary of State's power to issue communication interception warrants. In order to do this, the Commissioner undertakes inspections of the intercepting Agencies and relevant Government Departments to ensure that they are complying with the Act. The Commissioner is given full access to all relevant papers and he selects warrants for inspection, reviews files and associated documentation, and discusses cases directly with operational staff. Moreover, the Commissioner makes a written report annually to the

Prime Minister which is laid before Parliament, although provision is made allowing certain sensitive matters to be withheld by the Prime Minister if he feels it necessary.

Further to the point of necessity with respect to establishing an oversight body, the UK has also instituted a statutory Tribunal to which members of the public may apply if they believe that there has been any contravention of the warrant-issuing provisions in the Act. This Tribunal, which comprises five senior members of the legal profession, is independent of the intercepting Agencies and the Government. These persons have right of access to all relevant material held by the Agencies and may, if necessary, call upon the Commissioner for assistance to investigate complaints. If the Tribunal concludes that there has been a contravention of the Act it must inform the applicant, report its findings to the Prime Minister and, if it thinks fit, make an order which may quash the interception warrant, require the destruction of intercepted material, and/or require the Secretary of State to pay compensation.

PART FOUR: CONCLUDING REMARKS

Although it has been said by the Governor, and recently by Minister Simmonds, that "the warrants would only ever be granted in very exceptional circumstances relating to very serious crime or terrorism[5]", the ICTA Law would appear to contemplate their use in wider circumstances. The HRC would wish to be provided with a properly reasoned justification for this policy decision in order that it may further consider the matter and form a recommendation as to whether the powers should be vested in the Governor (whether upon the advice of the NSC in particular circumstances or not) or a judge of the Grand Court.

The Commission understands that the ability to intercept communication is for a legitimate objective, namely in the interests of public safety and public order by ensuring that law enforcement agencies can effectively investigate serious crimes, organised criminal activity, and conduct counter terrorism measures. Notwithstanding its legitimate function however, communications surveillance should be regarded as a highly intrusive act that potentially interferes with fundamental human rights and threatens the foundations of a democratic society when it is not monitored for legislative or constitutional compliance.

This scenario describes one of the fundamental principles of human rights – the balance of rights, freedoms, and responsibilities; treating individuals fairly, with dignity and respect – while still safeguarding the rights of the wider community.

The HRC cannot emphasise enough the importance of establishing a functioning Interception of Communications Audit Committee as the first step toward strengthening the framework for intelligence gathering in the Cayman Islands.

The Audit Committee's function will be to conduct audits of interceptions and in doing so will protect the public interest by determining whether or not:

a. communication interception is a justifiable response;
b. the interceptions applied for offered a reasonable prospect of providing the information sought;
c. other less intrusive methods of obtaining information were tried and failed or were not feasible;
d. the interception stopped as soon as it has ceased to provide information of the kind sought or it has become apparent that it is unlikely to provide it;
e. all products of interception not directly relevant to the purpose for which the warrant was granted are speedily destroyed; and/or

[5] Cayman News Service: Wiretap process 'mirrors' UK. 8 November, 2013.

f. material directly relevant to that purpose is given no wider circulation than is essential for carrying it out[4].

Disconcerting, therefore, is a seeming lack of willingness by previous Governments to establish an Interception of Communications Audit Committee. While the Commission does not foresee the Audit Committee as a human rights adjudicator, there is the realisation that a layer of oversight is unexplainably missing wherein it cannot be ignored that such inadequacies increase the risk of human rights violations going undetected and unreported. Consequently, until the Audit Committee is established, the public cannot be sufficiently assured that the surveillance equipment and circumstances underpinning each instance of telecommunication message interception is compliant with the ICTA legislation or established human rights standards intended to protect against unlawful, arbitrary, and unreasonable interceptions.

With the addition of the Ministry of Home and Community Affairs (MoH&CA) the Commission is unaware of whether the Honourable Premier, who has responsibility for the MoH&CA, will bring forward the list of recommended persons to be appointed to the Audit Committee, or whether that responsibility remains with the Honourable Deputy Governor. Either way the HRC urges Her Excellency to direct that the requisite Cabinet Paper be brought to Cabinet so that the Governor-in-Cabinet may confirm the appointments.

[4] Secretary of State for the Home Department (1999). Interception Of Communications In The United Kingdom. A Consultation Paper.

PART FIVE: ANNEX A – EXTRACTS FROM HANSARD

Section 1: Friday, 8 March 2002 – Second Reading of ICTA Bill

Extract from the Introduction by (then) Honourable Minister for Communications Linford Pierson

Licensees or Subscribers

Clause 53 specifies that it is an offence to intentionally intercept, alter, replicate, monitor or interrupt any messages transmitted over an ICT network by means of an ICT service. Exceptions are provided where the action is taken by order of the Governor or the Court. Madam Speaker, I should mention and in connection with this section I propose to bring a small amendment, as I will be seeking to amend clause 55, and 53 is connection with that clause also.

Clause 54 specifies that it is offence for a licensee to disclose any personal data of a subscriber and user. Limited exceptions are provided.

Clause 55 (creates some problems with myself and certain Members of the House and I am going to be proposing an Amendment to this clause). This clause enables the Governor to issue a warrant authorising the interception of a message transmitted by means of an ICT service.

I should quickly add here though, that this Authority is now given to the Governor under the Cayman Islands Constitution, so even if I amend this, the Governor will still have that authority under the Constitution. As we all know, the Constitution supersedes any other law passed or existing in this House. So, the Governor still has that same right under his reserve powers to have a message intercepted if he feels that it is warranted. This particular Clause (55) reads and I would like to read this so that it is understood. It states: "Subject to the provision of this section, the Governor may issue a warrant requiring the person to whom it is addressed to intercept, in the course of their transmission by means of an ICT service, such messages as are described in the warrant; and such a warrant may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as are described in the warrant".

Sub-clause (2) reads: "The Governor shall not issue a warrant under this section unless he considers that the information sought could not reasonably be acquired by other means and the warrant is necessary- (a) in the interests of the security of the Islands; (b) for the purpose of pre-venting or detecting an indictable offence; or (c) for the purpose of safeguarding the economic well-being of the Islands".

These same powers are contained in the Constitution; therefore the Governor already has these powers so it was considered that it would be duplication to have to again recite these same powers in this legislation. So, if the Governor feels that it is necessary for him to intercept any calls, whether it is being in connection with the commission of a crime or otherwise, he already has that power

under the Constitution. So, I am going to be proposing to delete this paragraph since the power is already in the Constitution for the Governor.

Part (7)–Review of Administrative Decisions and Appeals

Clause 56 sets out the procedures for the re-view of any administrative decision with respect to licensees or licensing made by the Authority.

The Speaker: Honourable Minister you have some 1 hour and 29 minutes remaining.

Hon. Linford A. Pierson: Thank you, Madam Speaker. I would like to take the opportunity to say that the reserved powers of the Governor, is contained under section (?) of the Constitution.

Clause 57 sets out the procedures for an appeal to the Court from any decision made by the Authority.

I now wish to turn to part (8) which deals with the offences under the Bill.

Section 2: Monday 18 March 2002 – Committee Stage Amendments

Clause 53

The Clerk: Clause 53 Interception of Messages Prohibited

The Chairman: The Honourable Minister for Communications.

Hon. Linford A. Pierson: Mr. Chairman, I beg to move that clause 53(2) be amended as follows: by deleting paragraph (a) and substituting the following— "(a) the message is intercepted, monitored or interrupted in obedience to a warrant or an order is-sued by the Governor;" -by deleting paragraph (b) and renumbering all subsequent clauses.

Further amendment—Subsection 2 Clause 53(2): in paragraph (c) by inserting after the word "expressly "the words "or impliedly"; in paragraph (d) by inserting after the word "Authority" the words "or on the written instructions of the Authority"; and by deleting paragraph (e) and substituting the following—"(e) the message is intercepted, monitored or interrupted by the ICT network provider or ICT service provider over whose network or service the message is being transmitted for the purposes of

i. providing or billing for that ICT network or ICT service;
ii. preventing the illegal use of the ICT network or ICT service; or
iii. preserving the technical integrity of an ICT net-work or ICT service;".

The Chairman: Permission is hereby granted for the waiver of the two days' notice as required.

Hon. Linford A. Pierson: Thank you, Mr. Chairman.

The Chairman: The amendment has been duly moved. Does any Member wish to speak thereto?

If no Member wishes to speak, the question is that the amendments stand part of the clause. All those in favour please say Aye. Those against, No.

Ayes.

The Chairman: The Ayes have it. Amendments stand part of the clause.

Agreed: Amendment to Clause 53 passed.

The Chairman: The question is that clause 53 as amended stand part of the Bill. All those in favour please say Aye. Those against, No.

Agreed: Clause 53 as amended passed.

The Chairman: Before we read clause 54 there seems to be a question as to the marginal notes for clause 54. On the inside of the notes it has 'privacy of subscriber information' but in the arrangement of sections it says 'privacy of customer information'. Can the Minister say which one it should be—customer or subscriber?

Hon. Linford A. Pierson: Mr. Chairman, to my knowledge it should be customer information but I would ask to discuss this matter with the Second Official Member and have it corrected.

The Chairman: All right.

<u>Clause 54</u>
The Clerk: Clause 54 Privacy of Subscriber Information

The Chairman: Honourable Minister for Communications.

Hon. Linford A. Pierson: Mr. Chairman, I beg to move that clause 54(3) be amended- by deleting sub clause (3) (e) and substituting the following— "(e) any disclosure which is made in obedience to a warrant or an order issued by the Governor;".

The Chairman: The amendment is duly moved. Does any Member wish to speak thereto?
If no Member wishes to speak the question is that the amendment stands part of the clause. All those in favour please say Aye. Those against, No.

Ayes.

The Chairman: The Ayes have it. Amendment passed.

Agreed: Amendment to Clause 54 passed.

The Chairman: The question is that clause 54 as amended do stand part of the Bill. All those in favour please say Aye. Those against, No.
Ayes.

Agreed: Clause 54 as amended passed.

Clause 55
The Clerk: Clause 55 Issue of warrant for interception

The Chairman: Honourable Minister for Communications

Hon. Linford A. Pierson: Mr. Chairman, I beg to move that clause 55 be deleted and renumber all subsequent clauses.

The Chairman: The amendment has been duly moved. Does any Member wish to speak thereto? If no Member wishes to speak the question is that the amendment stand part of the clause. All those in favour please say Aye. Those against, No.

Ayes.

The Chairman: The Ayes have it. Amendment passed.

Agreed: Clause 55 deleted.

Section 3: Tuesday, 17 July 2003 – Part of the debate on the Second Reading of the Terrorism Bill 2003

Hon. Linford A. Pierson: Madam Speaker, just to say that when the Information and Communications Technology Authority (ICTA) Law was proposed in Executive Council, it was proposed, in the identical form of the Bill that was just read from, that the court would have to give approval before any interception of telephone lines would be available and the then Governor, Peter Smith, removed it from the Law. He would not sign it into Law with that section in it. Recently, Madam Speaker, I brought the situation again to the present Governor. I wished to have it amended so that before any interception could be done to telephones, it would have to go through the Grand Court and not the Governor, because the section reads: **"the Governor"** not meaning the Governor in Executive Council but the Governor in his own position, solo. We opposed that, and I still oppose that and I must say that I am happy with the position that this House is taking [the House was discussing removing a similar clause from the Terrorism Bill 2003] and I hope that it will lay a precedent that I can now bring a Bill to correct the ICTA Law. Thank you, Madam Speaker.

Section 4: Wednesday, 1 October 2003 – Second Reading of the ICTA (Amendment) Law 2003.

Part of introductory statement by Hon Linford Pierson:

... However, in addition to that, I intend to move in committee stage an amendment to the Law which will have the effect of amending section 53 (2) by repealing the words "in obedience to warrant or order issued by the Governor" and substituting "the Governor" with "a Judge of the Grand Court." It is my intention to go into further details of this in committee stage.

Madam Speaker, I would like to say here that when the original Bill was being prepared and brought to Executive Council the then Governor had that section replaced where it referred to a Judge in the Grand Court. I have every reason to believe after discussing this with the present Governor that he might also have a problem with this amendment. However, it is the view of the Government that it is appropriate that any interception of a telephone line should be done on the order of a Judge of the Grand Court for various reasons that have already been mentioned during previous debates. I will not go into those again.

Section 5: Tuesday, 16 December 2003 – Reconsideration of Bills sent back to the House by the Governor

The Chairman: The House is now in Committee.

Honourable Members while there is a policy that Bills are not broadcast, it has always been a pol-icy of the House not to remove the press from the premises therefore they will remain in the Honourable House and in Committee.

Honourable Members, the first two Bills to be dealt with in Committee are the Terrorism Bill 2003 and The Information and Communication Technology Authority (Amendment) Bill 2003.
As Honourable Members are aware, the Terrorism Bill 2003 was passed with amendment by this Honourable House on 24 July 2003 and the Information Technology Authority (Amendment) Bill 2003 was passed with amendment by this Honourable House on 3 October 2003.

Both of these Bills were amended in order to provide for a Judge of the Court to authorise an interception order rather than the Governor in his discretion. These amendments received the unanimous approval of all Members present on those two occasions. I have subsequently been advised by the Attorney General that his Excellency has refused his as-sent to the Bills as amended and has requested pursuant to section 40 of the Constitution, which gives him the power to refuse his assent and to return this Bill back to the Assembly, that the Assembly reverse the amendments to the original status whereby such interception orders of telephone et cetera would be made by the Governor in his discretion.

Specifically, His Excellency has recommended that section 55 of The Terrorism Bill 2003 be amended so as to provide for an interception of communications order to be made by the Governor, in his discretion, rather than by a judge of the Grand Court.

Similarly, that clauses 24 and 25 of The Information and Communications Technology (Amendment) Bill 2003 be deleted, so as to provide for an interception order which would be

authorised in obedience to a warrant or order issued by the Governor rather than by a judge of the Grand Court.

The two Bills, as directed by His Excellency, have therefore been returned and are accordingly now being re-submitted for consideration of those specific amendments by all Honourable Members in accordance with Standing Order 57(1).

At the conclusion of the proceedings in Committee on these two Bills, the Honourable Leader of Government Business will move that the Bills with or without amendments on recommittal be reported to the House.

Honourable Members, these two Bills, or Bill 5; The Terrorism Bill 2003, and Bill 6; The Information and Communications Technology Authority (Amendment) Bill 2003 have been recommitted for your consideration. The consideration being that His Excellency the Governor wishes to have the provision for "a judge of the Grand Court" to make an interception or-der, deleted and that "the Governor in his discretion" be reinserted. This is now open for debate.

The Chairman: The Honourable Leader of Government Business.

Hon. W. McKeeva Bush: Mr. Chairman, from what we understand, Members prefer not to make any changes to the Bill as was passed.

The Chairman: The Second Elected Member for George Town.

Mr. Alden M. McLaughlin, Jr.: Thank you, Mr. Chairman. These two provisions, section 25 of The Information and Communications Technology Authority (Amendment) Law 2003 and section 55 of The Terrorism Bill 2003 are provisions that have been placed in those Bills as a result of concerns, as I understand it, of all Honourable Members of the House, relating to the invasion of privacy of persons in this country. While we recognise that, in the interest of the prevention of terrorism and for other legitimate purposes, it may well be necessary for telecommunications to be intercepted, particularly in light of what has transpired in recent times, having had the experience of the Euro Bank trial fiasco, we are duty-bound to ensure that if such interception is necessary that it has the benefit of judicial scrutiny. We do not repose any trust in the judiciousness of that exercise by Her Majesty's Government, of whom His Excellency the Governor is our representative, and therefore, Mr. Chairman, on behalf of the Opposition, we are not prepared to amend these Bills, as is urged upon us by His Excellency the Governor, and we wish that position to be duly recorded and reported to His Excellency in due course.

We mean Him no disrespect, but we are charged with the responsibility for representing the interests of the people of this country, not the people of any other country. If Her Majesty's Government is insistent that these provisions should go, then they will have to do what they have to

do in that respect. I must say that from our perspective their insistence on the removal is ominous, or appears to us to be ominous. Thank you, Mr. Chairman.

The Chairman: Does any other Member wish to speak? I now call on the Honourable Leader of Government Business to move the Motion.

Hon. W. McKeeva Bush: Mr. Chairman, I move that the two Bills be reported to the House without change; The Terrorism Bill 2003 and the Information and Communications Technology Authority (Amendment) Bill 2003.

The Chairman: The question is that the Terrorism Bill 2003 and the Information and Communications Technology Authority (Amendment) Bill 2003 be reported back to the House without any changes made.
All those in favour, please say Aye. All those against, No.

Ayes.

The Chairman: The Ayes have it.

Agreed. The Terrorism Bill 2003 and The Information and Communications Technology Authority (Amendment) Bill 2003 reported to the House without amendment.

PART SIX: ANNEX B: TELECOMM MESSAGE INTERCEPTION PROCESSES IN OTHER BRITISH OVERSEAS TERRITORIES

Summary

The following BOT's are jurisdictions wherein power to grant telecommunication message interception warrants is vested in the Governor:

(1) Anguilla
(2) Cayman Islands
(3) Bermuda
(4) British Virgin Islands
(5) St. Helena

The following BOT is the only jurisdiction wherein power to grant telecommunication message interception warrants is vested in the Minister with responsibility for Communications:

(1) Gibraltar

The following BOT is the only jurisdiction wherein power to grant telecommunication message interception warrants is vested in the courts:

(1) Turks and Caicos Islands

Outline of Legislation in British Overseas Territories

Anguilla Telecommunications Act (2004)

Section 54: Powers of the Governor –

The Governor may make written requests and issue Orders to operators of telecommunications networks and providers of telecommunications services requiring them to intercept communications, provide any user information or otherwise in aid of law enforcement or national security.

Bermuda Telecommunications Act (1986)

Section 62: Governor may prohibit transmission of messages in public interest –

Where he is satisfied that the interests of defence, public safety, public order or public morality so require, the Governor, acting in his discretion may by warrant under his hand direct that any message or any class of messages brought for transmission by telecommunication shall not be transmitted or that any telephone call or message or any class of messages brought for transmission, or transmitted or received or being transmitted, by telecommunication shall be intercepted or detained or disclosed to the Governor or to the public officer specified in the warrant.

British Virgin Islands Telecommunications Act (2006)

Section 90: Powers of the Governor –

The Governor may make written requests and issue orders to operators of telecommunications networks and providers of telecommunications services requiring them, at their expense, to intercept

communications for law enforcement purposes or provide any user information or otherwise in aid of his authority.

Cayman Islands ICTA Law (Telecommunication Message Interception Regulations 2011)

Regulation 4: Governor may Authorise Interception –

In the exercise of power conferred under section 75(2)(a), the Governor may issue a warrant authorizing any person employed by the Royal Cayman Islands Police Service to intercept a message in relation to a matter or person for purposes of gathering intelligence for purposes specified in regulation 5.

Gibraltar Telecommunications Act (2006)

Section 76: Misleading Messages and Interception and Disclosure of Messages –

Any person who, otherwise than under the authority of the Minister or in the course of his duty as an officer of the Crown, either–

(a) uses any radio communications apparatus with intent to obtain information as to the contents, sender or addressee of any message (whether sent by means of radio communications or not) which neither the person using the apparatus nor any person on whose behalf he is acting is authorised by the Minister to receive; or

(b) except in the course of legal proceedings or for the purpose of any report thereof, discloses any information as to the contents, sender or addressee of any such message, being information which would not have come to his knowledge but for the use of radio communications apparatus by him or another person,

St. Helena Telecommunications Ordinance (1989)

Section 55: Misleading Messages and Interception of Messages –

A person is guilty of an offence who—

(b) otherwise than under the authority of the Governor or in the course of his duty as a servant of the Crown or of a Utility licenced under this Ordinance, either—

i. uses any wireless telegraphy apparatus with intent to obtain information as to the contents, sender or addressee of any message (whether sent by means of wireless telegraphy or not) which neither the person using the apparatus nor any person on whose behalf he is acting is authorised by the Governor to receive; or

Turks and Caicos Islands Telecommunications Ordinance (2004)

Section 15: Messages

A licensee shall treat as confidential, the contents and circumstances of messages sent by telecommunications network and unsuccessful attempts to send messages.

A licensee shall not, except where necessary to provide telecommunications service to a customer –

(a) disclose to any other person, information relating to messages sent by telecommunications network or give any other person an opportunity to do so; and

(b) without the expressed or implied permission of the users involved in the sending and receipt of messages –

ii. monitor, intercept or record or permit the monitoring, interception or recording of Messages sent by telecommunications network; or

iii. send or permit the sending of information relating to these messages by persons other than the users.

Where the Royal Turks and Caicos Islands Police Force wish to have subsection (2) disapplied in relation to a user who is suspected of a criminal offence or charged with a criminal offence they shall apply to the court for a disapplication and the court may order that subsection (2) shall not apply subject to such conditions as the court may specify.

PART SEVEN: ANNEX C: THE INTERCEPTION OF COMMUNICATIONS AUDIT COMMITTEE

Section 17 of The Information and Communications Technology Authority (Interception of Telecommunication Messages) Regulations, 2011 provides for the establishment of an Audit Committee.

Section 17 –

(1) The Governor in Cabinet shall appoint a committee to be known as the Interception of Communication Audit Committee, whose function shall be to conduct audits of interceptions carried out under these Regulations.

(2) The ICAC shall consist of the following five persons –

(a) a Justice of the Peace, who shall be Chairperson;

(b) a retired –

i. Judge;

ii. Magistrate; or

iii. lawyer;

(c) the Chief Officer in the Portfolio of Internal and External Affairs [Home and Community Affairs];

(d) an information and technology specialist employed by the Cayman Islands Government; and

(e) a technical expert (from a law enforcement agency outside the Islands) with experience in the interception of telecommunications.

(3) Members of the ICAC shall serve at the pleasure of the Governor in Cabinet.

(4) The ICAC shall adopt its own rules of procedure.

Section 18 speaks to the conduct of audits carried out by the Committee.

Section 18 –

(1) The ICAC shall conduct an audit of all interception equipment and data records at least once every six months to determine whether interceptions were conducted in accordance with these Regulations.

(2) The Commissioner of Police shall disclose or provide to the ICAC access to interception equipment, data records and such documents and information as the ICAC may require for the purpose of enabling it to carry out its functions under these Regulations and, for the purposes of this regulation, data records do not include the recordings of the conversations or a transcript thereof.

Section 19 speaks to confidentiality.

Section 19 –

(1) Members of the ICAC shall sign a confidentiality agreement with the Governor, which shall prohibit the disclosure to unauthorized persons of information obtained during the

audit process.

Section 20 speaks to the publication of a report following an audit.

Section 20 –

(1) The ICAC shall, through the Chairperson, present a written report to the Governor no later than 30 days after an audit is complete.