

ANNUAL REPORT OF THE LAW REFORM COMMISSION

This is the first annual report of the Law Reform Commission for the period 1st May 2005 to 15th March 2006.

1. Establishment of the Law Reform Commission

- 1.1 The Law Reform Commission Law, 2005¹ (“the Law”) was passed by the Legislative Assembly on 21st February 2005. It was brought into force by the Law Reform Commission Law, 2005 (Commencement) Order, 2005 on 1st May, 2005.
- 1.2 Following the commencement of the Law, the Governor-in-Cabinet proceeded to deal with the composition of the Commission, the appointments being made for an initial period of three years. The Commission consists of the following members-

Nigel Clifford QC – Chairman
Langston Sibbles – General Legal Counsel, Cayman Islands
Monetary Authority
Andrew Jones QC- Attorney-at-law
Cheryl Richards – Solicitor General
Eileen Nervik – Attorney-at-Law
- 1.3 The Governor in Cabinet in making the appointments sought to put together a Commission that would, as best as possible, reflect a wide cross-section of the various areas of law in the Islands, including in particular commercial, insolvency, regulatory, family and criminal law.
- 1.4 A secretariat to administer the day-to-day operations of the Commission has been established. This is housed on the third floor of the Anderson Square Building. It is headed by the Law Reform Administrator and Senior Legislative Counsel appointed pursuant to the Law, Ms. Cheryl Neblett.
- 1.5 Ms. Neblett has recruited a paralegal officer, Mrs. Christine Cooke, to assist with her duties. She has also engaged another legal draftsman, Ms. Dlamini, to assist in the preparation of legislation and reports. She will commence work in April 2006.

¹ Law 6 of 2005

2. The Functions of the Commission, its Powers and Duties

practicable;

- (b) the elimination of anomalies in the law, the repeal of obsolete and unnecessary enactments and the simplification and modernisation of the law;
- (c) the development of new areas in the law with the aim of making them more responsive to the changing needs of Cayman Islands society;
- (d) the adoption of new or more effective methods for the administration of the law and the dispensation of justice; and
- (e) the modification of the unwritten laws of the Cayman Islands.²

2.2 The powers and duties of the Commission allow it in the performance of its functions to –

- (a) review and consider any proposals for the reform of the law which may be referred to it by any person or authority;
- (b) 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;
- (c) initiate and carry out, or direct the initiation and carrying out of, studies and research necessary for the improvement and modernisation of the law;
- (d) 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 and the Legislative Assembly;

² Section 7 of the Law

- (e) provide, at the instance of Government departments and other authorities concerned, general advice, information and proposals for reform or amendment of any branch of the law; and
- (f) 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 the Commission.³

3. **The Initial Work of the Commission**

- 3.1 During the summer of 2005 time was spent in establishing machinery for the operation of the Commission. As previously noted, a Law Reform Administrator was appointed and steps were taken for additional recruitment to assist the Administrator.
- 3.2 There were also informal discussions between the Commissioners, the Attorney-General and other interested parties regarding the work to be undertaken by the Commission.
- 3.3 The Law Reform Administrator helpfully assembled a number of press releases, reports, discussion papers and other documents relating to the work of Law Reform Commissions in other parts of the world. These are to be used for reference purposes and as possible precedents.
- 3.4 In early September 2005, the Attorney-General hosted an informal meeting of the members and staff of the Commission. He stressed that it is of paramount importance that the laws and legal system of the Cayman Islands should endeavour to remain contemporary. He went on to state that political stability, social stability, significant communications and financial infrastructure mean nothing unless we have the necessary relevant laws available to our sophisticated and experienced professionals properly to advise their clients. The point was made in this connection that many of the world's leading banks, trust companies, accounting firms and legal firms have offices in these Islands. In the circumstances he felt that the creation of the Law Reform Commission was timely, if not overdue. The Attorney-General also expressed satisfaction that the Commissioners appointed had all-round experience as attorneys, as well as having individual expertise in particular areas of law, notably commercial, regulatory, insolvency, family, criminal and international cooperation in mutual legal assistance.

³ Section 8 of the Law

- 3.5 On September 16th 2005 the Commission agreed the draft legislative programme submitted by the Law Reform Administrator. The Commission intends over the next 2 years at least to examine the areas of law set out in the Appendix to this Report.
- 3.6 There have since been several meetings of the Commission. The Law requires the Commission to meet at least once in every three months.⁴ The Commissioners have in fact resolved to meet more frequently. The Commission has held meetings on the following dates:
- 16th September 2005
21st October 2005
9th December 2005
3rd February 2006.
- 3.7 In October 2005 the Commission was also specifically requested by the Government to undertake a review of landlord and tenant relationships with the goal of making law reforms reflecting modern day standards.
- 3.8 There is a significant amount of important work to be undertaken by the Commission and naturally not everything can be done at once. The Commission has therefore been careful to determine what the priorities should be and to work on draft Bills as soon as possible after they have been produced. The specific matters so far dealt with by the Commission are referred to below.

4. **Corporate Insolvency Law and Practice**

insolvency law and recommendations for the amendment of Part V of the Companies Law.

- 4.2 In 2002 the Financial Services Secretariat asked Andrew Jones QC and G. James Cleaver to prepare a report upon the insolvency law and practice in response to their points made by KPMG in their *Review of Financial Regulation in the Caribbean Overseas Territories and Bermuda*.

Uncitral model law⁵.

- 4.3 It was recognised that in order to conduct an in depth review of the insolvency law and practice as a whole, a larger and more broadly based committee should be established. In the event the subject was divided into a series of topics which were considered by seven separate groups whose

⁴ Section 9 of the Law

⁵ The United Nations Commission on International Trade Law (generally known as “Uncitral”) published a model law on cross- border insolvency in 1997

reports were all submitted to Andrew Jones who acted as the overall chairman.

- 4.4 The Commission decided that it should assume responsibility for reviewing this important area of the law and therefore asked the private sector committee to submit its report and recommendations, which was done in September 2005.
- 4.5 The conclusions reached by the Commission are based to a substantial extent upon the research and recommendations of the broadly based private sector committee including insolvency practitioners and lawyers involved with capital markets and asset finance business. The Commission has also consulted with the Cayman Islands Monetary Authority, the Chief Justice, the Mutual Fund Administrators, the Company Managers Association and the Chamber of Commerce.
- 4.6 The conclusions of the Commission can be summarised as follows –
 - The existing law suffers from being unduly complex because it is derived from a combination of 19th century legislation, inappropriate foreign rules and local case law. The Commission therefore recommends that the existing law and best practice be codified by re-writing Part V of the Companies Law.
 - The practice of attempting to apply foreign insolvency rules does not work satisfactorily. The Commission therefore recommends the establishment of a new Insolvency Rules Committee which will be charged with the responsibility of enacting insolvency rules which specifically meet the needs of the Cayman Islands financial services industry.
 - In order to avoid damaging the Cayman Islands capital markets and asset finance business, it is critically important to maintain the current status as a “creditor friendly jurisdiction”. The Commission therefore recommends that “corporate rescue” provisions similar to Chapter 11 of the US Bankruptcy Code should not be introduced into the law.
 - It is the practice of the Grand Court to appoint as official liquidators only professional insolvency practitioners. The Commission recommends that the Insolvency Rules Committee be empowered to make regulations relating to the qualification and disqualification of professional insolvency practitioners.
 - There is currently a considerable degree of cross-border cooperation in respect of insolvency matters, but the basis upon which this cooperation is offered depends largely upon judicial

practice. The Commission therefore recommends that the law relating to international cooperation in respect of insolvency matters be modified and included in a new Part XVI of the Companies Law.

- 4.7 These matters are to be the subject of a detailed report which is in its advanced stages and in the course of being finalised by the Commission. The report will then be submitted to the Attorney- General together with a draft Bill to Amend the Companies Law (2004 Revision).

5. **The Legal Practitioners Bill**

- ⁶;
- the requirement that Rules of Conduct are to be approved by the Governor-in-Cabinet⁷;
- the composition of the Complaints Committee;

⁶ Clauses 5(5), 7, 12(2), 21(3), 21(4)

⁷ Clause 21(1)

- the regulation of the retainer of attorneys, including fees (except for litigation);⁸
- the Attorney-General's proposed veto over the dismissal of a complaint against an attorney by the Complaints Committee⁹; and
- the sole member of the Disciplinary Tribunal being the Chief Justice, or a Judge designated by him¹⁰.

5.6 There is an additional major point raised by Appleby Spurling Hunter. This involves revising the mechanism for the operational licence fee and the introduction of a new Schedule 4. This matter was discussed at the Commission's meeting of December 9th 2005. It was agreed that it is not within the remit of the Commission to consider such a matter and that this should be forwarded to the Financial Portfolio for consideration.

5.7 There are other points which need to be resolved, such as the proposal to allow attorneys-at-law who practise the laws of the Islands outside the Islands to obtain practising certificates.¹¹ In addition there is some tidying up to be done (which is unlikely to be controversial) and a number of small drafting points to be dealt with.

5.8 The Attorney- General has expressed the view that there is a need for further ongoing consultation on the various issues raised. He has expressed confidence that it will be possible to arrive at a regime acceptable to all parties. He is now awaiting the recommendations of the Commission and he has also asked that these be forwarded to the Chief Justice.

5.9 The Commission is in the process of finalising its comments and recommendations. These will be incorporated into a revised draft Bill and circulated for further consultation with the professional associations, the Attorney-General and the Chief Justice.

6.

6.1 In October 2005 the Cabinet instructed the Attorney-General to have the Law Reform Commission review landlord and tenant laws with the goal of making reforms reflecting what the Leader of Government Business referred to as "modern day standards". In giving the instruction reference was made to there having been a lot of contention between landlords and tenants following Hurricane Ivan. Tenants in particular have complained of rent price gouging and improper termination of leases. Landlords for

⁸ Clause 18 (c) and (d)

⁹ Clause 25(5)

¹⁰ Clause 26(1)

¹¹ Discrepancy between clauses 3(1)(d) and 7(2) and (10)

their part have objected to being expected to absorb hurricane restoration costs along with increased insurance costs and higher strata fees.

- 6.2 The relationship between landlords and tenants is governed to some extent by common law principles. There are also relevant statutory provisions in the Registered Land Law (2004 Revision) and the Landlord and Tenant Law (1998 Revision) the latter having been originally enacted as long ago as 1964. The Commission has been asked to undertake an overall review of the position with a view to making recommendations for reform reflecting contemporary best practices.
- 6.3 Inevitably there are competing interests to be considered. On the one hand tenants might wish to see the introduction of improved security of tenure and rent control. On the other hand landlords for the most part would be concerned that the pendulum should not swing too far in conferring rights on tenants. There is even a concern that this could prove to be a disincentive to the letting of property and thus reduce the available stock of accommodation. Clearly there is a delicate balance to be struck.
- 6.4 With this in mind the Commission has decided that it is important to research these issues carefully prior to making recommendations. As well as looking at the position in other jurisdictions, information has been gathered from various sources locally and there has been a process of consultation. Figures have been obtained from the Economics and Statistics Office as to increases in consumer prices over the past year. Information has also been requested from rental agencies, the Chamber of Commerce, CIREBA, the Complaints Commission, and others. Detailed proposals and suggestions for reform have been received from Island Rental Services and from Mr. Stephen Hall-Jones, attorney-at-law. The Commission is grateful for all the help which has been received from these various sources.
- 6.5 Some responses are still outstanding, but the Commission has begun the task of considering the issues and forming preliminary views on matters to be addressed. These include –
 - requiring tenancy agreements to be in writing;
 - new and improved statutory implied terms in tenancy agreements;
 - limited security of tenure by provision of minimum periods of notice;
 - requirement of advance notice of any increases of rent; and
 - termination of leases where premises remain unfit for habitation or use for a particular period.

6.6 The Commission is working towards producing a detailed report on these matters and proposing new legislation as soon as possible.

7.

7.1 A discussion draft of the Legal Aid Bill was prepared by the Law Reform Administrator and submitted to the Commission on 3rd November 2005. The Bill was first addressed by the Commission on 3rd February, 2006.

7.2 In 2004 the Attorney- General requested a review of the system of legal aid in light of the rising cost of legal aid to the Government. From January to June 2003 the cost of legal aid was \$734,177; from June 2003 to June 2004 the cost was \$821,000 and in the 12 months to June 2005 the cost was \$1,500,000.

7.3 There have also been complaints relating to availability of legal aid counsel. The Commission was therefore asked to propose an alternative way of dealing with legal aid or a more cost effective and efficient way of providing such aid. Currently legal aid is administered by the Courts based upon information provided in accordance with the Legal Aid Rules 1997.

7.4 The discussion draft Bill proposes a dual system with a list of private lawyers willing and able to carry out legal aid work and provision for setting up a public defenders office.

7.5 The Commission in considering the Bill shall address the following issues-

- whether the legal aid system may be reformed simply by improving the investigative and assessment process relating to the grant of legal aid;
- whether it would be more cost effective to establish a public defenders office where counsel would be available year round;
- whether such an office could effectively provide most of the services required under legal aid or whether there will be a need to hire specialist lawyers when required;
- the setting up of the office independently of the Attorney-General's Office to ensure that there is no conflict of interest;
- the need for an appeal system to deal with appeals from a person who is refused legal aid; and
- the need for a recovery system where certain persons who are granted legal aid would be liable to pay the legal aid fund back.

7.6 The Commission intends to look at other legal aid legislation in the region, to assess the cost of having a public defenders office and to consult with local attorneys-at-law whose practices consist mainly of legal aid work.

8.

8.1 Due to the heavy legislative programme the Attorney-General has recently requested that the Law Reform Commission prioritise matters in the following order:

- Proceeds of Criminal Conduct (Consolidation Bill)
- Landlord and Tenant
- Legal Practitioners
- Legal Aid
- Corruption

8.2 Legislative Counsel of the Legislative Drafting Department, Mr. Bilika Simamba, has agreed to draft the Proceeds of Crime Bill for the Law Reform Commission. This Bill would harmonise the laws of the Cayman Islands relating to the proceeds of criminal conduct. At present there is a forfeiture scheme in the Misuse of Drugs Law (2000 Revision) and one in the Proceeds of Criminal Conduct Law (2005 Revision) but both are different. There is also no civil forfeiture which is a serious lacuna in the law. The knowledge requirement is different in each law and there are other anomalies. This Bill would aim to rectify this situation.

8.3 The Law Reform Commission also intends in the near future to review the law relating to corruption. This matter was referred to the Commission by the Attorney-General. In 2000 the Government was informed of the United Kingdom's intention to ratify the United Nations Convention against Transnational Organised Crime and of its consideration to extend the ratification to cover the overseas territories. Each overseas territory was invited to consider whether it wishes the Convention to be extended to it by the United Kingdom when the Convention is ratified and what changes to the law in force in the territory would be required to enable compliance with the Convention.

8.4 The purpose of the Convention is to promote co-operation to prevent and combat transnational organised crime. The Convention, among other things, imposes obligations on countries to establish criminal offences of money laundering, corruption in the Islands, participation in an organised criminal group and obstruction of justice. Cayman Islands does have the necessary legislative framework to give effect to most of the obligations but

its corruption laws are outdated and relate only to corruption of public officers.¹²

- 8.5 In reviewing the law of corruption the Commission will also take into account the obligations under the 2003 United Nations Convention Against Corruption and the 1999 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
- 8.6 The Law Reform Administrator has also commenced consultations with the Department of Children and Family Services and the Education Department regarding the preparation of children's regulations and a review of the 2003 Children Law. The Departments wish to review the Law before its commencement to ensure that it deals effectively with all matters relating to the care and protection of children. A consultant has been appointed by the Ministry of Health to assist with the preparation of the regulations.

There is clearly much important work to be done by the Commission. Inevitably at the start a number of different projects have presented themselves all at the same time. For this reason it has been essential to determine priorities and to work consistently on various revisions to ensure that progress is made. The Commission is pleased to report that such progress has been achieved in the first months of operation. The Commission now looks forward to the tasks which lie ahead in the coming year when it is anticipated that several key reports will be finalised and draft Bills produced covering a wide range of important new legislation for the Cayman Islands.

APPENDIX

LEGISLATIVE PROGRAMME

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- The Youth Justice (Amendment) Bill
- The Legal Practitioners Bill
- The Legal Aid Bill
- The Consumer Agency Bill
- Examination of the Maintenance Law (1996 Revision)
- Examination of the Affiliation Law (1995 Revision)
- Examination of the Matrimonial Causes Law (1997 Revision)
- The Companies (Amendment) Bill, 2005

¹² Sections 88 to 94 of the Penal Code (2005 Revision)

- Children's Regulations
- Family Court Bill

Nigel R.L. Clifford QC
Chairman of The Law Reform Commission
_____ **March 2006**