



The Cayman Islands

Law Reform Commission

1 April, 2013/31 March, 2014

**NINTH ANNUAL REPORT OF THE
LAW REFORM COMMISSION**



FOREWORD

I am pleased to present to the Honourable Attorney General the Ninth Annual Report of the Law Reform Commission (LRC). The Report covers the activities of the LRC from 1st April, 2013 to 31st, March, 2014.

Let me begin by welcoming the appointments of Solicitor General, Ms. Jacqueline Wilson and attorney-at-law, Mr. Huw St. J. Moses, OBE as Commissioners. Their addition certainly bolsters the LRC. The value of the work of the LRC is assisted by all Commissioners having an understanding of the practical application of the law and problems which arise in the various areas of the law which are considered. It is in this particular regard that we look forward to benefiting from the vast knowledge and expertise these two senior attorneys will no doubt share as the LRC seeks to enhance and advance the law reform process.

I wish to express my appreciation for the enthusiasm, contribution and commitment of my fellow Commissioners who are of the highest legal caliber and to congratulate Commissioner Mrs. Eileen Nervik on her appointment as Queen's Counsel. I am also humbled and honoured by my appointment as Queen's Counsel as well.

During the period under review we saw the advancement of several law reform initiatives which had been the subject of ongoing research by the LRC during earlier review periods. These areas of research include-

- sexual harassment;
- strata titles reform;
- directors' duties;
- contempt of court;
- family law reform;
- stalking; and
- whistle blower protection.

On 1st May, 2013, the LRC submitted its Final Report on Sexual Harassment to the Hon. Attorney General. This report was supported by a Sexual Harassment Bill, 2013 and it contains legislative proposals which seek to respond to the issues that touch and concern acts of sexual harassment. We look forward to the consideration of our Final Report by the Government.

The other areas are at different stages and are discussed in further detail in the report.

As a Commission, our role has been to work towards adding value to the legal expertise of the Government by drawing on our skills of research and analysis and representing issues in a clear and impartial manner. Similar to past areas we have examined, it is our belief that the current subjects have a direct bearing on the needs of the contemporary Cayman Islands society.

Though the formulation of our papers and reports is done within office, we understand that the law reform process and its outcomes are enhanced when staff and Commissioners actively engage with the public, practitioners, stakeholders and persons with relevant policy and legal expertise. Even if our proposals are not implemented into legislation we seek to ensure that our research and analysis of the law has practical utility for those who may wish to refer to our reports for reference purposes. In the interest of the advancement of our legal system, it is however important that the LRC's reform proposals are given timely consideration and if deemed appropriate, implemented as soon as practicably possible.

In pursuing our law reform objectives we take pride in being an inclusive body. Accordingly, we seek contributions from the public, stakeholders, legal profession and courts in order to enfranchise, listen and learn. It is on this basis that I express my thanks to all those who have participated in the work of the LRC either by responding to the consultation papers we have published or by serving on sub-committees that have been established.

The strength of the LRC comes in large part from the contribution of its personnel. In this regard, I express my thanks to the Director and staff of the Commission. It is my considered view that the level of productivity coupled with the excellence of the work of the LRC is in large part a tribute to the able assistance and dedication of the staff.

Law reform plays an important role in any society which aspires to maintain the rule of law. As our society evolves, our laws have to change to meet the needs of the society in order to prevent injustice and unfairness.

During the next year, I therefore join the Commissioners and staff in a commitment to continuing the law reform process and maintaining our high standards as we pursue and conclude law reform projects that seek to contribute to the development of a Cayman society based on democratic values, social justice and fundamental human rights for all. While there have been and will continue to be challenges along the road of law reform, the LRC will do its utmost to fulfil its mandate.

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OVERVIEW OF THE LAW REFORM COMMISSION

The Law Reform Commission was established by the Law Reform Commission Law No. 6 of 2005 and commenced operation on 16 September, 2005.

In accordance with the Law, the Commission's mandate is to study and keep under constant review the statutes and other laws comprising the law of the Cayman Islands with a view to its systematic development and reform, including in particular -

- the modification of any branch of the law as far as that is practicable;
- the elimination of anomalies in the law, the repeal of obsolete and unnecessary enactments and the simplification and modernisation of the law;
- the development of new areas in the law with the aim of making them more responsive to the changing needs of Cayman Islands society;
- the adoption of new or more effective methods for the administration of the law and the dispensation of justice; and
- the codification of the unwritten laws of the Cayman Islands.

The Commission, in the performance of its functions, may-

- review and consider any proposals for the reform of the law which may be referred to it by any person or authority;
- prepare and submit to the Attorney General from time to time, a programme for the study and examination of any branch of the law with a view to making recommendations for its improvement, modernisation and reform;
- initiate and carry out or direct the initiation and carrying out of, studies and research necessary for the improvement and modernisation of the law;
- undertake, pursuant to any such recommendation approved by the Attorney General, the formulation and preparation of drafts in the form of Bills or other instruments for consideration by the Governor in Cabinet and the Legislative Assembly;
- provide, at the instance of Government departments and other authorities concerned, advice, information and proposals for reform or amendment of any branch of the law; and
- with the approval of the Attorney-General, appoint or empanel committees, whether from among members of the Commission or from among persons outside the Commission or both, to study and make recommendations to the Commission on any aspect of the law referred to it by the Commission.

The work of the Commission is carried out by six part-time Commissioners and two full time legal counsel (the Director and Legislative Counsel) and one executive officer. The Commission is a department of the Portfolio of Legal Affairs but it acts independently in its review of matters. Its recommendations are based on its own research and analysis of ideas submitted by stakeholders and by the public.

The Attorney General refers matters to the Commission but the Commission may initiate and carry out studies and research necessary for the improvement and modernisation of any area of the law based on comments from the public, interest groups or on its research.

The law reform process is a time consuming one and comprises extensive consultation, legal research and writing. The Commission usually prepares two publications during the course of a project. The first publication, the Discussion or Consultation Paper, sets out the Commission's preliminary suggestions for reform. The preliminary suggestions are usually made after legal research is carried out by the staff of the Commission and after such research has been considered by the Commissioners. The Commission either publishes the Discussion or Consultation paper on <http://www.lrc.gov.ky>, www.gov.ky or the www.judicial.ky or it submits the consultation paper to identified stakeholders for comments.

The second publication is a Final Report, which is submitted to the Attorney General. It contains the final recommendations of the Commission and, in most cases to date, a draft law. The Commission makes its final recommendations after it takes into account the responses it receives to the Discussion or Consultation Paper. Since its establishment the Commission has produced several project papers and reports and eight annual reports which are listed in the Appendix.

THE COMMISSIONERS AND STAFF OF THE LAW REFORM COMMISSION



Law Reform Commissioners from left- Ms. Cheryll Richards Q.C.; Mr. Huw Moses, OBE; Mr. Ian Paget-Brown Q.C.; Mrs. Eileen Nervik Q.C.; Mr. Kenneth Farrow Q.C.; Ms. Jacqueline Wilson



Staff of the Commission from left-Legislative Counsel, Mr. José Griffith, Director, Ms. Cheryl Neblett and Executive Officer, Mrs. Kimberly Allen

YEAR IN REVIEW- PROJECTS OF THE LAW REFORM COMMISSION FROM 1 APRIL, 2013 TO 31 MARCH, 2014

MEETINGS OF THE COMMISSION

The Commission met four times between 1 April, 2013 and 31 March, 2014 on the following dates-

- 10 December, 2013;
- 30 January, 2014;
- 27 February, 2014; and
- 25 March, 2014.

PROJECTS

SEXUAL HARASSMENT

The LRC on 1st May, 2013 concluded its work on the review of sexual harassment. The Final Report and the supporting Bill comprising the Sexual Harassment Bill, 2013 were submitted to the Attorney General for consideration. This Bill contained legislative proposals which seek to respond to the issues that touch and concern acts of sexual harassment in the workplace environment and other professional contexts.

Following upon the Report of the Special Advisory Committee on Gender Violence in 2008, the then Cabinet issued a directive that the issue of gender violence should be examined by a committee established by the Portfolio of Legal Affairs in consultation with the then Ministry of Health and Human Services. It was instructed that the examination should fall within the parameters of the LRC and address interpersonal and gender-based violence issues such as rape, marital rape, sexual harassment, stalking, domestic violence, incest, child abuse and prostitution.

The Report of the Special Advisory Committee on Gender Violence along with the Report prepared by the Young Business and Professional Women's Club on Sexual Harassment and Stalking was subsequently referred to the LRC in 2009 by the Senior Policy Advisor (Gender Affairs) in the Ministry of Community Affairs, Gender and Housing.

The LRC treated this project as strictly a legislative drafting project having had the benefit of reviewing the report of the Young Business and Professional Women's Club on Sexual Harassment and Stalking.

The primary conclusion which emerged from the Report of the Young Business and Professional Women's Club on Sexual Harassment and Stalking is that there is a need for comprehensive legislation to protect potential victims from sexual harassment. It was recommended that the legislation include the following-

- (a) a test of sexual harassment which combines a subjective test (i.e. the perception of the alleged victim) and an objective test (i.e. the perception of a reasonable person);

- (b) a civil offence of sexual harassment which enables one party to bring an action directly against the alleged perpetrator;
- (c) remedies which include dismissal of a complaint, power to direct reimbursement of legal fees in bringing an action, directions to stop the offending conduct, compensation for any loss or damage suffered, employer being ordered to take appropriate action and penalties for victimising a complainant; and
- (d) power to compel information or documents, direct the attendance of witnesses prohibit publication of details of hearings and impose punishment for interruption of proceedings.

In seeking to give effect to these recommendations, the LRC commenced its review by providing a brief overview of the sexual harassment issue. The issue of sexual harassment, the LRC noted, has long been recognised internationally and in recent years has been increasingly viewed as a major international human rights problem.

Also, the LRC recognised the effort of the Government to protect human dignity and ensure the right of individuals to a safe and non-threatening environment by enacting the Gender Equality Law, 2011. We however pointed out that this Law dealt only with sexual harassment as it relates to gender discrimination within employment and occupational contexts.

The LRC expressed the view that the Gender Equality Law is restrictive in nature and does present limitations in light of the broader spectre of the sexual harassment issue.

In addition to the recommendations of the Young Business and Professional Women's Club on Sexual Harassment and Stalking we indicated that there is a need for legislation which mandates the formulation of a sexual harassment policy and expands the contexts in which the conduct can occur to include, among other things, educational and other institutions, associations and accommodations.

In advancing this process, the LRC prepared for consideration a draft Sexual Harassment Bill, 2012 which was forwarded to stakeholders and the general public.

The provisions of the Bill were informed by several legislative precedents including the Australian Sex Discrimination Act, 1984, the Bahamian Sexual Offences and Domestic Violence Act, 2006, the CARICOM Model Law on Sexual Harassment, the Belizean Sexual Harassment Act, 2000, the California Civil Code, the Canadian Labour Code and the Sex Discrimination Act, 1975 of the United Kingdom.

The consultation period on the Bill expired on 27th September, 2012 by which time we had received comments from the Ministry of Community Affairs, Gender and Housing, the Cayman Islands Law Society and Bishop Nicholas Sykes. Following upon the examination of the comments of all stakeholders the LRC revised the Bill to reflect those amendments which were consistent with its objectives to respond to the sexual harassment issue.

Accordingly, the LRC recommended for consideration the proposed Sexual Harassment Bill, 2013. The Bill contains legislative proposals which-

- (i) include a definition of sexual harassment;
- (ii) identify the types of conduct that may constitute sexual harassment;
- (iii) require the formulation of policies dealing with sexual harassment conduct in a number of professional relationship settings;
- (iv) provide for sexual harassment complaints to be made to the Gender Equality Tribunal; and
- (v) introduce protective remedies for victims or potential victims who have been or might be exposed to sexual harassment conduct within different interpersonal relationships.

As part of the process to give effect to the recommended proposals it will be necessary for consequential amendments to be made to the Gender Equality Law, 2011 to do the following-

- (i) define sexual harassment in accordance with the definition in the proposed Sexual Harassment Bill; and
- (ii) expand the functions of the Gender Equality Tribunal to include the hearing and determination of complaints submitted pursuant to the sexual harassment legislation.

MODERNISATION OF THE REGULATION OF STRATA TITLES IN THE CAYMAN ISLANDS

The LRC submitted for public comment a discussion paper and a Strata Titles Bill, 2013 on 3rd January 2013. The Bill contained a complete review of the regulation of strata titles in the Islands. The deadline for submission of comments was 4 April, 2013 but the LRC, after several requested extensions of the deadline, received final comments in December 2013.

In 2011 a Strata Titles Registration (Amendment) Bill containing provisions relating to the management and administration of strata schemes, the termination of strata schemes and resolution of disputes, was submitted for public comment. The LRC received responses from a wide variety of persons including the legal associations, the Bankers' Association, CIREBA, individual real estates agencies, strata owners, executive committees, the Water Authority and the Cayman Contractor's Association. The clauses set out in the first Bill were amended pursuant to comments submitted and were inserted in the new Bill.

Matters dealt with in the Strata Titles Bill, 2013 include the creation of strata lots and common property; the management and administration of strata schemes; phased development of strata schemes; the regulation of leasehold and vacant land strata schemes; protection of purchasers; termination of strata schemes and resolution of disputes. The Schedules to the Bill provide model management statements to be used in mixed strata schemes and revised model bye-laws for residential strata schemes.

The main objections to the Bill relate to the amendments passed by the Legislative Assembly in August 2012, more particularly the amendment which provides for the special and super-majority resolutions under which less than all of the strata owners may be permitted to vote on

selling a strata scheme. The provisions have been described in some correspondence as unconstitutional.

Since receiving final comments in late 2013 the LRC, with the assistance of prominent attorney-at-law Mr. David Ritch, has been revising the Bill to take into account the many comments and recommendations which were submitted. The LRC is examining the submissions on the special and super-majority resolutions with a view to making recommendations thereon. After the Bill is finalised the LRC will consider whether to re-submit it for further public consultation.

FAMILY LAW REFORM- REVIEW OF THE MATRIMONIAL CAUSES LAW (2005 REVISION) AND THE MAINTENANCE LAW (1997 REVISION); THE FAMILY PROPERTY (RIGHTS OF SPOUSES) BILL, 2013

On 9 July, 2013 the LRC submitted the Matrimonial Causes Bill, the Maintenance Bill and the Family Property (Rights of Spouses) Bill for public consultation. These Bills formed part of the reform of “family” legislation commenced by the LRC in 2011. The deadline for submission of comments was 11 November, 2013.

The Bills were prepared after the consideration of comments received to the 2011 discussion paper on family law reform, other submissions to the LRC and the recommendations in the 2012 Report relating to the Islands’ legislative compliance with the Convention on the Elimination of All Forms of Discrimination Against Women.

The Bills cover a wide range of matters including the following-

- (a) one ground of divorce i.e. irretrievable breakdown of the marriage as evidenced by 12 months of separation;
- (b) mediation in family proceedings;
- (c) the recognition of pre-nuptial agreements;
- (d) abolition of actions and damages for adultery;
- (e) financial relief in the Cayman Islands courts after separation or divorce in another jurisdiction;
- (f) abolition of the need for men to prove domicile in order to apply for a divorce in the Islands;
- (g) gender equality in maintenance proceedings; and
- (h) the regulation of property and financial matters of both married and unmarried couples in de facto relationships of five years or more.

The Bill received feedback from several persons, two Government Ministries and bodies including the Cayman Ministers Association. The LRC received final comments from the Department of Children and Family Services on 24 March, 2014 in relation to the role of social workers under the Matrimonial Causes Bill. We intend to submit the final report on this review by 30 April, 2014.

WHISTLE-BLOWING- PROTECTED DISCLOSURES BILL AND DISCUSSION PAPER

On 3 April, 2013 the Complaints Commissioner, pursuant to her legislative powers, gave notice of the intention of that office to carry out an own motion investigation into whether there are adequate protections for reporters of wrongdoing (also known as whistle-blowers). The Office was of the view that there are reasons of special importance which makes such investigation desirable in the public interest.¹

The Director of the LRC met with one of the officers of the office of the Complaints Commissioner (OCM) in June 2013. A brief overview of the relevant laws in the Cayman Islands as well as in other jurisdictions was provided to the officer by the Director. Pursuant to a request of the officer of OCM, the Chairman of the LRC thereafter agreed to assist in the investigation by the provision of a paper on the relevant legislative provisions in the Islands and a summary of legislation in some other Commonwealth jurisdictions. A draft discussion paper and Protected Disclosures Bill was sent to the OCM in September 2013.

The remit of the OCM related primarily to the public sector but the paper provided by the LRC not only examines legislation relating to the public sector but also legislation which deals comprehensively with the protection of reporters of wrongdoing.

It is clear from a brief examination of the laws of the Islands that the Cayman Islands has only taken a very small step in providing legislative protection for whistleblowers such as section 50 of the Freedom of Information Law which seems to be operating in a vacuum as there are no supporting processes to ensure the protection given by that section. In considering the need for more comprehensive legislation it is necessary to consider what are the minimum requirements for such legislation. Based on an examination of legislative precedents it is suggested that the following are matters which should be considered²-

- (a) how should whistleblowing be defined? Is the current definition in the Freedom of Information Law adequate?
- (b) what will be the stated objectives of the legislation?
- (c) who should be eligible for whistleblower protection?
- (d) should public and private sector whistleblowing be covered by the same law?
- (e) what are the types of wrongdoing which should be regulated by the legislation?

¹ Memorandum of 4 April 2013

² See “Public interest disclosure legislation in Australia: Towards the next generation?”- A J Brown, Griffith Law School, Griffith University Discussion Paper 25/06 (August 2006); also “Best-practice whistleblowing legislation for the public sector: the key principles”, A. J. Brown, Paul Latimer, John McMillan and Chris Wheeler, Australia

- (f) should the motivation or intention of the reporting person be relevant?
- (g) how should disclosures be received, handled and investigated?
- (h) what legal protection should there be for whistleblowers?
- (i) what penalties should there be for employers and other persons who victimise whistleblowers?
- (j) how should confidentiality be dealt with?
- (k) when should disclosures to non-governmental persons be protected?
- (l) how should whistleblowers and internal witnesses be managed?
- (m) how should the legislation be monitored and by whom?
- (n) should legal aid be available for victims of reprisals?
- (o) is there a role for mediation when dealing with complaints of reprisals?
- (p) should there be financial incentives for whistleblowing? If so, how will such incentives be funded;
- (q) should there be periodic review of the legislation and by whom?

The final draft of the Discussion paper and the Protected Disclosures Bill will be submitted for public comment by 15 April, 2014. The Bill seeks to provide protection for whistleblowers both in the private and public sector and contains provisions relating to the following matters-

- (a) the definition of disclosures which qualify for protection;
- (b) the persons to whom disclosures may be made such as employers and Ministers of Government;
- (c) the procedures to be followed when making disclosures;
- (d) the procedures to be followed for the investigation of disclosures;
- (e) protection against reprisals in the form of court action, criminal complaint and resolution by labour tribunals;
- (f) penalties for reprisals against whistleblowers;
- (g) confidentiality relating to disclosures;
- (h) the provision of a supervisory body to oversee the operation of the legislation; and
- (i) periodic review of the legislation by a committee of the Legislative Assembly.

REFORM OF THE CORONERS LAW AND RULES

In September 2012 the Attorney General asked the LRC to consider the reform of the outdated Coroners Law and Rules. The LRC was subsequently advised that interim rules were needed until a new law is passed and in January 2013 draft interim rules were prepared and sent by the LRC to the Rules Committee for their consideration. Thereafter the Rules were submitted to the Attorney General for consideration in May 2013. The current Rules contain very few provisions and consist primarily of forms. The draft Rules are more comprehensive and deal with matters such as the following-

- (a) the persons who are under a duty to notify the Clerk of the Courts of deaths;
- (b) notices to be given to the next of kin, etc.;
- (c) particulars relating to autopsies;
- (d) particulars relating to special autopsies;
- (e) burial orders;
- (f) particulars relating to medical reports; and
- (g) particulars relating to inquests.

REVIEW OF THE LAW OF CONTEMPT

The LRC submitted for public discussion on 10 January, 2014 a discussion paper on the law of contempt. The paper deals with the existing law and the possible changes to it under the following broad heads-

- (a) contempt in the face of the court;
- (b) contempt by publications tending to prejudice the conduct of particular proceedings;
- (c) juror contempt;
- (d) scandalising the court;
- (e) acts interfering with the course of justice;
- (f) jurisdiction, procedure and penalties;
- (g) contempt by disobeying a court order or, what amounts to the same thing, by breaching an undertaking given to the court.

The LRC was assisted in the preparation of this paper by the work of other Law Reform Commissions more particularly the Hong Kong Law Reform Commission's Report (December 1986), the exhaustive Australian Law Reform Commission's Report No 35 (1987), the Western Australia Law Reform Commission's Report, Project No 93 (June 2003) and, most recently, the UK Law Reform Commission's Consultation Paper of 2013.

Due to many calls before and after the publication of the paper on the issue of how to achieve a proper balance between freedom of expression and the right to a fair trial, a second paper was published on 19 March, 2014 to principally discuss the “sub judice” rule, that is, the rule which prohibits publications commenting on pending court proceedings until after those proceedings are concluded.

The deadline for comments on the first paper is 10 April, 2014 and 21 April, 2014 on the second paper.

DIRECTORS’ DUTIES

The LRC published on 16 January, 2014 an Issues Paper entitled “Directors’ Duties – Is Statutory Codification Needed? The issue of the codification of directors’ duties first came to the fore during the LRC’s review of the law dealing with corporate insolvency. At that time, the Hon. Chief Justice raised the question of whether the Companies Law should be amended in order to codify the duties of directors. He further suggested that the LRC consider whether Cayman law should bring certainty to the issue of directors’ duties.

Accordingly, the Issues Paper focuses on whether the common law fiduciary duties and the duty of care, skill and diligence of company directors in the Cayman Islands should be codified in order to promote consistency, predictability, transparency and high standards of corporate governance.

It was pointed out in the paper that when dealing with the regulation of companies, the issue of duties of directors is one of the critical areas to be considered in the formulation of an appropriate legislative framework. The activities of companies are conducted by individuals under the guise of corporate legal personality and given that a company’s directors are its principal agents, the duties of those directors to the company and third parties are central to the legal control and operations of that company.

Recognising that the Cayman Islands economy continues to benefit from the efficiency and profitability of the companies registered in the Islands and their affiliates it was argued that the effectiveness of the board of directors in discharging their duties and responsibilities will play an integral role in determining the global competitive position of the Islands.

While company directors should be allowed a certain degree of flexibility in the advancement of their companies, that flexibility needs to be exercised within a framework of effective accountability. A proper and efficient system of corporate governance is therefore necessary in a company in order to regulate the directors and prevent them from abusing their powers.

Several issues were identified in the paper with a view to balancing the clarity and certainty that codification may offer against the need for flexibility in judicial interpretation based on the circumstances of a particular case. Some of the main issues identified relate to-

- the express identification of the various categories of directors in legislation, a prescription of the manner in which each should execute their duties and the extent of the liability to be attached for a breach of those duties;
- the identification in legislation of the persons to whom directors owe a duty and making a distinction as to which duties and the elements of such duty should apply to particular stakeholders;
- identification of the principal fiduciary duties of directors;
- whether the fiduciary duties of directors should be codified or represented as guidance rules;
- the introduction of a statutory statement on the director's duty of care to the company in order to clarify the law and make it more accessible to directors;
- the objective or subjective standard of care on which a director should be judged;
- the imposition of civil, criminal and disqualification sanctions in circumstances where the duties of a director are breached;
- the disqualification of directors in instances such as fraud, unfitness or summary conviction;
- exploration of the option of limited codification of the duties of directors;
- a codified statement on how directors should govern;
- whether the codification of directors' duties should apply equally to directors in public, private, holding and subsidiary companies; and to directors sitting on statutory boards;
- the introduction of a business judgment rule;
- the need for specific legislative authority to allow for a director to delegate his duties; and
- the imposition of statutory obligation on directors to consider human rights issues in the execution of their duties.

In the paper we concluded that it is necessary to ensure that company directors act in the best interests of their companies as well as ensuring the observance and compliance with all laws, regulations and codes of conduct and best practices. The task of clarifying and reformulating directors' duties so as to promote accountability is necessary in order to ensure that our corporate law framework remains effective and can facilitate business. The confidence of stakeholders should not be derogated by poor performance of the directors.

The deadline for comments on the Issues Paper was 14 March, 2014. The LRC is currently in the process of examining the various submissions received from stakeholders.

STALKING

On 29 January, 2014 the LRC published a consultation Penal Code (Amendment) Bill, 2014 and a Stalking (Civil Jurisdiction) Bill, 2014. These Bills are aimed at addressing the problems relating to stalking by defining stalking behaviour and identifying appropriate legal remedies to prevent or reduce harm brought about by such conduct.

Issues surrounding stalking formed the basis of discussions undertaken by the Young Business and Professional Women's Club ("YBPW") which established a Taskforce in 2005 to investigate, assess and provide legislative recommendations to the then Government on sexual

harassment and stalking. It was intended that those recommendations would facilitate the protection of persons from sexual harassment and stalking in the Cayman Islands.

A report was prepared by the YBPW in which the prevalence of sexual harassment and stalking was highlighted and it concluded that sexual harassment and stalking present a serious problem in the Islands which required legislative intervention.

Subsequently, pursuant to the Report of the Special Advisory Committee on Gender Violence, 2008, the then Cabinet issued a directive in December, 2008 that the issue of gender violence should be examined by a committee established by the Portfolio of Legal Affairs in consultation with the then Ministry of Health and Human Services. It was instructed that the examination should fall within the parameters of the LRC and address interpersonal and gender-based violence issues such as domestic violence, sexual harassment and stalking. It is on this basis that the LRC has embarked upon the examination of the stalking issue.

We noted that historically, in jurisdictions where the “fan” culture is prevalent, stalking was associated with those obsessed fans who harassed and threatened various celebrities. Today, stalking is no longer restricted in nature as it affects a wide variety of persons.

Stalking behaviour may be described as a series of acts or course of conduct directed towards any person that, taken together over a period of time, causes that person to feel harassed, alarmed, distressed or intimidated and to fear for his or her safety or the safety of others known to him or her.

This type of behaviour may escalate from what may initially be annoying, alarming but lawful behaviour to the level of dangerous, violent and potentially fatal conduct. The methods employed by stalkers can involve a series of unlawful actions such as making obscene telephone calls, using threatening language and committing acts of violence.

Additionally, stalkers may harass their victims by making unwelcome visits, making unwanted communications or silent telephone calls, repeatedly following the victim on the streets, watching the victim’s home or place of work, persistently sending unwanted gifts or articles to the victim, disclosing intimate facts about the victim to third parties, making false accusations about the victim, damaging property belonging to the victim or physical and verbal abuse.

Stalking is gender neutral behavior, that is, both male and female perpetrators and victims are involved. However, women are usually the primary victims and men are the primary perpetrators. Some perpetrators may be suffering from minor psychiatric and emotional illness, whilst others may be suffering from a serious psychological syndrome or psychiatric breakdown.

Studies have identified several categories of stalkers. These include the rejected stalker, predatory stalkers, debt collectors, erotomanics, love obsessional stalkers, sociopathic stalkers, stalkers with false victimisation syndromes, disgruntled clients or employees of private or public organisations and cyberstalkers.

Stalking may have the effect of causing behavioural, psychological and social consequences for the affected person. Specific risks to the victim include loss of personal safety, the loss of a job, insomnia and a change in work or social habits. The experience in other jurisdictions is that these effects of stalking have the potential to adversely affect criminal justice resources, the health care system and the economy.

The LRC felt that it is in the best interests of our society to take immediate and effective action when cases of stalking arise. Many jurisdictions have implemented legislation against stalking behavior in recognition that it is a problem and requires serious attention.

In advancing this process the LRC prepared for consideration a draft Penal Code (Amendment) Bill, 2014 and a Stalking (Civil Jurisdiction) Bill, 2014.

The provisions of the Bills are informed by several legislative precedents including the Australian Capital Territory Crimes Amendment Act, 2000 (No. 4), the Bermuda Stalking Act, 1997 the New South Wales Crimes (Domestic and Personal Violence) Act, 2007, the Canadian Criminal Code, 1985, the United Kingdom Protection from Harassment Act, 2007, the New Zealand Harassment Act, 2007 and the South Africa Protection from Harassment Act, 2010.

The Penal Code (Amendment) Bill, 2014 contains legislative proposals which-

- identify the elements that must be satisfied before the offence of stalking is constituted;
- the types of conduct that may constitute the offence of stalking; and
- the defences that may be raised against allegations of stalking.

The Stalking (Civil Jurisdiction) Bill, 2014 contains legislative proposals which deal with stalking from a civil perspective. These proposals provide for-

- the issuance of a protection order for the benefit of a stalking victim;
- the making of an application for a protection order on behalf of a stalking victim who is unable or unwilling to apply;
- investigation of stalking complaints and the conduct of court proceedings; and
- damages for any loss suffered by the victim of stalking or the person against whom a frivolous or vexatious claim was made.

The deadline for comments on the legislation was 21 March, 2014. The LRC is currently in the process of examining the various submissions received from stakeholders.

CONSUMER PROTECTION

The LRC has resumed its work on consumer protection. Our aim has been and continues to be the determination of whether a consumer protection regime is needed to promote and advance the social and economic welfare of consumers. Ultimately, a legal framework is being considered for the achievement and maintenance of a consumer market that is accessible, fair, efficient, responsible and sustainable for the benefit of consumers generally, and which provides

adequate safeguards to vulnerable consumers. The issues that form part of our discussion include-

- consumer rights;
- standards of consumer information;
- consumer guarantees in respect of the supply of goods and services;
- the protection of consumers from hazards to their well-being and safety;
- product liability;
- the prohibition of unfair terms in consumer contracts and unfair business practices;
- the regulation of distance selling, doorstep selling and unsolicited consumer transactions;
- the regulation of consumer credit;
- an effective enforcement framework relating to consumer transactions and agreements; and
- an effective system of redress for consumers.

BULLYING

The LRC has placed the subject of bullying in schools and the workplace on its agenda and intends to commence research into this issue by way of an Issues Paper. This paper will examine the public policy response to bullying and determine the benefits and limitations of anti-bullying legislation.

Bullying is a relational problem that impacts the social climate of a school community and the workplace environment. It is indeed a serious issue that has been linked to depression, violent behaviour and suicide. From all indications, increased awareness and media coverage has created stakeholder interest in addressing this problem. Bullying is no longer considered “just part of growing up”, rather, it is now being described by some as an epidemic.

It is in this regard that the LRC believes that it is timely that we examine the policy responses to bullying and to explore the prospect of formulating legislation to provide clear definitions of bullying behaviour, mandate the need for policies, assign responsibility and empower educators and employers with disciplinary tools.

However, in our examination of this issue we will bear in mind that while legislation may provide a supporting context to deal with bullying, it cannot regulate and repair school yard or workplace relationships. The complex nature of bullying may indeed require direct intervention from parents, students, educators and employers.

CONDITIONAL AND CONTINGENCY FEE AGREEMENTS

On 27 February, 2012 the Attorney General requested that the LRC undertake a review of the law relating to conditional or contingency fee agreements with a view to its reform. This referral was made pursuant to the case of *Latoya Barrett v the Attorney General*³ in which the Honourable Justices of Appeal called for an examination of the law relating to conditional fee

³ CICA 19 of 2012, unreported

agreements in the Cayman Islands. Research started on this topic in August 2013 and the discussion paper will examine, among other things, the historical background to conditional/contingency fees; the existing law of the Cayman Islands; the law of maintenance and champerty; the law in other jurisdictions such as the USA, UK, Canada and Australia and the arguments for and against contingency fees.

REGULATION OF TIMESHARES

The review of timeshares which was referred to the LRC in December 2006 by the Attorney-General, with the approval of the then Leader of Government Business, is being conducted by the staff of the LRC. A wide variety of literature on the subject matter has been considered and the research to date has identified that the following main problems are faced in most jurisdictions which have timeshares-

- (a) avoidance of existing legislation;
- (b) high pressure selling;
- (c) lack of cancellation rights;
- (d) loss of deposits and pre-payments;
- (e) a failure to protect deposits and other advance payments;
- (f) unclear information about what is being sold;
- (g) failure to provide clear information about the business involved and where to find them;
- (h) misleading claims; and
- (i) financial failure of the business.

A Bill and discussion paper are being prepared and will be sent when completed to the Ministry of District Administration, Tourism and Transport for their preliminary views.

UPDATE ON COMPLETED PROJECTS OF THE COMMISSION

Legal Aid Bill

The LRC conducted a substantive review of the legal aid system in the Cayman Islands between October 2005 and February 2008. A final report entitled "A Review of the legal aid system in the Cayman Islands" on 15 July, 2008 was submitted to the Attorney General in July 2008. The LRC found that the system offered good value for money but recommended certain changes, some legislative, others administrative. Among other things, the LRC recommended that the current court-administered model of legal aid be maintained but that efficiency be improved by the appointment of a specially designated Legal Aid Administrator, with adequate support staff and resources to undertake the task of administering legal aid.

The report of the LRC did not comprise a Legal Aid Bill. After the report was submitted to Cabinet the Attorney General requested in September 2008 the drafting of a Legal Bill and

regulations. The Bill was to deal with the recommendations of the LRC but to also include provisions for mandatory pro bono as recommended by the then Cabinet. A draft Bill was prepared in 2009 and revised several times up to May 2012 when a draft was submitted by the Cabinet to the public for further consultation.

The Bill of 2012 was not acceptable to any of the legal associations or to the Chief Justice due largely to the pro bono provisions. In February of this year the Government expressed its desire to proceed with the changes to the legal aid system. A revised Bill is currently being prepared on behalf of the Legislative Drafting Department by the Director of the LRC.

Charities

The LRC submitted to the Attorney General its Final Report entitled “the Review of the Law Regulating Charitable Organisations in the Cayman Islands” dated 31 March, 2010. Included in this Report was a draft Charities Bill, 2010 which has as its objective the introduction of a legislative framework which would ensure that any entity representing itself as a charity meets specified legal requirements for existing and operating as a charity.

The Report was considered and approved by the then Cabinet on 1 June, 2010 and instructions were issued for the supporting Bill to be gazetted on 21 June, 2010 and placed on the Order Paper for debate in the Legislative Assembly. Due to continued reservations expressed by the charitable sector, a subsequent decision was taken to withdraw the Bill in order to facilitate further public consultation. Since that time, the Attorney General, along with Legislative Counsel, met with stakeholders to determine what were the lingering concerns in relation to the Bill. The current Cabinet also expressed concerns and made several recommendations for the revision of specific provisions in the Bill.

The outcome of these consultations has been a revised draft Charities Bill, 2014 which was submitted in February to the Attorney General for his consideration and possible referral to Cabinet for the appropriate action.

Administrator-General

There had been calls for some time for an office similar to that of a public trustee which has been a feature of many Commonwealth jurisdictions since the 19th century. These calls were repeated during the LRC’s review of enduring powers of attorney in 2007. Thereafter pursuant to a referral by the Attorney General in January 2011, the LRC agreed to examine the feasibility of the introduction of the office of Administrator-General. A final report on this matter was submitted by the LRC to the Attorney General on 8 August, 2012. Based on comments submitted by the Chief Justice thereafter the Bill was amended and re-submitted to the Attorney General on 8 January, 2013.

The Bill seeks to provide an office of the Administrator-General to provide services such as the administration of small estates, legally representing disabled adults, acting as guardian ad litem, acting as trustee pursuant to terms of a will or appointing legal guardians for children.

In February of this year the Government expressed its interest to proceed with such an office and it has been suggested that perhaps the office could be combined with that of the office of Legal Aid and that it be called the more recognised name of Public Trustee. The relevant legislation is being revised to include recommendations made in February for submission as soon as possible to the Cabinet.

Enforcement of Foreign Judgments and Interim Orders in Aid of Foreign Proceedings

The LRC submitted to the Attorney General its Final Report entitled “Interim Orders in Aid of Foreign Proceedings (Part I) and Enforcement of Foreign Judgments (Part II)” on 8 March, 2013.

Part I of the Report is supported by the Grand Court (Amendment) Bill, 2013. This Bill contains legislative proposals intended to empower the Grand Court, in the exercise of its discretion, to facilitate proceedings that have commenced in a foreign superior court, by enforcing any order made for interim relief in circumstances where there is no substantive cause of action within the Cayman Islands.

Part II of the Report is supported by the Foreign Judgments Reciprocal Enforcement (Amendment) Bill, 2013 and the Foreign Judgments Reciprocal Enforcement (Scheduled Countries and Territories) Order, 2013. The primary objective of these legislative proposals is to facilitate the enforcement, through the registration process without the need for parties to pursue the common law procedure which requires a judgment creditor to commence new proceedings in the Cayman Islands Grand Court. The proposals also seek to remove the requirement for reciprocity in the enforcement of a foreign judgment or in the alternative, identify jurisdictions which will benefit from the registration process without reciprocity being a deciding factor.

The Attorney General has since submitted the Bills for the consideration of the Rules Committee of the Grand Court. Members of the Committee have made several recommendations which have been incorporated into a revised Foreign Judgments Reciprocal Enforcement (Amendment) Bill, 2014. The revised Bill was forwarded in March 2014 to the Attorney General for his consideration and appropriate action. It is anticipated that both the Foreign Judgments Reciprocal Enforcement (Amendment) Bill, 2014 and the Grand Court (Amendment) Bill, 2014 will be referred to Cabinet for consideration.

APPENDIX

Publications/Papers

1. A Review of the legal aid system in the Cayman Islands- A preliminary discussion paper; Draft Legal Aid Bill; Draft Legal Aid Regulations (28 March, 2006)
2. First Annual Report of the Law Reform Commission 2005/6 (31 March, 2006)
3. Final Report- A Review of the Corporate Insolvency Law and recommendations for the amendment of Part V of the Companies Law; Draft Companies (Amendment) Bill (12 April, 2006)

4. Discussion paper- The Law of Landlord and Tenant; Draft Residential Tenancies Bill (30 September, 2006)
5. Consultation paper - A Review of the Law regulating legal practitioners in the Cayman Islands (29 January, 2007)
6. Second Annual Report of the Law Reform Commission 2006/7 (31 March, 2007)
7. Final Report - A Review of the Law regulating legal practitioners in the Cayman Islands; Draft Legal Practitioners Bill; Draft Accountant's Reports Regulations (31 May, 2007)
8. Final Supplemental Report of the Law Reform Commission- Review of Corporate Insolvency Law in the Cayman Islands and Recommendations for the Amendment of Part V of the Companies Law (2004 Revision); Companies (Amendment) Bill (20 July, 2007)
9. Discussion paper- A Review of the legal aid system in the Cayman Islands (14 December, 2007)
10. Third Annual Report of the Law Reform Commission 2006/7 (31 March, 2008)
11. Final Report- A Review of the legal aid system in the Cayman Islands (15 July, 2008)
12. Final Report- Review of the Law regulating the relationship of landlords and tenants in the Cayman Islands (11 August, 2008)
13. Preliminary Discussion paper- Is there a need for enduring powers of attorney in the Cayman Islands? (20 January, 2009)
14. Discussion paper- Regulation of Charitable Non-profit Organisations in the Cayman Islands (26 January, 2009); Draft Charities Bill, 2009
15. Review of the Law Regulating Charitable Organisations in the Cayman Islands, Final Report (29 April, 2010)
16. Fourth Annual Report of the Law Reform Commission 2008/9 (31 March, 2009)
17. "Is there a need for enduring powers of attorney in the Cayman Islands? Final Report No. 6 (30 April 2009)
18. Discussion Paper – Review of the Arbitration Laws of the Cayman Islands (11 May, 2009)
19. The Draft Charities Bill (26 June, 2009)
20. The Draft Trusts (Amendment) Bill (26 June, 2009)
21. The Protection Against Domestic Violence Legislative Proposals, (12 October, 2009)
22. The Protection Against Domestic Violence Bill, (12 October, 2009)
23. Fifth Annual Report of the Law Reform Commission 2009/10 (31 March, 2010)

24. Protection Against Domestic Violence Final Report (29 April, 2010)
25. Review of the law of contempt of court in the Cayman Islands (Part 1)- Consultation paper- Contempt in the face of the court (September 2010)
26. Tort Reform Consultation Paper -Caps on Non-Economic Damages and Reducing the Limitation Period (22 October, 2010)
27. Family Law Reform (Part 1) Discussion Paper - the Matrimonial Causes Law (2005 Revision) (18 February 18, 2011)
28. Modernisation of the regulation of Strata titles in the Cayman Islands (Part 1)- Management of Strata Schemes- Discussion Paper and Strata Titles Registration (Amendment) Bill, (4 April 2011)
29. Preliminary Discussion paper -Introduction of the office of the Administrator-General in the Cayman Islands (11 June 2011) (to Attorney General and Chief Justice)
30. Final Report - Review of the Arbitration Laws of the Cayman Islands; Arbitration Bill (4 January, 2012)
31. Issues Paper - The Enforcement of Foreign Judgments and Interim Orders, (6 March, 2012)
32. Discussion paper -Introduction of the office of the Administrator-General in the Cayman Islands (22 March 2012); draft Administrator-General Bill
33. Consultation Foreign Judgments Reciprocal Enforcement (Amendment) Bill, 2012 (9 July, 2012)
34. Consultation Sexual Harassment, Bill 2012 (3 August, 2012)
35. Final Report- Introduction of the office of the Administrator-General in the Cayman Islands (8 August 2012); draft Administrator-General Bill
36. Consultation Grand Court (Amendment) Bill, 2012 (28 September, 2012)
37. Discussion paper- Modernisation of the regulation of strata titles in the Cayman Islands (Part 2)-Review of the creation, management and termination of strata schemes (3 January, 2013); draft Strata Titles Bill, 2103
38. Final Report- The Enforcement of Foreign Judgments and Interim Orders- Part 1- Interim Orders in Aid of Foreign Proceedings (8 March, 2013)
39. Final Report- The Enforcement of Foreign Judgments and Interim Orders - Part 2- Enforcement of Foreign Judgments (8 March, 2013)
40. Eight Annual Report of the Law Reform Commission 2012/13 (31 March, 2013)
41. Final Report – Sexual Harassment (1st May, 2013)

42. Discussion paper (Part 2)- Review of the Matrimonial Causes Law (2005 Revision) and the Maintenance Law (1997 Revision); the Family Property (Rights of Spouses) Bill, 2013- Tuesday, July 09, 2013
43. Issues Paper - Directors' Duties - Is Statutory Codification Needed? (16th January, 2014)
44. Stalking Legislation - The Penal Code (Amendment) Bill and the Stalking (Civil Jurisdiction) Bill, 2014 (29th January, 2014).

Mr. Ian Paget-Brown, Q.C.

Chairman of the Law Reform Commission

31 March, 2014