



The Cayman Islands
Law Reform Commission
1 April 2009/31 March 2010

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



It is with pleasure that I present to the Honourable Attorney General the Fifth Annual Report of the Law Reform Commission. The Report covers the activities of the Commission from 1st April, 2009 to 31st, March 2010.

Arguably, the period under review may be remembered most as the year in which the global economic recession took hold with the consequential financial reverberations being felt in the Cayman Islands. Despite these and other challenges, the Law Reform Commission has remained steadfast in the pursuit of its core objectives. The Commission continues its work towards the fulfillment of its mandate of reform and harmonisation of the laws of the Cayman Islands. This has been achieved through the related processes of comprehensive research, analysis, consultation, reports and education.

Emphasis of the Commission on wide stakeholder and public consultation in the reform process has from inception formed part of our central ethos and this review year has been no different. The Commission has formulated a reform agenda designed to place the law within a social framework and in accordance with societal needs. In this regard, we have over the period produced consultation reports and draft bills dealing with several issues including enduring powers of attorney, regulation of charities, domestic violence issues and arbitration. Also being pursued is work in other key areas of the transformation of our legal and social relationships. These areas include strata titles reform, family law reform, contempt of court issues and consumer protection.

It is this multidisciplinary and participatory approach adopted by the Commission that seeks to stimulate reflection on the role of the law in our society and more critically, inform the required legislative reforms.

The Commission wishes to express its gratitude to all of the Commissioners and supporting staff for demonstrating their fervent dedication to the reform process. We extend thanks to the Hon. Attorney General for the support provided during the period. The Commission is also grateful to all stakeholders and the general public for allowing us the benefit of their invaluable submissions.

The Law Reform Commission looks forward to meeting the challenges of the next reporting year and welcomes the continued participation of all concerned.

Langston R.M. Sibblies, QC
Chairman

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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 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 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 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 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 the several project reports and four annual reports which are listed in the Appendix .

THE COMMISSIONERS AND STAFF OF THE LAW REFORM COMMISSION

1. The Commissioners are-
 - Langston Sibblies, Chairman, QC
 - Mrs. Eileen Nervik
 - Mr. Justice Andrew Jones, QC
 - Ms. Cheryll Richards, Solicitor General, QC
 - Mr. Ian Paget- Brown.



Commissioners from left to right- Mr. I. Paget- Brown; Mrs. E. Nervik, Mr. Justice A. Jones QC; Ms. C. Richards (Solicitor General) QC and Mr. L. Sibblies, Chairman, QC

2. The members of staff of the office of the Commission are-
- Ms. Cheryl Ann Neblett, Director
 - Mr. José Griffith, Legislative Counsel
 - Mrs. Kimberly Allen, Executive Officer.



From left to right- Ms. Cheryl Neblett, Mr. José Griffith and Mrs. Kimberly Allen

**YEAR IN REVIEW- PROJECTS OF THE LAW REFORM COMMISSION
FROM 1 APRIL, 2009 TO 31 MARCH, 2010**

3. The Commission met four times between 1 April 2008 and 31 March 2009 on the following dates-

- 4 June, 2009
- 24 September, 2009
- 17 December, 2009
- 29 March, 2010.

4. A sub-committee of the Commission was appointed to deal with the review of the Strata Titles legislation on 2 April 2009. This sub-committee is comprised as follows-

- Mrs. E. Nervik, LRC Commissioner and chairperson
- Mrs. K. Bergstrom
- Mr. G. Loutas, Maples and Calder
- Mr. N. Klein, Appleby
- Mr. Ward Sykes, Appleby
- Mr. T. Hepburn, BCQS.

5. The sub-committee is assisted in its functions by the Director who is responsible for preparing the draft strata titles legislation.

6. During the past year the Commission completed projects on enduring powers of attorney, the regulation of charities and protection against domestic violence. The Commission also continued work on six other projects together with other legal work.

COMPLETED PROJECTS

Enduring powers of attorney

7. As indicated in the Fourth Annual Report of the Commission, the Honourable Attorney General referred a draft Enduring Powers of Attorney Bill to the Commission for its review in 2007. It had been submitted in February 2007 by the chairman of the Society of Trust and Estate Practitioners, (“STEP”) Mr. Andrew Miller. Mr. Miller was of the view that such legislation was needed as the present lack of such legislation causes difficulties in proper estate planning for both residents and non-residents who have assets in the Islands. He felt that the Cayman Islands could better promote itself as an ideal jurisdiction through which to conduct estate and trust planning by having such legislation. A draft Bill was provided.

8. The Commission carried out research in this matter and submitted a discussion paper on 12th January 2009 to the following stakeholders-

- The Legal Department of the Portfolio of Legal Affairs;
- the Cayman Islands Law Society;
- the Caymanian Bar Association;
- the Medical and Dental Council;
- the CMO and the Medical Director of the Health Services Authority;
- the Ministry of Health;
- the Department of Children and Family Services;
- the Chief Justice and the Clerk of the Court; and
- the Chairman of STEP.

9. The Chief Justice¹, the Assistant Solicitor-General² and STEP³ responded.

10. In carrying out its research the Commission investigated how enduring powers of attorney are dealt with in other jurisdictions and the success or failures such jurisdictions have had in this area. The discussion paper contained a discussion of the merits and disadvantages of an enduring power of attorney and posed a number of questions.

11. The final report which was submitted to the Attorney General on 30 April, 2009 sets out the issues relating to enduring powers of attorney which were highlighted, the questions posed to stake holders, the answers given as well as the final recommendations of the Commission on this matter.

12. The Commission noted that an enduring power of attorney has the following advantages-

- (a) it allows an individual to choose the person or persons who will look after the individual's affairs if the individual becomes incapable of doing so;
- (b) it avoids expensive and embarrassing court proceedings for the appointment of a trustee to look after the individual's affairs; and
- (c) it provides an efficient and cost-effective way of administering an individual's property.

13. However our research shows that in the jurisdictions in which they are used they can create many problems including the following-

- (a) abuses in relation to the initial granting of the power, including failures to explain and explore options alternative to a grant of general and unqualified powers to a single attorney;
- (b) abuses in the procuring of execution of powers of attorney in situations where the donor is unduly influenced by the attorney or where the donor lacks capacity;

¹ E-mail to the Commission dated 22 January 2009

² Memorandum dated 3 February, 2009

³ Letter dated 9 March 2009

- (c) high-handedness, bullying and failure to consult (selling the home of an institutionalised donor, for example, without the donor's knowledge) by attorneys;
- (d) embezzlement of moneys and theft of goods by attorneys;
- (e) neglect of the donor by the attorney (failure, for example, to institutionalise the donor where this is warranted because of the anxiety of the attorney as an ultimate beneficiary of the donor's estate not to see the estate whittled away);
- (f) failure by a donor to obtain legal advice prior to signing the EPA; ineffective monitoring of whether, on signing, the donor had the capacity to understand what is being signed;
- (g) no machinery to ensure that a donor is informed of the donor's right of revocation;
- (h) ineffective monitoring of attorneys;
- (i) ineffective monitoring of the decision that a donor is mentally incapable which triggers personal and welfare powers;
- (j) attorneys failing to account to donor or his family members;
- (k) the powers of a court to intervene are largely ineffectual because nothing happens unless someone sets proceedings in train;
- (l) reluctance by donors to initiate court proceedings against children or family members who have misused powers;
- (m) donor being prevented from involving court assistance by ignorance, lack of funds or social isolation;
- (n) lack of recognition by third parties of the instrument creating the power of attorney;
- (o) relevant legislation sometimes make the use of EPAs cumbersome and expensive; and
- (p) legislative difficulty in defining "mental incapacity".

14. One of the main problems with an enduring power of attorney is that by the time abuse is detected it is usually too late for the donor to act to revoke or change the power of attorney as he may be physically incapacitated by that time. It is then for interested parties to seek the assistance of a Public Guardian or the court to remedy the abuse.

15. The response from the Legal Department and the Chief Justice was that if such powers of attorney are introduced effective monitoring and other safeguards must be in place in order to avoid the pitfalls faced in other jurisdictions. Such safeguards would include-

- regulation of attorneys-
 - protective measures against financial abuse by attorneys;
 - oversight of attorneys;
 - creation of a public office for registration of instruments and monitoring of attorneys;
 - codifying the nature of the duty owed by the attorney;
- execution safeguards i.e.-

- signatories to the instrument;
- how many witnesses;
- status of witnesses- professional or lay;
- family relationship to donor, allowed or not;
- ensuring the donor signed voluntarily and without duress; and
- recognition by third parties of the instrument creating the power of attorney.

16. The Legal Department stated that there was a need for an office of Public Guardian generally and more particularly if such powers of attorney were introduced. The Chief Justice recommended the establishment of the office of Official Receiver whose duties would include-

- ensuring that donors get proper legal advice before granting an EPA;
- assessing whether the incapacity triggering the operation of the EPA has occurred;
- monitoring the actions of attorneys; and
- bringing court proceedings to protect the donor's or any beneficiary's interests.

17. STEP responded by stating that, in light of the potential for abuse associated with EPAs as highlighted in the discussion paper, it would not support the introduction of EPA legislation.

18. Notwithstanding the utility of enduring powers of attorney, the Commission believes that they produce more problems than they resolve. At present, in the absence of a power of attorney, and upon application by an interested party, the court can invoke its powers under section 14 of the Grand Court Law (2008 Revision) and section 14 of the Mental Health Law (1997 Revision), to appoint a guardian or receiver for a person of unsound mind. Such guardian or receiver would be required to account to the court for the receipt and disposition of property and in respect of any other decision made relating to the person under guardianship. There are sufficient safeguards under those Laws for vulnerable persons and the Commission does not therefore recommend the introduction of EPA legislation.

Review of the law relating to charities

19. The Law Reform Commission in March 2010 concluded its work on the review of the law regulating charitable organisations in the Cayman Islands. The final Report and the supporting Charities Bill were approved by the Commissioners on 29 March, 2009 and will be submitted to the Attorney-General by 30 April, 2010 for consideration.

20. The recommendations for reform contained in the report were the culmination of in-depth legal research into the operation of the charitable sector in the Cayman Islands. That research extended to the legislative framework existing in other jurisdictions dealing with the regulation of charities. The primary legislation which informed the basis of the Commission's research were the-

- Cayman Islands Companies Law (2009 Revision);
- Cayman Islands Trusts Law (2009 Revision);
- Bermuda Charities Act, 1978 (1989 Revision);
- Barbados Charities Act, 1985;
- New Zealand Charities Act, 2005;
- New South Wales Charitable Trusts Act, 1993; and
- United Kingdom Charities Act, 2006.

21. The Commission identified several issues that required examination in order to formulate appropriate recommendations to preserve and protect the existence of an effective charitable sector in the Cayman Islands. In the process, consideration was given to the international obligations of the Islands as articulated under the Financial Action Task Force (FATF) recommendations. These recommendations related to the establishment and implementation of a comprehensive legislative framework that will insulate the charitable sector from money laundering and terrorist financing activities.

22. The issues identified by the Commission were subsequently incorporated into a draft discussion paper entitled “Regulation of Charitable Non-Profit Organisations in the Cayman Islands”.⁴ This paper was supported by a draft Charities Bill, 2009. Both documents were published⁵ for public consultation and directed to several stakeholders in the charitable sector and the general public.

23. On conclusion of the consultation period,⁶ the Commission received written submissions from the following stakeholders-

- Assistant Financial Secretary (Financial Services) Portfolio of Finance and Economics;
- Assistant Director of Legal Studies Cayman Islands Law School;
- Cayman Islands Crisis Centre (CICC);
- Cayman Islands Human Rights Committee (CIHRC);
- Cayman Islands Humane Society (CIHS);
- Cayman Islands Bar Association (CIBA);
- Cayman Islands Law Society (CILS);
- Estella Scott-Roberts Foundation;
- Melanie Whittaker of Maples Finance;
- National Council of Voluntary Organisations (NCVO);
- Society of Trust and Estate Practitioners (Cayman Islands) (STEP); and
- United World Colleges (Cayman Islands) National Foundation Limited (CIUWC)

24. The Commission, during its deliberations, considered all responses from the above-mentioned organisations and persons. Generally, the comments of stakeholders

⁴ Dated 23 January, 2009

⁵ Dated 26 January, 2009

⁶ Dated 13 March, 2009

ranged from those of support for the proposals⁷ to questions concerning the need for legislation of this nature having regard to our current anti-money laundering and anti-terrorism regime⁸.

25. After considering the relevant comments, the Commission prepared a revised draft Charities Bill, 2009 along with a companion draft Trusts (Amendment) Bill, 2009. These Bills sought to reflect those comments of stakeholders which were accepted by the Commission. On the issue of the companion Trusts (Amendment) Bill, the Commission felt that the issues relating to charitable trusts warranted treatment in separate legislation. This represents a change in the initial approach of the Commission to include charitable trusts provisions in the substantive Charities Bill.

26. On conclusion of the second consultative period,⁹ the Commission received written and oral submissions from the following stakeholders-

- Assistant Director of Legal Studies Cayman Islands Law School;
- Cayman Islands Humane Society (CIHS);
- Cayman Islands Cancer Society (CICS)
- Cayman Islands Law Society (CILS);
- National Council of Voluntary Organisations (NCVO);
- Rotary Club of Grand Cayman;
- Rotary Club Central; and
- Society of Trust and Estate Practitioners (Cayman Islands) (STEP).

27. After taking into consideration the comments arising from the revised Charities Bill, 2009 and Trusts (Amendment) Bill, 2009 which were overall supportive, the appropriate amendments were made by the Commission.

28. Accordingly, the recommendations articulated in the final report and the provisions formulated in the Charities Bill primarily reflect the following-

- (a) A definition of charity to capture any person who conducts activities for charitable purposes. The definition will not include a private charity which in this context means a trust or company which fulfils charitable purposes without reliance on public or governmental funding and which has its trustees or directors as persons being regulated by the Cayman Islands Monetary Authority.
- (b) A definition of charitable purpose to cover several categories of charitable purposes including those relating to poverty; education; religion; citizenship; human rights; conflict resolution; equality; prevention of abuse; family planning; and special needs.

⁷ Melanie Whittaker of Maples Finance, CICC, CIHRC

⁸ CILS and STEP

⁹ Initially 7 August, 2009. This period was however extended to 31 August at the request of the CILS and STEP, who wished to submit their version of a charities bill for the consideration of the Commission

- (c) A definition of public benefit which covers any activity which is available to the general public or to a section of the public.
- (d) The appointment of a Registrar of Charities whose functions include-
 - (i) pursuing measures to increase public trust and confidence in charities;
 - (ii) promoting compliance by charity trustees or directors with their legal obligations;
 - (iii) enhancing the accountability of charities to donors, beneficiaries and the general public;
 - (iv) identifying and investigating apparent cases of misconduct or mismanagement in the administration of charities; and
 - (v) referral of cases of non-compliance with this Law, including acts of misconduct or mismanagement, to the Attorney General for inquiry or prosecution.
- (e) Establishment of a registration process for charities. A charity in the Cayman Islands desirous of conducting any activity for a charitable purpose which involves fund-raising by means of soliciting property from the public or Government will be required to apply to the Registrar to be registered as a charity. On registration the charity will be issued a registration number and will be obliged to affix the words “Registered Charitable Organisation” to any of its documents or promotional material. This advises the public that a particular charity has complied with the legal requirements for registration.
- (f) Regulation of Fundraising Activities by or on behalf of a Charity. In this regard a scheme of regulation will focus on regulating the manner in which charities conduct their activities by requiring that a charity shall declare its status as registered in the stipulated manner.
- (g) The power of the Attorney General to institute inquiries. The Commission recommends that the Attorney General be given authority either independently or by virtue of a referral by the Registrar to investigate or supervise organisations and individuals that administer or solicit charitable funds or other charitable assets. In light of the *parens patriae* power of the State to protect the interest of the public in assets pledged to public purposes, it is the view of the Commission that the Attorney General should be given power to protect donors to charity, charities and the beneficiaries of charities.
- (h) Maintenance of charity accounts and the conduct of audits. The Commission recommends mechanisms which allow for proper accounting. The goal in establishing internal controls over the fiscal management of a charity is to prevent error, fraud, theft, or mismanagement. Good internal

controls safeguard charitable assets and ensure the reliability of financial records.

- (i) Creation of a category of exempt of charities. The intention is to remove certain charities from within the registration regime of the legislation if they are already being regulated under another law or are supervised by other regulators such as government departments, public authorities or agencies. In addition, there is provision for the relaxation of some of the requirements attached to the registration process in the case of charitable activities for a short duration.
- (j) Exclusion of charitable trusts proceedings from these proposals. The Commission accepts the view that any modern comprehensive reform of charities law should extend to charitable trust proceedings. However, given the impact that any amendment in this area may have on the trusts law regime, the Commission thought it appropriate to exclude charitable trust issues from our current proposals and leave it to be dealt with as part of more substantive reforms relating to trusts law.

29. The Commission is of the view that these proposals will streamline the overall regulations relating to charities in the Cayman Islands and satisfy the reform objectives.

Review of the law relating to domestic violence

30. Arising from the Report of the Special Advisory Committee on Gender Violence¹⁰, a directive¹¹ was issued requiring that gender violence be examined within the parameters of the Law Reform Commission. Subsequently, this matter was referred for the attention of the Commission in April 2009 by the Ministry of District Administration, Works and Gender Affairs.

31. Based on this referral, the Law Reform Commission thought it appropriate to include the legislative issues that touch and concern gender based violence, domestic abuse and child abuse as an additional element of its current reform agenda dealing with family law reform.

32. The research of the Commission in this matter was concluded in March 2010 and culminated in the preparation of a final report on domestic violence which was approved by the Commissioners on 29 March, 2010. This report reflects a discussion paper outlining the legislative proposals for reform and the formulation of a supporting Bill entitled “the Protection Against Domestic Violence Bill, 2010”. The Bill seeks to repeal the current Summary Jurisdiction (Domestic Violence) Law (1998 Revision) in order to

¹⁰ 25 November, 2008. The Committee was appointed by the then Leader of Government Business, Hon. D. Kurt Tibbetts, JP and the then Minister for Health and Human Services, Hon. Anthony Eden, OBE, JP

¹¹ Extract From Minutes of the Cabinet of the Cayman Islands, Item No 2812 or Meeting No 178/08 on 16 December, 2008 and Cabinet Paper by the then Honourable Minister of Health and Human Services, 11 December, 2008, para. 4c

effectively accommodate the proposed legislative measures. The final report and Bill will be submitted to the Attorney-General by 30 April, 2010.

33. The legislative proposals are intended to enhance the protective remedies available to specified categories of persons living within a household residence and who are or may become exposed to domestic violence.

34. In formulating the proposals, the Commission benefited from the learning emerging from the Report on gender violence and that of the legislative experience of several other jurisdictions including the Bahamas, Barbados, Belize, Bermuda, Jamaica and Saint Lucia.

35. The Bill was subsequently published¹² for stakeholder and public consultation along with the background paper highlighting the proposals encapsulated in the Bill.

36. On conclusion of the consultation period,¹³ the Commission received written submissions from the following stakeholders-

- The Department of Children and Family Services;
- The Department of Community Rehabilitation;
- The Legal Department;
- The Ministry of District Administration Works and Gender Affairs (DAW&GA);
- The National Drug Council; and
- Dr. Victor Look Loy.

37. The Commission during its deliberations considered all responses from the above-mentioned organisations and persons. Generally, the comments of stakeholders were supportive of the proposals though in some instances recommendations were made for refinement.

38. After considering the relevant comments, the Commission prepared a revised draft Bill which reflected those comments of stakeholders which were accepted.

39. Accordingly, the recommendations articulated in the final report and the provisions formulated in the Protection Against Domestic Violence Bill primarily reflect the following-

- (a) An expansion of the types of conduct that would constitute domestic violence to include conduct which causes or is intended to cause the victim emotional or psychological abuse; financial abuse; physical abuse; or sexual abuse.

¹² Dated 12 October, 2009

¹³ Dated 30 November, 2009

- (b) A definition of household residence to mean the place where persons are likely to spend most of their time and thus be exposed to the potential of domestic abuse. This definition calls for the creation of a category of persons referred to as “prescribed persons” who would include the spouse, parent, child or dependant of the respondent or any person who is a member of the household residence or is in a visiting relationship with the respondent
- (c) An expansion of the category of persons entitled to protection under the law to include a person who is or has been in a visiting relationship with the respondent. “Visiting relationship” is defined to mean a close personal relationship between a man and a woman who do not share a common household residence. In determining whether such a relationship exists, the court must have regard to the nature and intensity of the relationship and in particular-
 - (i) the amount of time the persons spend together;
 - (ii) the place or places where that time is ordinarily spent;
 - (iii) the manner in which that time is ordinarily spent;
 - (iv) the duration of the relationship; and
 - (v) the presence of a child of both parties.
- (d) Reformulating the definition of “child” to ensure that the protective remedies covers a person under the age of eighteen years of age who is unmarried and a person who, by virtue of his or her presence in the household or his or her relationship to an adult member of the household, might be exposed to the risk of domestic violence.
- (e) An expansion of the types of court orders available to a victim of domestic violence to include a protection order, an occupation order, a tenancy order and various ancillary orders such as a maintenance order. This approach is in recognition of the need to afford flexibility in allowing an applicant to avail himself of a remedy which is relevant to the particular circumstances.
- (f) Permitting third party applications for a particular order on behalf of any person falling within the ambit of the legislation. Where the child or dependant is the victim or potential victim of domestic violence, an application for the relevant order may be made by a range of persons including a person with whom the child or dependant ordinarily resides or resides on a regular basis, a parent or guardian of the child or dependant; or a person who is approved by the relevant ministry responsible for family services. In the case of a spouse, parent, member of the household residence or person in a visiting relationship with the respondent, it is recommended that third party applications be permitted by a police officer

or any other person, whether or not he is a member of the household residence.

40. The Commission believes that these reforms will serve to improve the systemic reaction to violence within the domestic setting by ensuring that societal and legal responses protect the most vulnerable people who are, or may become, exposed to domestic violence.

CURRENT PROJECTS

Review of the law relating to arbitration

41. Further to the referral by the Attorney-General in 2006 for the Commission to review the Foreign Arbitral Enforcement Law (1997 Revision) and the Arbitration Law (2001 Revision), a draft arbitration discussion paper entitled “Review of the Arbitration Laws in the Cayman Islands” was prepared and approved by the Commission for publication.

42. The primary recommendation arising from this paper was to streamline our law along the lines of the UNCITRAL Model Law on International Commercial Arbitration¹⁴ as the foundation upon which a unitary regime for arbitration law may be established in the Cayman Islands. It was felt that the UNCITRAL Model Law provides a sound framework within which arbitrations can be conducted and that the general philosophy behind the Model Law of giving more autonomy to the arbitrator is one which is more likely to appeal to practitioners and parties.

43. It was also recommended that the proposals draw from several other legislative models that have adopted the UNCITRAL Model Law as the foundation for the formulation of their laws. These include the laws in the United Kingdom, Singapore, Bermuda and Hong Kong, among others.¹⁵ The arbitration regime in these jurisdictions reflect a modern approach from both a legislative and jurisprudential perspective to dealing with arbitration proceedings from which the Cayman Islands can benefit.

44. The Arbitration discussion paper was made available for stakeholder and public consultation on 11 May, 2009. That consultation period expired on 19 June, 2009, at which time the Commission received responses from the Cayman Islands Bar Association (CBA) and the Cayman Islands Society of Professional Accountants (CISPA).

45. The Commission also received offers of assistance in formulating its proposals from Ms. Corinne Montineri, Legal Officer at the UNCITRAL Secretariat; Mr.

¹⁴ UNCITRAL Model Law on International Commercial Arbitration (United Nations documents A/40/17, annex I and A/61/17, annex I) (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)

¹⁵ Reliance is also placed on the Arbitration Laws in Australia.

Veeraraghavan Inbavijayan, an Advocate/International Arbitrator based in India; and Dr. David M. Binder, Attorney-at-Law and Arbitration consultant based in Austria.

46. The Cayman Islands Law Society (CILS) forwarded for the attention of the Commission a draft International and Domestic Arbitration Bill and a supporting paper entitled "Arbitration Law of the Cayman Islands: A comparative Case for Reform". These documents were represented as the result of the findings of a Law Society sub-committee looking at the reform of the Arbitration Law.

47. The Commission is of the view that the CILS proposals are in line with the proposals of the Commission and the articulation of the issues as represented in the discussion paper.

48. While CISPA offered no comments on our discussion paper, the CBA supported the objectives of the Commission and suggested that it might be to the benefit of the Cayman Islands if consideration was given to the establishment of an arbitration centre.

49. Based on the comments resulting from the consultation process the Commission has since prepared a draft Arbitration Bill, 2010 was discussed at the meeting of the Commission on 29 March, 2010.

50. The Commission will refine the current Bill and thereafter have it published for stakeholder and public consultation in April 2010.

Introduction of Consumer Protection Legislation

51. The objective of the Commission's research in this area is to examine whether there is a need to establish a regulatory framework which protects consumers from unfair business practices. The Commission is of the view that consumer protection is crucial against those who profit from mass consumption, engage in cost cutting measures at all levels of production and at the same time, in the absence of legal obligations, adopt predatory practices which ultimately abuse consumer interests.

52. Based on our preliminary assessment of the research material and legislative trends that exist, our findings are likely to point to the need for consumer protection legislation for the Cayman Islands. Primarily, this project will focus on-

- recommendations which cover a broad range of legal issues affecting consumers, such as consumer fraud, investment fraud, identity theft, warranties, product safety, products liability and debtor rights;
- the need to ensure that goods supplied for local consumption satisfy safety standards and that goods and services supplied are of reasonable quality and offered on fair terms;

- mechanisms for ensuring that aggrieved consumers have access to relevant legal remedies and are given adequate consumer education and information; and
- establishment of an office to deal with complaints, mediating in consumer disputes and conducting tests and surveys on products and services;

53. The research of the Commission in this regard has already commenced. The objective is to produce an issues paper seeking public input on the introduction of consumer protection legislation.

Review of the Strata Titles Registration Law and Regulations

54. This project was referred to the Law Reform Commission on 31 July, 2006 by the then Chairman of the Cayman Islands Law Society, Mr. Charles Quin (now Justice Quin). The Chairman stated that many local practitioners were of the view that the present Law was unworkable, particularly in the case of the destruction of condominium buildings.

55. On 20 January, 2009 the Commission, by press release, invited members of the public to submit their comments on any aspect of the regulation of strata on the Islands or to highlight any issues or problems which have arisen in this area of the law. The deadline for submissions was 6 March, 2009.

56. A wide variety of issues were raised by members of the public in response to the press release of the Commission. However the main problem highlighted was ineffective management of strata schemes. The complaints and comments may be summarised as follows-

- the law should be changed to provide that a majority (perhaps 65%) of owners can make a decision on whether to sell a strata;
- the powers of some developers under strata schemes were too many and led to problems including unfair distribution of insurance proceeds after Hurricane Ivan;
- many strata schemes had poor strata bye-laws and strata committees which lacked accountability;
- strata committees were negligent in either not carrying out adequate research in order to obtain best insurance premiums or in not ensuring that insurance or adequate insurance was paid on premises;
- the accounts of strata corporations should be audited annually by one or more properly qualified chartered or certified public accountants or there should be an annual financial review and certification of the accounts by independent accountants;
- the method of examination of the financial statements should be determined by the proprietors at each annual general meeting for the next accounting period; and
- strata members met irregularly in many schemes.

57. Other concerns were that the existing legislation fails to address many substantial issues that deal with strata titles such as strata of leasehold land. There was also the criticism that phasing provisions are minimal at best, unduly inflexible and fail to take account of market realities and changing planning and best practice standards. It was submitted that this has resulted in the need for detailed provisions in strata contracts in order to create the flexibility needed to ensure that phased developments can be completed over time in a sensible manner.

58. Several local attorneys responded to the press release and they all indicated that the law was in need of a comprehensive overhaul and most recommended reform along the lines of the strata legislation in New South Wales, Australia.

59. A sub-committee of the Law Reform Commission was appointed in April 2009. This sub-committee is comprised as follows-

- Mrs. E. Nervik, LRC Commissioner and chairperson
- Mrs. K. Bergstrom
- Mr. G. Loutas, Maples and Calder
- Mr. N. Klein, Appleby
- Mr. Ward Sykes, Appleby
- Mr. T. Hepburn, BCQS.

60. The Committee met on the following dates-

- 23 April, 2009
- 15 May, 2009
- 11 June, 2009
- 2 September, 2009
- 10 September, 2009
- 17 September 2009
- 1 October 2009
- 15 October, 2009.

61. A first draft of a Strata Titles Bill was submitted to the sub-committee in June 2009 and was re-drafted three times between June and October, 2009. The matters discussed by the sub-committee in that period related to the following-

- (a) the creation of strata lots on freehold as well as leasehold land;
- (b) the creation of tiered strata and mixed strata schemes;
- (c) phased development of strata schemes by way of development contracts;
and
- (d) the variation and termination of strata schemes.

62. Research was conducted by the members of the sub-committee and the legislation of New South Wales, South Australia, Western Australia and Ontario were considered during the deliberations of the sub-committee.

63. In February 2010 the Director, after meeting with the chairman of the Commission, agreed, in light of the complexity of this subject matter and the volume of work which is involved in this review, to divide the strata review in two parts- firstly, the management of strata schemes and secondly the creation of strata schemes. It was decided to focus on the reform of the management of strata schemes first as this was the area in which most issues arise.

64. A draft discussion paper was submitted to the Commissioners on 16 March and a draft Strata Titles Registration (Amendment) Bill on 22 March, 2010. The paper and the Bill cover the following matters-

- (a) insurance of buildings and other type of insurance;
- (b) constitution and powers of executive committee;
- (c) levy of contributions;
- (d) procedure at meetings; bye-laws;
- (e) strata accounts;
- (f) variation and termination of strata schemes;
- (g) resolution of disputes under strata legislation.

65. In preparing the paper, the Commission considered the papers and recommendations for reform presented by various attorneys and other persons at the strata titles conference of 2007.¹⁶

66. The paper and Bill were considered at the meeting of 29 March and it was agreed to send the same to the sub-committee for their deliberations. Public consultation on the paper and Bill will follow later this year.

67. A second paper dealing with the creation of strata schemes, tiered and mixed strata as well as phased strata developments will be prepared and submitted in May 2010.

Review of contempt of court

68. In the Fourth Annual Report in 2009 it was indicated that the Legislative Drafting Department had been directed by the Attorney-General to prepare contempt of court legislation in light of requests for modernisation and codification in this area of the Law. A draft bill was prepared in 2004 and transferred to the Law Reform Commission in 2005 for more in-depth research.

69. The draft Bill was reviewed by the staff of the Commission in February 2009 and a revised draft bill was submitted to the Commissioners for their consideration on 5 March, 2009. The Bill, inter alia, dealt with the following-

- (a) power to punish for contempt in face of court;
- (b) failure to obey or comply with order of court;

¹⁶ 19 April, 2007

- (c) contempt in face of a tribunal;
- (f) definition of spoken or written contempt;
- (g) innocent publication and distribution;
- (h) contemporaneous publication of fair and accurate reports; and
- (i) confidentiality of jury's deliberations.

70. The draft bill was discussed by the Commissioners between September and 17 December 2009. Research is ongoing and it was agreed in March 2010 to deal with the review in the three stages (similarly to the approach taken by the Law Commissions of Western Australia and Tasmania) which are (a) contempt by publication; (b) contempt by disobedience to a court order and (c) contempt in the face of the court. There will however be a single final report that encompasses the law of contempt as a whole.

Review of the Matrimonial Causes Law (2005 Revision), the Maintenance Law (1996 Revision) and Affiliation Law (1995 Revision)

71. The Director commenced the family law reform project in July 2009 by a review of the Matrimonial Causes Law (2005 Revision). A draft Family Law Bill was presented to the Commissioners on 3 August 2009. The Bill addressed the following matters-

- (a) children of the marriage;
- (b) polygamous marriages;
- (c) marriage counseling and reconciliation;
- (d) jurisdiction in matrimonial causes;
- (e) dissolution and nullity of marriage;
- (f) effect of resumption of cohabitation;
- (g) effect of interruption of cohabitation;
- (h) nullity of marriage;
- (i) welfare and custody of children including overseas custody orders;
- (j) maintenance and property including cohabitation and separation agreements; maintenance agreements;
- (k) evidence as to paternity; and
- (l) recognition and enforcement of decrees.

72. The Bill was discussed at the meeting of 24 September 2009 and it was agreed that instead of commencing with a draft Bill that a discussion paper setting out issues faced in the Cayman Islands should be prepared instead. Research is ongoing and an issues paper should be finalized by April/May 2010.

Regulation of timeshares

73. The review of timeshares which was referred to the Commission 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 Commission. 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.

74. A Bill and discussion paper will be submitted by August 2010.

FUTURE PROJECTS

Sexual Harassment and Stalking Legislation

75. In keeping with our review of legislation that deal with gender and family related issues, the Commission intends to conduct research into the issues that relate to sexual harassment and stalking. Having dealt with the issues surrounding domestic violence the Commission recognizes that there are other substantive areas which would need to be addressed as we seek to formulate legislation that adequately responds to all issues relating to sexual and violent conduct which touch and concern the person.

76. The research of the Commission on this project will commence in April 2010.

LEGISLATIVE DRAFTING PROJECTS OF THE STAFF OF THE COMMISSION

77. The Director and Legislative Counsel, as legal officers of the Portfolio of Legal Affairs, also undertake from time to time legislative drafting and other legal projects on behalf of the Portfolio of Legal Affairs. The Commissioners do not participate in these projects.

78. In September 2009 the Director met with officers of the Department of Environmental Health and the Ministry of District Administration, Works & Gender Affairs to discuss the preparation of legislation dealing with environmental health, solid waste management, management of hazardous materials, health and safety laws, food safety and primary health care. This project was referred to the staff of the Law Reform Commission due the depth of research which is required. Research has started and draft legislation will be provided later this year.

79. The draft Legal Aid bill and Regulations which were drafted in October 2008 were finalised by the Director in October 2009. However, before the draft legislation

could be sent to the Attorney General the Premier announced Government's plan to establish a Legal Services Office to be headed by Mr. Steve McField and Mrs. T. Pitcairn. The Director was thereafter requested by the Solicitor General to prepare a paper on the establishment of public defenders offices and this was done on 21 October 2009.

80. In light of the response from the legal associations in relation to the proposal to set up a Legal Services Office the Government decided to establish a Legal Aid Review Committee to review the proposal submitted by Messrs. McField and Pitcairn. On 7 December 2009 the Director was appointed as chairperson of the Committee and Legislative Counsel acted as secretary.

81. The review was concluded on 1 March, 2010 by the submission of a report to the Ministry of Finance which appointed the Committee.

82. In November 2009 the Director, at the request of the Attorney General and on behalf of the Cayman Islands Government, attended the UN Anti-Corruption Conference in Doha, Qatar. The third session of the Conference of the States Parties to the United Nations Convention against Corruption took place from 9 to 13 November 2009. The Conference was established in accordance with article 63 of the United Nations Convention against Corruption and concentrated on issues such as review of the implementation of the Convention, asset recovery and technical assistance.

83. The Director and Legislative Counsel have also drafted the following-

- Public Service Pensions (Amendment) Bill, 2009
- The Parliamentary Pensions (Amendment) Law, 2009;
- The Proliferation Financing (Prohibition) Bill, 2010; and
- The Amateur Radio Regulations, 2010.

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. Fourth Annual Report of the Law Reform Commission 2008/9 (31 March, 2009)
16. "Is there a need for enduring powers of attorney in the Cayman Islands? Final Report No. 6 (30 April 2009)
17. Discussion Paper – Review of the Arbitration Laws of the Cayman Islands (11 May, 2009)
18. The Draft Charities Bill (26 June, 2009)
19. The Draft Trusts (Amendment) Bill (26 June, 2009)
20. The Protection Against Domestic Violence Legislative Proposals, (12 October, 2009)

21. The Protection Against Domestic Violence Bill, (12 October, 2009)

Langston R.M. Sibblies, QC
Chairman of the Law Reform Commission
30 March, 2010