



The Cayman Islands
Law Reform Commission
1 April 2007/31 March 2008

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



The Law Reform Commission is pleased to present to the Honourable Attorney-General the Third Annual Report of the Law Reform Commission. The Report covers the activities of the Commission from 1 April 2007 to 31 March 2008.

As indicated in this report the Law Reform Commission continues to undertake work of significant importance to the legal framework and the administration of justice in the Cayman Islands. The Commission members are all experienced practitioners with other professional obligations who participate in the work of the Commission on a part time basis. The members of staff of the Commission are likewise professionally qualified public servants who are committed to the ideals and objectives of law reform. It is a tribute to the commitment of both Commissioners and staff that the Commission has been able to undertake the substantial projects dealt with in the report in a time sensitive and thorough manner. We are aware that the service we provide can and will have a significant impact on the jurisprudence and legal system of the Cayman Islands for years to come and consequently remain committed to objective research and analysis as well as appropriate consultation as the tools by which we can come up with meaningful and balanced reports in the public interest.

Langston R.M. Sibblies
Chairman

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A. 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 five part-time Commissioners and three full time legal staff. 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 own research.

The law reform process is a time consuming one and comprises extensive consultation, legal research and writing. The Commission typically 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 www.gov.ky or the www.caymanjudicial-legalinfo.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 all cases to date, a draft Bill. 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 reports and two annual reports which are listed in Appendix A.

B. THE COMMISSIONERS AND STAFF OF THE LAW REFORM COMMISSION

At the end of May 2007 Legislative Counsel, Ms. Fikile Dlamini, resigned and returned to her homeland of Swaziland. On 5th November 2007 the Law Reform Commission welcomed new Legislative Counsel, Mr. José Griffith. Mr. Griffith is an attorney-at-law of 11 years call to the Bar and was recruited from Jamaica. In Jamaica, he had been employed as Assistant Director of the Legal Reform Department of the Jamaican Government. Mr. Griffith is also a qualified legal draftsman with a Masters Degree in Legislative Drafting from the University of the West Indies.

There was no other change to the membership of the Commission or to the staff of the office of the Commission.

The Commissioners are-

- Mr. Langston Sibblies, Chairman
- Mrs. Eileen Nervik
- Mr. Andrew Jones, Q.C.
- Ms. Cheryll Richards, Solicitor General
- Mr. Ian Paget- Brown

The members of staff of the office of the Commission are-

- Ms. Cheryl Ann Neblett, Director
- Mr. José Griffith, Legislative Counsel
- Mrs. Christine Cooke, Paralegal Officer.

C. YEAR IN REVIEW- PROJECTS OF THE LAW REFORM COMMISSION FROM 1 APRIL 2007 TO 31 MARCH 2008

The Commission met five times during 2007 and between 1 April 2007 and 31 March 2008 met on the following dates-

- 30 August 2007
- 5 December 2007
- 28 February 2008.

During the past year the Commission completed three reports and drafted one. Below are brief outline of such reports.

Completed projects

1. Review of the Legal Practitioners Law

The review of the Legal Practitioners Bill commenced in September 2005 and concluded on 31 May 2007 when the Law Reform Commission submitted to the Attorney-General its Final Report, a Draft Legal Practitioners Bill and the Draft Legal Practitioners Accounts Rules.

The main matters provided for by the Legal Practitioners Bill are as follows-

- (a) the regulation of the practice of the law of the Cayman Islands both inside and outside of the Islands;
- (b) the establishment of a Complaints Committee to whom members of the public and others may make complaints about alleged misconduct of attorneys-at-law in the private sector;
- (c) the establishment of a Disciplinary Tribunal to determine complaints against private sector attorneys;
- (d) the continued discipline of government attorneys by the Grand Court; and
- (e) the provision of a Code of Conduct.

The current Law (the Legal Practitioners Law (2007 Revision)) contains few provisions relating to the discipline of practitioners. There is no official mechanism for a member of the public to make a complaint against an attorney under the legislation. The Law provides for suspension and striking attorneys-at-law off the Court Roll with no intermediate sanction for professional misconduct.

The Legal Practitioners Bill provides a new regime for the investigation of professional misconduct and for the discipline of attorneys, with an emphasis on self-regulation. Under the draft Bill a body to be known as the Complaints Committee will be responsible

for receiving and considering complaints against all attorneys-at-law, including those practising overseas. The Committee will investigate a complaint and, following its investigation, it shall either dismiss the complaint or refer the complaint to the Disciplinary Tribunal. The Committee may also on its own motion refer evidence of what it considers to be the misconduct of an attorney-at-law to the Disciplinary Tribunal. In accordance with the Bill, the Complaints Committee will have the power to receive and consider complaints against any attorney-at-law, other than the Attorney-General and a government attorney-at-law.

It is proposed that the Complaints Committee should comprise the following members-

- (a) three attorneys-at-law appointed by the President of the Cayman Islands Law Society;
- (b) three attorneys-at-law appointed by the President of the Caymanian Bar Association;
- (c) one attorney-at-law employed by the Legal Portfolio of the Government and appointed by the Attorney-General; and
- (d) two persons appointed by the Chief Justice who are not required to be attorneys-at-law and who, in the opinion of the Chief Justice, have demonstrated a wide knowledge of law, finance, financial regulation, accounting or arbitration principles.

The Bill provides that the Disciplinary Tribunal shall comprise¹-

- (a) a chairman who shall be the Chief Justice or a judge of the Grand Court designated by him;
- (b) one member appointed by the Chief Justice after consultation with the President of the Cayman Islands Law Society; and
- (c) one member appointed by the Chief Justice after consultation with the President of the Caymanian Bar Association.

The Tribunal may impose a disciplinary sanction if it is satisfied that an attorney-at-law-

- (a) is guilty of misconduct in his professional capacity;
- (b) has behaved in a manner tending to bring the legal profession into disrepute; or
- (c) has been convicted of an offence punishable by a term of imprisonment or an offence involving moral turpitude.

The types of sanctions which the Tribunal would have the power to impose include the following -

- (a) an order that the attorney-at-law's name be struck off the Court Roll;
- (b) an order that the attorney-at-law's practising certificate be qualified to the effect that he shall not be entitled to appear as an advocate before all or any

¹ Clause 31

- courts or tribunals in the Islands or to practise in specific areas of law either permanently or for a specified period;
- (c) an order that the attorney-at-law be suspended from practise as an attorney-at-law for a specified period, not exceeding five years;
 - (d) an order that the attorney-at-law pay a fine of twenty five thousand dollars;
 - (e) where the attorney-at-law practises outside the Islands or is temporarily admitted, a report of his conduct to any other professional association or authority having jurisdiction over him; or
 - (f) a reprimand of the attorney-at-law.

It had been proposed to the Commission that all attorneys-at-law should be subject to the same mode of discipline. However, after considering the advantages and disadvantages of such proposal, the Commission recommended that the Complaints Committee and the Disciplinary Tribunal should have jurisdiction over all attorneys except those employed by the Portfolio of Legal Affairs (“government attorneys”). Apart from the many layers of oversight to which a government attorney² is subject there is also the issue of conflict of interests to consider. The Commission believes that if government attorneys are made subject to the same disciplinary process as private attorneys there is some potential for the complaints mechanism to be used to hinder such attorneys from effectively carrying out their work on behalf of the public. On balance the majority of the Commission considers that it is in the public interest to have the Courts retain the power to discipline attorneys.

One of the principal issues focused on by the Commission was the proposal made by the Cayman Islands Law Society and the Caymanian Bar Association for the grant of practising certificates to non-resident attorneys who work in the overseas/satellite offices of Caymanian law firms. Currently several Caymanian law firms practise law in a number of other jurisdictions including Anguilla, the British Virgin Islands, UK, Jersey, Bermuda, Dubai and Mauritius. After extensive research and consultation with the associations mentioned above the Commission recommended that such attorneys may be granted certificates to practise the law of the Cayman Islands overseas subject to a number of conditions. Under these conditions the attorney must be employed with a firm which has a substantial nexus with the Islands. Such nexus will be established where the majority of the partners holding equity interests are Caymanians, or persons ordinarily resident in the Islands who practise primarily in the Islands or alternatively half of the attorneys of the firm must be ordinarily resident or practise primarily in the Islands. Other conditions require that the attorney (subject to certain exceptions) must provide evidence of knowledge of certain local laws and must be subject to rules of professional conduct.

The recommendations of the Commission are currently being considered by the Cabinet.

² The Public Service Management Law, 2006; the official corruption provisions of the Penal Code (2006 Revision) (sections 90 to 98);

2. Second review of the law of corporate insolvency and recommendations for the amendment of Part V of the Companies Law (2004 Revision)

Pursuant to the request of the Honourable Attorney-General, the Law Reform Commission carried out a second consultation on the reform of corporate insolvency between October 2006 and April 2007. The Commission received responses from the Chief Justice, Cayman Islands Society of Professional Accountants (“CISPA”) and the law firms of Ogier, Maples and Calder, Appleby and Walkers. A supplemental report and an amended draft Companies (Amendment) Bill was then submitted to the Attorney-General by the Commission on 20 July 2007. The Bill was passed by the Legislative Assembly on 17 September 2007.

The main focus of the second round of consultation was on the test of insolvency but there were other issues considered including-

- (a) the appointment of liquidators and the replacement of liquidators appointed by the Court;
- (b) the selection of liquidation committees;
- (c) the remuneration of liquidators; and
- (d) the duties of directors.

It had been recommended in the 12 April 2006 report³ that the Companies Law should be changed to empower creditors and contributories to remove a liquidator following an initial appointment by the court. However, after concerns expressed by CISPA and by the judiciary, it was recommended by the Commission that the law should remain unchanged and that an official liquidator, once appointed, should only be removed from office by order of the court.

The Commission also recommended that the remuneration of liquidators should continue to be approved by the court but that the court should be guided in the assessment of fees by expert guidelines. Such guidelines could be prepared by an Insolvency Rules Committee after seeking advice from the industry and from the Cayman Islands Monetary Authority (“CIMA”).

In the April 12 Report it was recommended that the law be amended to provide for a balance sheet test of insolvency. The Commission however recommended in its second report that there should be no such change. After wider consultation the Commission concluded that there was not enough support for the changes in as much as three major law firms were of the opinion that the proposed changes could be potentially damaging to the financial services industry. The Commission is of the opinion that the current legislation is sufficiently flexible as it stands to allow the courts in appropriate circumstances to take into account the balance sheet test.

³ See Second Annual Report of the Commission

Notwithstanding the Commission's opinion that the test for insolvency in the existing Companies Law should remain unchanged, the Commission is sensitive to concerns about the potential for "asset stripping" by the directors and officers of a company. As a consequence and in order to ensure certainty as to the liabilities of directors, the Commission is of the opinion that it should in the future consider further revision of the Companies Law to set out more comprehensively, in statutory form, the duties of directors.

Work in progress

3. Review of the legal aid system

In September 2005 the review of the legal aid system in the Islands was referred to the Law Reform Commission for research and consultation. A discussion draft Legal Aid Bill and preliminary draft discussion paper were prepared by the Director of the Commission and submitted to the Commission on 3 November 2005. The Bill was first addressed by the Commission on 3 February, 2006.

Since that time the topic of the reform of the legal aid system in the Islands became a growing subject of debate, in the Legislative Assembly, in the press and in the society at large. Concerns were raised in the Legislative Assembly in May 2007 regarding the perceived high costs of legal aid in the Islands. The legislators were also concerned that too many legal aid cases were being conducted by foreign attorneys.

In June 2007 the Commission was asked by the Attorney-General to continue its review as a matter of priority and to propose an alternative way of dealing with legal aid or a more cost effective and efficient way of providing such aid. The Commission resumed its consideration of legal aid reform in August 2007 and agreed that the main issues which need to be resolved are as follows-

- whether the legal aid system may be reformed simply by improving the investigative and assessment process relating to the grant of legal aid;
- whether the system should be administered instead by a court-based legal aid administrator and other support staff;
- whether it would be more cost effective to establish other means by which legal aid could be provided such as by-
 - (a) a legal aid clinic;
 - (b) a public defenders office where counsel would be available year round;
 - (c) a mixture of clinic, public defender and the private bar;
- whether the recovery system, where certain persons who are granted legal aid would be liable to pay the legal aid fund back, should be improved;
- whether legal fees are too high and should be capped; and
- whether pro bono work should be mandatory in order to give the public access to more legal services.

The staff of the Commission carried out preliminary research on the operation of the legal aid system in the Cayman Islands as well as in other Commonwealth jurisdictions such as-

- Antigua and Barbuda
- Australia
- Bahamas
- Barbados
- Bermuda
- British Virgin Islands
- Jamaica
- Jersey
- Gibraltar
- Grenada
- St. Helena
- Ontario
- British Columbia
- United Kingdom
- New Zealand

A Discussion Paper was prepared by the staff of the Commission on 18 October 2007 and considered by the Commission on 5 December 2007. Thereafter, a Draft Discussion Report was submitted by the Commission on 14 December 2007 to the Attorney-General and to the Chief Justice. In its Draft Discussion Report the Commission made the preliminary findings indicated below-

- Access to legal aid is an integral aspect of the administration of justice in the Cayman Islands and consequently the delivery of appropriate and cost effective legal aid in both the criminal and civil areas is essential. The existence of a modern, effective and transparent system of legal aid not only provides access to justice for those in need it also enhances the image of the Cayman Islands as a sophisticated democratic and stable jurisdiction.
- While the complaints from the legislative and executive arms of government focus mainly on excessive costs and the fact that too many of the services are being provided by foreign counsel, the main issue may perhaps be the need to improve the administration of legal aid services.
- The eligibility requirements for legal aid are not adequately provided for in the Law. The general nature of the wording of the eligibility criteria in the Legal Aid Rules, 1997 (“the Rules”) allow for a wide exercise of discretion in what is taken into account in determining the assignment of legal aid. The Rules do not define nor provide a method of calculating the “disposable capital” or “disposable income” of an applicant. These provisions are imprecise and greater clarity could be established by the provision of additional details on these concepts and how they are to be determined in practice. The Commission recommended the incorporation of more detailed

provisions similar to those contained in, for example, the legislation of Bermuda or New Zealand.

- The Law and Rules should be revised to make it clear that contributions may be required of persons above a certain specified income, that the Government may require a charge on property as a condition of legal aid in certain circumstances and that such contributions will be recoverable and such charge will be enforced by the Attorney-General in a court of competent jurisdiction.
- Research shows that there is a remarkable consensus that the ideal way forward for western countries is a legal aid delivery model that involves a mixture of judicare and salaried schemes. Most of the jurisdictions researched by the Commission use a mixed scheme of judicare, salaried staff and community clinics, with varying degrees of success. The Commission sought comments on whether that the issue of shortage of local counsel and overuse of foreign counsel would be best addressed by establishing a mixed scheme of salaried staff (public defenders or duty counsel or both) a legal clinic and private attorneys.
- After examining the cost of legal aid in other jurisdictions it is very difficult to compare costs in the Islands with cost in other jurisdictions as it will be necessary to compare not only the type of cases dealt with but also the number of cases within any particular period and how the services are delivered.
- In order to ensure that lawyers are being appropriately paid (i.e. not being overpaid or underpaid) for their services that the courts should have staff dedicated only to the taxing of legal aid costs. The provisions regulating taxation of bills of costs under the Legal Aid Rules are adequate to ensure that bills of costs are taxed in accordance with accepted standards and no amendment thereof is necessary.
- While pro bono work does assist a jurisdiction in ensuring that those who are unable to afford legal representation have a wider access to legal services and provides social and economic benefits, the Islands should not seek to reduce legal aid costs by making pro bono work mandatory. Such work should be more aggressively promoted by the legal associations.

The Chief Justice responded to the Draft Discussion Report on 15 January 2008. Also, in January 2008, the Commission sought input in this matter from the Cayman Islands Law Society, the Caymanian Bar Association, the Criminal Defence Bar Association and Dr. John Epp⁴. The Law Society, the Criminal Defence Bar Association and Dr. Epp responded in February 2008. The Commission is in the process of preparing a report

⁴ In his personal capacity, having written on legal aid in Commonwealth jurisdictions e.g. "Legal Aid Provision in the British Overseas Territories and the Commonwealth Caribbean, 2002", John Epp, Derek O'Brien and Terence Caudeiron

which will take account of the comments submitted by all of the afore-mentioned persons and will make specific recommendations for consideration by Government.

4. Review of landlord and tenant legislation in the Islands

The Leader of Government Business, in October 2005, asked the Law Reform Commission to undertake a review of the landlord and tenant legislation in the Islands. The relevant laws are the Registered Land Law (2004 Revision), the Landlord and Tenant Law (1998 Revision) and the common law where statute does not otherwise provide.

The Commission conducted research from October 2005 to December 2007. In September 2006 the Commission prepared and submitted a Consultation paper and Draft Bill for public comment. The Commission received many comments from persons such as the Chief Justice and representatives of the Law Society, the Minister's Association and real estate agents in the Islands.⁵ The comments were considered by the Commission and a revised Draft Bill and Final Report have been drafted to reflect such input. The Final Report and Draft Residential Tenancies Bill will be submitted to the Attorney-General in 2008. This review was delayed because of the decision by the Commission to make the review of legal aid a priority. The Bill and Report will address the following issues-

- the establishment of a post of a mediator called the Residential Tenancies Commissioner;
- the minimum provisions of a tenancy agreement;
- regulation of security deposits;
- regulation of rent increase;
- the keeping of records by landlords;
- the landlord's and tenant's responsibilities under a tenancy agreement;
- the landlord's right of entry;
- termination of tenancies and recovery of possession;
- mesne profits;
- registration of tenancy agreements;
- liability of tenant who abandons premises or chattels on premises;
- liability of tenant for the damage to, or for the destruction of, premises;
- penalty for securing entry to premises by violent means; and
- forms of notice to quit.

D. OTHER MATTERS; FUTURE PROJECTS

The **Anti-Corruption Bill and Children Regulations** were withdrawn from the legislative programme of the Commission on the request of the Attorney-General in 2007. The **Anti-Corruption Bill** was completed by the Director of the Commission and

⁵ See details Second Annual Report

the **Children Regulations** by the Legislative Counsel, Mr. Griffith, as legislative drafting projects.

The Attorney-General in April 2006 referred the **Charities Bill** (previously prepared by the Legislative Drafting Department) to the Law Reform Commission for review by the Commission. The staff of the Commission prepared a reviewed Charities Bill and discussion paper in October 2006. The **Charities Bill** and the **Enduring Powers of Attorney Bill**⁶ will be the next projects to be considered by the Commission in 2008.

Langston R.M. Sibblies
Chairman of the Law Reform Commission
March 31st 2008

⁶ See reference to this in the Second Annual Report of the Commission

APPENDIX

Law Reform Commission 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)

Langston R.M. Sibblies
Chairman of the Law Reform Commission
31 March, 2008