



# CAYMAN ISLANDS LAW REFORM COMMISSION



ANNUAL REPORT NO. 13

1<sup>st</sup> April, 2017 / 31<sup>st</sup> March, 2018





## FOREWORD

I present to the Honourable Attorney General the Thirteenth Annual Report of the Law Reform Commission. The Report covers the activities of the Law Reform Commission from 1<sup>st</sup> April, 2017 to 31<sup>st</sup> March, 2018.

The period under review, in addition to dealing with substantive law reform matters, has been one which saw several changes and appointments with respect to Commissioners and Commission staff. As such, it might be more fitting that I begin by highlighting those respective changes and appointments. First, the Commission thanks former Commissioner and Solicitor General, Ms. Jacqueline Wilson, Q.C. for her contribution to the work of the Commission during her three years of service. We recognize Ms. Wilson's call to high judicial office and accordingly congratulate Ms. Wilson on her appointment as Judge in the High Court of Trinidad and Tobago.

We welcome the September 2017 appointment of Acting Solicitor General, Ms. Reshma Sharma, as Commissioner. I have no doubt that the Commission will benefit from Ms. Sharma's substantive knowledge and expertise in public law, among other areas, as we seek to advance the law reform process with respect to the several matters on the law reform agenda.

We recognize the exemplary service of former Director of the Law Reform Commission, Ms. Cheryl Neblett, who was the first Director of the Commission since its establishment in 2005. Ms. Neblett was appointed, with effect from 1<sup>st</sup> June, 2017, First Legislative Counsel in the Legislative Drafting Department. Over her twelve year tenure as Director, the Commission has benefitted from her sound understanding of the law and ability to reflect that understanding in the formulation of comprehensive law reform proposals and unambiguous supporting legislation. I have no doubt that as First Legislative Counsel, Ms. Neblett will steer the Legislative Drafting Department with the excellence demonstrated in the Commission.

The Commission equally welcomes the announcement that Mr. Jose Griffith, Senior Legislative Counsel and currently acting Director in the Law Reform Commission has been appointed Director having served the Commission for the last ten years. Mr. Griffith's appointment will take effect from 1<sup>st</sup> April, 2018.

The Commission also congratulates Mrs. Kimberly Allen on her appointment as Personal Assistant to the Director of Public Prosecutions which took effect from September, 2017. Mrs. Allen served the Law Reform Commission from 2008, first as Executive Officer and then as Administrative Secretary.

Finally, the Commission welcomes Mrs. Lourdes Pacheco who was appointed as Administrative Secretary of the Law Reform Commission with effect from 2<sup>nd</sup> October, 2017. Mrs. Pacheco previously served as Library Assistant at the Truman Bodden Law School.

The 2017/2018 year was an active one as the Commission sought to advance several matters on its agenda in keeping with its mandate to reform and update the laws of the Cayman Islands in line with the social, cultural and economic needs and values of the people of the Cayman Islands.

The Commission is in the process of finalising its reports on the statutory regulation of the use of Queen's evidence and the review of the Law of Contempt. We anticipate that the Final Report on this matter will be submitted to the Hon. Attorney General shortly.

Our role as a Commission has been and continues to be working towards adding value to the legal expertise of the Government by drawing on our skills of research and analysis and representing issues in a clear and impartial manner. On this strength, our work continued with a focus on several projects. These include-

- consumer protection;
- review of the law of Trusts;
- cyber- security and cybercrime;
- Penal Code reform;
- anti-bullying legislation;
- severance of joint tenancy agreements;
- property foreclosures;
- reform of the Interpretation Law;
- reform of the Defamation Law;
- review of the law of contempt;
- Contingency/conditional fees; and
- statutory regulation of the use of Queen's evidence.

All of these projects are at various stages of the law reform process.

As a Commission, we are positioned to undertake reviews involving controversial legal issues where there is a need to be completely independent from Government, industry and special interests groups. Such reviews require in-depth consultation with diverse and often opposing stakeholders to consider their opinions and interests carefully, so that the Government is provided with independent advice that has thoroughly canvassed many opinions and options. One such example is that related to property foreclosures which has been referred to the Commission by the Hon. Attorney General for review. Indeed, the value that the Commission brings to matters such as these is the ability to undertake an independent process of consultation

and research that starts with questions and is able to involve the participation of stakeholders across the broadest spectrum of interests.

In pursuing our law reform objectives we take pride in being an inclusive body. Accordingly, we always seek contributions from the public, stakeholders, legal profession and the judiciary. It is on this basis that I express my thanks to all those who have participated in the work of the Commission through their responses to the consultation papers we have published.

I recognise that the Commission could not achieve its contribution to a sound and principles-based legal system for the Cayman Islands without the commitment and skill of the Commissioners and staff. Their expertise and dedication ensures that the Commission makes a valuable contribution to clear, fair and modern laws appropriate for a progressive democracy. I therefore express my appreciation for the commitment of my fellow Commissioners. It is a privilege to engage in discussions with them and benefit from their knowledge of the several subject areas placed before the Commission.

I also express my thanks to the staff of the Commission. It is my considered view that the level of productivity of the Commission is in large part a tribute to the able assistance and dedication of the staff.

The Commission expresses its gratitude to Hon. Attorney General and the Government for their support of the Commission.

During the next year, I join the Commissioners and staff in a commitment to continuing the law reform process. Notwithstanding the challenges, which are normal when seeking to reform the law, I am confident that the Commission's methodology will ensure that we adequately meet those challenges. It is expected that the Commission's work will facilitate an informed Government response to this ever-changing environment and will help to ensure that our legal system can respond appropriately and effectively.



**Mr. Kenneth Farrow, Q.C.**  
**Chairman**

**31<sup>st</sup> March, 2018**



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## **OVERVIEW OF THE LAW REFORM COMMISSION**

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

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

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

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

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

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

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



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

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

## THE COMMISSIONERS AND STAFF OF THE LAW REFORM COMMISSION



**Law Reform Commissioners** from left- Ms. Reshma Sharma; Mr. Hector Robinson, Q.C.; Mr. Kenneth Farrow, Q.C. (Chairman); Ms. Cheryll Richards, Q.C.; and Mr. Vaughan Carter (Missing - Mrs. Eileen Nervik, Q.C.)



**Staff of the Commission** from left- Director, Mr. José Griffith and Administrative Secretary, Mrs. Lourdes Pacheco



## **YEAR IN REVIEW- PROJECTS OF THE LAW REFORM COMMISSION FROM 1<sup>st</sup> APRIL, 2017 TO 31<sup>st</sup> MARCH, 2018**

### **MEETINGS OF THE COMMISSION**

The Commission met four times between 1 April, 2017 and 31 March, 2018 on the following dates-

- 5<sup>th</sup> October, 2017
- 7<sup>th</sup> December, 2017
- 25<sup>th</sup> January, 2018; and
- 27<sup>th</sup> March, 2018.

### **CURRENT PROJECTS**

#### **STATUTORY REGULATION OF QUEEN'S EVIDENCE**

The Criminal Justice (Offenders Assisting Investigations and Prosecutions) Bill, 2017 was part of a review of the statutory regulation of the use of accomplice evidence (Queen's Evidence) and was outlined in the 12<sup>th</sup> Annual report. After two consultations which yielded no response from the local Bar, the public or the judiciary, a Final report, supported by the Criminal Justice (Offenders Assisting Investigations and Prosecutions) Bill, 2018 are being considered for submission to the Attorney General.

The main precedent used in the drafting of the Bill was the UK Serious Organised Crime and Police Act, 2005. Also considered in depth was the Criminal Justice (Plea Negotiations and Agreements) Act of 2005 of Jamaica before its recent repeal in 2017 by the Plea Negotiations and Agreements Act, 2017.

#### **The Criminal Justice (Offenders Assisting Investigations and Prosecutions) Bill, 2018**

The main provisions of the Bill are as follows-

(a) The duty of the DPP to prosecute under section 57 of the Constitution remains intact notwithstanding the legislation. In other words, the DPP is not compelled to enter into a plea agreement. **See clause 3.**

(b) Use of immunity from prosecution- if the Director of Public Prosecutions is of the opinion that, for the purposes of an investigation or prosecution of any offence, in an exceptional case, it is appropriate to offer a person immunity from prosecution, the Director may give the person an immunity notice. If a person is given an immunity notice, no proceedings for an offence of a description specified in the notice may be brought against that person except in circumstances specified in the notice. An immunity notice ceases to have effect in relation to the person to whom it is given if the person fails to comply with any conditions specified in the notice. **See clause 4.**

(c) Use of restricted use undertakings- If the Director of Public Prosecutions thinks that, for the purposes of the investigation or prosecution of an offence, it is appropriate to offer a person an undertaking that information of any description will not be used against the person in any proceedings to which this section applies, the Director of Public Prosecutions may give the person a written restricted use undertaking. Restricted use undertakings apply not only to criminal proceedings but also to civil proceedings related to the recovery of proceeds of crime- **see clause 5.**

(d) Reduction in sentence by the court because the defendant has assisted in or offered to assist the investigator or prosecutor in relation to that or any other offence.- **See clause 6.**

(e) A review of a sentence where a person has obtained a discounted sentence because he or she agreed to assist and-

(i) received a discounted sentence in consequence of that person having offered, in pursuance of a written agreement, to give assistance to the prosecutor or investigator of an offence but he or she knowingly fails to any extent to give assistance in accordance with the agreement;

(ii) received a discounted sentence in consequence of that person having offered, in pursuance of a written agreement, to give assistance to the prosecutor or investigator of an offence and, having given the assistance in accordance with the agreement, in pursuance of another written agreement, gives, or offers to give, further assistance; or

(iii) received a sentence which is not discounted but in pursuance of a written agreement the person subsequently gives, or offers to give, assistance to the prosecutor or investigator of an offence. **See clause 7.**

(f) Exclusion of the public from proceedings relation to the review of a sentence- **See clause 8.**

(g) The right to legal representation of the accused when negotiating a deal; **See clause 9**

(h) An obligation of certain persons to keep information secret and confidential under the legislation; **See clause 11**

(i) The rights of victims to have a say before plea negotiations- **See clause 12**

(j) A court is not bound to accept a restricted use undertaking or an agreement for a reduced sentence. **See clause 13. 5**

## **CONTINGENCY AND CONDITIONAL FEE AGREEMENTS**

The Commission has prepared an Interim Report entitled “**A Review of Litigation Funding in the Cayman Islands – Conditional and Contingency Fee Agreements**” and a supporting Private Funding of Legal Services Bill, 2018 and the Private Funding of Legal Services Regulations, 2018. The report and legislation have been forwarded to the Hon. Chief Justice, the Financial Services Division of the Grand Court and the Cayman Islands Law Society for their comments. Submissions are due by 31<sup>st</sup> May, 2018.



## **CONSUMER PROTECTION**

### ***Publication of Discussion Paper***

In December 2015 the Cayman Islands Law Reform Commission submitted for stakeholder and public comment a Discussion Paper entitled “Consumer Protection: Entrenching Consumer Supremacy in Cayman Islands Legislation”.

Several issues were examined and questions asked in relation to the introduction of consumer protection legislation. Accordingly, stakeholders and members of the general public were invited to make submissions on the issues and proposals identified in the Discussion Paper.

The consultation deadline for comments was 29th April, 2016. Four responses were received, three from members of the public who expressed support for the initiative and one from the then Ministry of Financial Services, Commerce and Environment.

The paper was sent to several stakeholders including the Chamber of Commerce, Cayman Islands Law Society, the Cayman Islands Bar Association and the Cayman Islands Bankers Association. During the period none of these stakeholders provided a response to the paper.

Based on the limited feedback, the Commission extended the deadline for submissions to 3rd June, 2016 as it was felt that an additional opportunity should be given to allow all to express their views. Since publishing the extension period, the CILS acknowledged receipt of our consumer protection paper and provided general remarks suggesting that we review our approach to this issue. No further comments were received.

### ***Publication of the Consumer Protection and Guarantees Bill, 2017***

In October 2017, the Commission submitted for stakeholder and public comment a Bill titled the “Consumer Protection and Guarantees Bill, 2017”. This Bill was influenced by the limited responses to the Commission’s discussion paper on the prospect of formulating discrete consumer protection legislation and also by the general public sentiment on the issues affecting consumers in the Islands.

The Bill covers the following areas -

- procedure to make a consumer complaint;
- rights of consumers;
- consumer guarantees in relation to the supply of goods;
- consumer remedies when a supplier guarantee is breached;
- consumer remedies when a manufacturer guarantee is breached;
- consumer guarantees in respect of services;
- consumer remedies for breach of a service guarantee;
- duties of suppliers;
- unfair trade practices;
- unfair contracts terms;
- recall of goods; and

- distance selling.

The consultation period on the Bill expired 12<sup>th</sup> January, 2018 at which time no responses were received. The Commission then extended the consultation period to 1<sup>st</sup> March, 2018. Since publication of the extension, the Chamber of Commerce and the Cayman Islands Institute of Professional Accountants responded to the publication of the Bill and have requested a further extension of the consultation period. Accordingly, the Commission has extended the consultation to 1<sup>st</sup> May, 2018.

The main provisions of the Consumer Protection and Guarantees Bill, 2017 relate to the following-

- Establishment and functions of the Consumer Affairs Commission;
- Making consumer complaints;
- Rights of the consumer;
- Consumer remedies when a supplier guarantee is breached;
- Consumer remedies when a manufacturer guarantee is breached;
- Consumer guarantees in respect of services;
- Consumer remedies for breach of service guarantee;
- Duties of a supplier;
- Unfair trade practices;
- Dual pricing;
- Bait advertising;
- Referral selling;
- Unfair contract terms;
- Recall of goods;
- Distance selling; and
- Regulations.

On conclusion of the consultation period, the Commission will review all comments and determine whether further research or consultation is required or whether final recommendations should be formulated for the consideration of the Attorney General.

## **REVIEW OF THE TRUSTS LAW**

The Commission published, in March 2017, its discussion paper on Trusts Law Reform. The Paper, among other things, sought to examine whether any reform is needed to the law with respect to the codification of the duties of trustees, the Hastings Bass rule, judicial and extra-judicial variation of trusts and the use of mediation and arbitration in trust disputes. The Commission received several responses from the Society of Trust Estate Practitioners (STEP).

After taking into account the views expressed by STEP on the discussion paper, the Commission drafted for consultation a Trusts (Amendment) Bill, 2017. The Bill seeks to amend the Trusts Law (2017 Revision) by amending the definition of “trust corporation” to mean a body corporate



licensed to conduct trust business, with or without restriction, under the Banks and Trust Companies Law (2013 Revision) or registered under that Law as a controlled subsidiary.”

The Bill introduces the definition of “trust litigation” which means litigation invoking the inherent jurisdiction of the Court in relation to the administration of trusts.

The Bill inserts new sections 64A and 64B which provides as follows-

“ 64A. (1) If the Court, in relation to the exercise of a fiduciary power, is satisfied by a person specified in subsection (5) that the conditions set out in subsection (2) have been met, the Court may -

- (a) set aside the exercise of the power, either in whole or in part, and either unconditionally or on such terms and subject to such conditions as the court may think fit; and
- (b) make such order, consequent upon the setting aside of the exercise of the power, as it thinks fit.

(2) The conditions referred to in subsection (1) are that -

- (a) in the exercise of the power, the person who holds the power did not take into account one or more considerations (whether of fact, law or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power; and
- (b) but for his failure to take into account one or more such relevant considerations or his having taken into account one or more such irrelevant considerations, the person who holds the power -
  - (i) would not have exercised the power;
  - (ii) would have exercised the power, but on a different

occasion to that on which it was exercised; or

- (iii) would have exercised the power, but in a different manner to that in which it was exercised.

(3) If and to the extent that the exercise of the power is set aside under this section, to that extent the exercise of the power shall be treated as never having occurred.

(4) The conditions specified in subsection (2) may be satisfied without it being alleged or proved that in the exercise of the power, the person who holds the power, or any advisor to such person, acted in breach of trust or in breach of duty.

(5) An application to the court under this section may be made by -

- (a) the person who holds the power;
- (b) where the power is conferred in respect of a trust or trust property, by any trustee of that trust, or by any person beneficially interested under that trust, or (in the case of a purpose trust) the enforcer;
- (c) where the power is conferred in respect of a charitable trust or otherwise for a charitable purpose, the Attorney General; or
- (d) with the leave of the court, any other person.

(6) No order may be made under subsection (1) which would prejudice a bona fide purchaser for value of any trust property without notice of the matters which allow the court to set aside the exercise of a power over or in relation thereto.

(7) In this section -

“fiduciary power” means any power that, when exercised, must be exercised for the benefit of or taking into account the interests of at least one person other than the person holding the

power;

“power” includes a discretion as to how an obligation is performed; and

“person holding the power” includes any person, whether or not the trustee of a trust, on whom a power has been conferred, whether or not that power is exercisable by that person alone, and any person to whom the exercise of a power has been delegated.

64B. Where a compromise of trust litigation is proposed and the approval of the Court is required on behalf of any beneficiary, whether a party to the litigation or represented by a party to the litigation, the Court shall be entitled to approve the compromise if it is satisfied that the compromise is not to the detriment of such beneficiary notwithstanding that the Court is not satisfied that it is for his benefit.”.

The Bill amends section 72(1) of the principal Law by deleting the words “the carrying out thereof would be for the benefit of that person” as they appear in the proviso and substituting the words “the carrying out thereof would not be to the detriment of that person”.

It also amends section 91(b) of the principal Law by inserting after the words “a personal relationship to the settlor” the words “or any beneficiary (whether discretionary or otherwise)”.

A new section 111A is inserted in the Law to provide for rules of Court to be made for giving effect to the provisions of the Law.

The Commission will prepare its final Report for submission to the Attorney General.

## **CYBERSECURITY ISSUES**

The Commission continues its research into cybersecurity and cybercrime. The Commission recognises the public interest in encouraging the use of computers and it is equally recognised that with the utilization of the available technology there comes exposure to the negative aspect of navigating the cyber environment evidenced by security breaches and criminal conduct. An effective response may well be necessary whether it be borne out in strategic policy, legislation, or a combination of both. In this regard, the Commission is in the process of finalizing a draft Issues Paper for consultation which will focus on what should feature in an effective cybersecurity legislative framework.

Our examination of the international approaches and strategies identified have highlighted several considerations that must be borne in mind when seeking to formulate a cybersecurity legislative framework or policy. These include –



- (a) an oversight Agency;
- (b) identification of critical information infrastructures;
- (c) agency power to designate infrastructure as being critical;
- (d) duties of critical information infrastructures owners;
- (e) agency response to cybersecurity threats and incidents;
- (f) penalties; and
- (g) regulation of cybersecurity service providers.

**(a) Oversight Agency**

For a cybersecurity regime to be effective there is a need to establish an Agency in which the powers of the legislation shall be vested. This agency should practically be headed by a Commissioner or Director of cybersecurity. The legislation should, among other things, set out the corporate governance structures and arrangements of the entity and its functions and powers. It would be beneficial to give legislative authority to the Cayman Islands Cyber Incident Response Team (CIRT-KY) or a similar body which has the capacity to identify and bring to attention cyber threats.

**(b) Identification of critical information infrastructure**

A critical information infrastructure (“CII”) would be a computer or computer system that is necessary for the continuous delivery of essential services which the Islands rely on and the loss or compromise of which will have an adverse impact on the economy, national security, foreign relations, public health, public safety or public order.

The Information and Communications Technology Law (2017 Revision) refers to the term “critical ICT infrastructure” which means ICT systems and assets, whether physical or virtual, that are so vital to the Islands that the incapacity or destruction of the systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.

A list of those essential services and assets will need to be identified in legislation with scope for adding new services and assets as they emerge. But arguably, the critical sectors span across utilities, transport and services and include government, security and emergency, healthcare, telecommunications, banking and finance, energy, water, media, land transport, air transport and maritime.

It will nonetheless be important to have set criteria to determine whether a computer or computer system falls within the category of a CII. Hence, the Agency may require the owner of the CII to provide certain information about the computer or computer system provided that the disclosure of such information will not constitute a breach of any law or right.

**(c) Agency power to designate infrastructure as being critical**

The relevant agency should have the power to designate a computer or computer system as a CII. In doing so, the agency will be required to provide written notice to the owner of the computer or computer system. The owner would be the person who has effective control over the operations of the CII and has the ability to carry out changes to the CII or is responsible for ensuring the continuous functioning of the CII if directed by the agency.

**(d) Duties of critical information infrastructure owners**

The legislative framework should impose obligations on CII owners to ensure the cybersecurity of the CII. To this end, every CII owner will have an obligation to –

- provide information on the technical structure of the critical information infrastructure;
- comply with codes and directions in relation to the CII as may be issued by the Agency;
- notify the Agency of any cybersecurity incident that occurs in respect of the CII and any cybersecurity incident that occurs in respect of any computer or computer system under the owner's control that is interconnected with or communicates with the CII;
- notify affected parties;
- conduct audits of the CII, with codes of practice and standards of performance to be carried out by an auditor approved or appointed by the Agency;
- carry out regular risk assessments of the CII;
- create procedures and policies to deal with cybersecurity breaches;
- encrypt personal data transmitted externally;
- have in place administrative, technical, and physical security controls; and
- participate in cybersecurity exercises.

**(e) Agency response to cybersecurity threats and incidents**

As earlier pointed out, Cayman is a highly connected territory and as reflected in the several reports, cybersecurity threats and incidents are real. These threats would have a real risk of affecting CII, Cayman's national security, or a large number of computers and people across Cayman.

The mandate of any cybersecurity agency is therefore to prevent and respond to cybersecurity threats and incidents at the national level. It must ensure that cybersecurity threats and incidents are contained and do not develop into more serious consequences.

The strategy has to be one that when the Agency becomes aware of a cybersecurity threat or cyber incident, it is required to investigate the threat or incident in order to determine

its impact or potential impact, to prevent further harm from arising from the incident, and to prevent further cybersecurity incidents from arising from the threat or incident.

**(f) Powers to investigate cybersecurity threats and incidents**

An appropriate Agency response to a cybersecurity threat presupposes that relevant staff will be empowered to conduct investigations in respect of CIIs and any computer or computer system in the Islands.

The level of the power would however depend on the severity of the situation. A cybersecurity threat may be considered serious if it creates a real risk-

- of significant harm being caused to a CII;
- of disruption being caused to the delivery of an essential service; and
- to national security, justice, defence, foreign relations, economy, public health, public safety or public order.

At the same time, however, one has to be mindful of privacy issues when conducting investigations. Powers should be duly balanced with the need for protection of privacy by ensuring that requirements and obligations are proportionate, do not represent an intrusion of fundamental rights, follow due process and are supported by adequate judicial oversight.

**(g) Penalties**

In the strategies examined, the offences are typically criminal offences attached to the CII Owners in cases where they fail to perform their duties willfully, or fail to comply with Agency directions without reasonable excuse. The criminal nature of the offences are necessary because of the national security implications of non-compliance.

CIIs may be owned by either the public or private sector and the duties, offences and penalties pertaining to CII owners must apply equally regardless. This, it is contended, will ensure that all CIIs in the Islands are protected in a consistent manner.

**(h) Regulation of cybersecurity service providers**

As cybersecurity risks become more widespread, the need for credible cybersecurity services will grow in the Islands. As with many things, high demand tends to trigger more providers, and where there are more providers there is a risk to the consumer of receiving substandard services. It is in this regard that several protective measures need to be out in place for cybersecurity service providers. These are discussed below.



### *(i) Code of ethics*

Some cybersecurity services may be sensitive because the service providers performing the service may have broad access into a client's computer systems and network. They may acquire an understanding of the cybersecurity posture and vulnerabilities of the client and its operations. Such services, if abused, can compromise and disrupt the client's operations even after the service provider's job has been completed. It is therefore important that the providers of cybersecurity services be held to certain requirements or ethics that strengthen the assurance to customers of the security and safety of the cybersecurity services being provided.

### *(ii) Quality Certifications*

If services are carried out by incompetent service providers, systems will become vulnerable, damaged or suffer loss of information. This may also endanger other computer systems. There is therefore a need to ensure that cybersecurity service providers and professionals meet specific quality assurance requirements or certifications.

### *(iii) Licensing*

Consumers may not have expert knowledge and may not know which cybersecurity service providers are ethical or of good quality. This can create a situation where a consumer may eventually acquire an inappropriate cybersecurity service from a service provider. Mechanisms therefore need to be put in place to help organisations identify credible service providers. It is in this regard that a licensing regime is a useful option. Licensed service providers will need to meet certain basic requirements such as -

- being fit and proper persons from the standpoints of honesty, integrity and financial soundness;
- having in place a system for the proper retention of service records;
- complying with a Code of Ethics to maintain confidentiality about client information; and
- requiring processes to ensure that employees performing the licensable services are fit and proper.

Meeting the evolving cyber threat requires ongoing vigilance and flexibility to respond to the changing environment. The strategy of the Islands should be to introduce specific measures to deal with the cybersecurity threat. These measures should be complemented by building on existing government and non-government efforts to improve cybersecurity. Initiatives aimed at improving cyber security for individuals, businesses, critical national infrastructure and government need to be properly considered so that the cybersecurity strategy reflects a partnership between Government, industry and non-government organisations.

## **PENAL CODE REFORM**

The Attorney General, in 2017, referred for the review of the Law Reform Commission the Penal Code (2017 Revision).

The Penal Code has not undergone a major review since it was introduced on 24<sup>th</sup> November, 1975. The Penal Code is primarily a consolidation of a number of pieces of legislation which were passed between the late 1800s and to the mid 1900s. The legislation which has its roots based on English Law of the Victorian Era. Since its introduction in 1975, the Penal Code has been amended and revised primarily by the adjustment of type and length of punishments with the introduction of some new offences. Some of the criticisms of the Code are that parts of it are archaic and constitutionally incompatible.

Accordingly, the Commission will examine the Code with a view to assessing whether there is a need for the reform of several of its provisions whether by way of amendment or repeal, in order to achieve the following –

- removal of archaic provisions;
- compatibility with the Constitution; and
- consistency with modern legislative trends.

The Commission intends to first look at those provisions which might be incompatible with the Constitution. Some of the offences identified relate to the following -

- Idle and disorderly persons;
- Practice of obeah;
- Criminal defamation;
- Defilement of idiots or imbeciles;
- Insulting the modesty of a woman; and
- Obscene publications.

## **SEVERANCE OF JOINT TENANCY AGREEMENTS**

As part of the Family Law reform project which was finalized in 2015 the Commission was asked to consider amendments to the Registered Land Law to facilitate the easier severance of joint tenancies. It had been posited that because of the archaic rules relating to such severance that, for example, couples who had separated either from their marriages or from unions must seek judicial intervention in severing their interests in joint tenancies where there is no agreement. It is proposed to draft a bill which accords with modern law in several jurisdictions to provide that a joint proprietor, not being a trustee, may sever a joint tenancy of land, lease or charge by an instrument of declaration in a form set out in the Schedule to the amendment and by serving a copy of the instrument of declaration personally or by registered post on the other joint proprietors.

The law on this matter was amended as far back as 1925 in the UK by the Law of Property Act 1925. Under that law a joint tenant may by notice to other joint tenants sever a joint

tenancy. This is unlike section 100(3) of the Registered Land Law (2004 Revision) which provides that joint proprietors, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joint proprietorship, and the severance shall be completed by registration of the joint proprietors as proprietors in common in equal shares and by filing the instrument.

A discussion paper and an amendment to the Registered Land Law (2004 Revision) will be prepared for consultation.

## **FORECLOSURES**

Following upon public outcry with respect to the practices of banks when foreclosing on the properties of persons in mortgage arrears, the Hon. Minister of Financial Services and Home Affairs, through the Hon. Attorney General, has requested that the Commission examine the laws and Practice Directions that are applicable when dealing with the rights and obligations of both the mortgagor and mortgagee in bank foreclosure proceedings. The aim is to determine whether the right balance can be found between preserving the sanctity of contractual obligations under a mortgage agreement while allowing the defaulting mortgagor a reasonable opportunity to make amends before foreclosure proceedings are instituted.

## **OTHER AREAS UNDER EXAMINATION**

- Anti-bullying legislation;
- Reform of the Interpretation Law; and
- Reform of the Defamation Law.



## APPENDIX

### Publications/Papers

1. A Review of the legal aid system in the Cayman Islands- A preliminary discussion paper; Draft Legal Aid Bill; Draft Legal Aid Regulations (28 March, 2006)
2. First Annual Report of the Law Reform Commission 2005/6 (31 March, 2006)
3. Final Report- A Review of the Corporate Insolvency Law and recommendations for the amendment of Part V of the Companies Law; Draft Companies (Amendment) Bill (12 April, 2006)
4. Discussion paper- The Law of Landlord and Tenant; Draft Residential Tenancies Bill (30 September, 2006)
5. Consultation paper - A Review of the Law regulating legal practitioners in the Cayman Islands (29 January, 2007)
6. Second Annual Report of the Law Reform Commission 2006/7 (31 March, 2007)
7. Final Report - A Review of the Law regulating legal practitioners in the Cayman Islands; Draft Legal Practitioners Bill; Draft Accountant's Reports Regulations (31 May, 2007)
8. Final Supplemental Report of the Law Reform Commission- Review of Corporate Insolvency Law in the Cayman Islands and Recommendations for the Amendment of Part V of the Companies Law (2004 Revision); Companies (Amendment) Bill (20 July, 2007)
9. Discussion paper- A Review of the legal aid system in the Cayman Islands (14 December, 2007)
10. Third Annual Report of the Law Reform Commission 2006/7 (31 March, 2008)
11. Final Report- A Review of the legal aid system in the Cayman Islands (15 July, 2008)
12. Final Report- Review of the Law regulating the relationship of landlords and tenants in the Cayman Islands (11 August, 2008)
13. Preliminary Discussion paper- Is there a need for enduring powers of attorney in the Cayman Islands? (20 January, 2009)
14. Discussion paper- Regulation of Charitable Non-profit Organisations in the Cayman Islands (26 January, 2009); Draft Charities Bill, 2009
15. Review of the Law Regulating Charitable Organisations in the Cayman Islands, Final Report (29 April, 2010)
16. Fourth Annual Report of the Law Reform Commission 2008/9 (31 March, 2009)
17. "Is there a need for enduring powers of attorney in the Cayman Islands? Final Report No. 6 (30 April 2009)
18. Discussion Paper – Review of the Arbitration Laws of the Cayman Islands (11 May, 2009)
19. The Draft Charities Bill (26 June, 2009)
20. The Draft Trusts (Amendment) Bill (26 June, 2009)
21. The Protection Against Domestic Violence Legislative Proposals, (12 October, 2009)
22. The Protection Against Domestic Violence Bill, (12 October, 2009)
23. Fifth Annual Report of the Law Reform Commission 2009/10 (31 March, 2010)
24. Protection Against Domestic Violence Final Report (29 April, 2010)
25. Review of the law of contempt of court in the Cayman Islands (Part 1)- Consultation paper- Contempt in the face of the court (September 2010)
26. Tort Reform Consultation Paper -Caps on Non-Economic Damages and Reducing the Limitation Period (22 October, 2010)

27. Family Law Reform (Part 1) Discussion Paper - the Matrimonial Causes Law (2005 Revision) (18 February 18, 2011)
28. Modernisation of the regulation of Strata titles in the Cayman Islands (Part 1)- Management of Strata Schemes- Discussion Paper and Strata Titles Registration (Amendment) Bill, (4 April 2011)
29. Preliminary Discussion paper -Introduction of the office of the Administrator-General in the Cayman Islands (11 June 2011) (to Attorney General and Chief Justice)
30. Final Report - Review of the Arbitration Laws of the Cayman Islands; Arbitration Bill (4 January, 2012)
31. Issues Paper - The Enforcement of Foreign Judgments and Interim Orders, (6 March, 2012)
32. Discussion paper -Introduction of the office of the Administrator-General in the Cayman Islands (22 March 2012); draft Administrator-General Bill
33. Consultation Foreign Judgments Reciprocal Enforcement (Amendment) Bill, 2012 (9 July, 2012)
34. Consultation Sexual Harassment, Bill 2012 (3 August, 2012)
35. Final Report- Introduction of the office of the Administrator-General in the Cayman Islands (8 August 2012); draft Administrator-General Bill
36. Consultation Grand Court (Amendment) Bill, 2012 (28 September, 2012)
37. Discussion paper- Modernisation of the regulation of strata titles in the Cayman Islands (Part 2)-Review of the creation, management and termination of strata schemes (3 January, 2013); draft Strata Titles Bill, 2103
38. Final Report- The Enforcement of Foreign Judgments and Interim Orders- Part 1- Interim Orders in Aid of Foreign Proceedings (8 March, 2013)
39. Final Report- The Enforcement of Foreign Judgments and Interim Orders - Part 2- Enforcement of Foreign Judgments (8 March, 2013)
40. Eight Annual Report of the Law Reform Commission 2012/13 (31 March, 2013)
41. Final Report – Sexual Harassment (1 May, 2013)
42. Discussion paper (Part 2)- Review of the Matrimonial Causes Law (2005 Revision) and the Maintenance Law (1997 Revision); the Family Property (Rights of Spouses) Bill, 2013- Tuesday, July 09, 2013
43. Issues Paper - Directors' Duties - Is Statutory Codification Needed? (16 January, 2014)
44. Stalking Legislation - The Penal Code (Amendment) Bill and the Stalking (Civil Jurisdiction) Bill, 2014 (29th January, 2014).
45. Consultation paper, Contempt of court – (10 January 10, 2014)
46. Consultation paper, Contempt of court - the sub judice rule, (21 March, 2014)
47. Discussion Paper – Legislative Protection of Whistle Blowers – an Examination of the Legislation in in the Cayman Islands and other Jurisdictions (14 April, 2014)
48. Discussion Paper - The Way Forward for Regulation of Timeshares in the Cayman Islands (15 September, 2014).
49. Final Report – Legislative Protection of Whistle Blowers – an Examination of the Legislation in in the Cayman Islands and other Jurisdictions; Draft Protected Disclosures, Bill, 2014 (5 December, 2014)
50. Final Report – Stalking Legislation; Draft Penal Code (Amendment) Bill, 2014 and Stalking (Civil Jurisdiction) Bill, 2015 (5 February, 2015)
51. Law Reform Notes, 9 March, 2015

52. Tenth Annual Report of the Law Reform Commission 2014/15 (31 March, 2015)
53. Final Report- The Way Forward For the Regulation of Timeshares in the Islands; the Timeshare Bill, 2016; the Tourism (Timeshare) (Amendment) Bill, 2016 (24 August, 2015);
54. Final Report- Review of the Matrimonial Causes Law (2005 Revision) and the Maintenance Law (1997 Revision); the Family Property (Rights of Spouses) Bill, 2016- (24 August, 2015)
55. Eleventh Annual Report of the Law Reform Commission 2015/16 (31 March, 2016)
56. Discussion Paper - Consumer Protection: Entrenching Consumer Supremacy in Cayman Islands Legislation (30<sup>th</sup> November, 2015)
57. Issues Paper - "Bullying: Legislation, Policy or Both? (20<sup>th</sup> January, 2016).
58. Final Report- "Modernisation of the Regulation of Strata Titles in the Cayman Islands" (20<sup>th</sup> November 2016); the Strata Titles Bill, 2016
59. Twelfth Annual Report of the Law Reform Commission 2016/17 (31 March, 2017)
60. Interim Report – A Review of Litigation Funding in the Cayman Islands – Conditional and Contingency Fee Agreements, 26<sup>th</sup> January, 2018
61. The Private Funding of Legal Services Bill, 2018
62. The Private Funding of Legal Services Regulations, 2018
63. Discussion Paper – Trusts Law Reform, (5 April, 2017)
64. The Draft Trusts (Amendment) Bill, 2017
65. The Draft Consumer Protection and Guarantees Bill, 2017
66. Issues Paper - Cyber-Security – Strategic Policy and Legislation, 29<sup>th</sup> November, 2017
67. Discussion Paper - Regulations of Queen's Evidence – Immunity From Prosecution and Reduced Sentences, 20<sup>th</sup> March, 2018
68. The Draft Criminal Justice (Offenders Assisting Investigations and Prosecutions) Bill, 2018



**Mr. Kenneth Farrow, Q.C.**  
**Chairman of the Law Reform Commission**

**31<sup>st</sup> March, 2018**