

BY EMAIL

Hon. Wayne Panton, MLA
Minister of Financial Services, Commerce & Environment
5th Floor, Government Administration Building
133 Elgin Avenue
George Town
Grand Cayman
Cayman Islands

10 November 2016

Dear Minister Panton,

Re: Legal Practitioners Bill 2016

Thank you for the opportunity to meet at the Ministry of Financial Services on the morning of 17 October 2016, following comments that we made at the Public Meeting held to discuss the Legal Practitioners Bill 2016 (the “LPB 2016”) the previous Thursday evening.

While we were grateful for the opportunity to meet and for the ensuing invitation to provide further input, we have been at pains to note that there are other Attorneys who have significant concerns regarding the LPB 2016 and to encourage you to consult with such persons in addition to those that attended your meeting.

Like you, we all agree that the Legal Practitioners Law (2015 Revision) (the “Law”) requires modernisation. We are also in agreement that, amongst other important advancements, the Law should include a statutory authority for the regulation of the legal profession in the Cayman Islands; embrace a Code of Conduct for Attorneys at Law in the Cayman Islands; and address the long-standing “anomaly” of persons who, contrary to section 4 and section 10 of the Law, are not Generally Admitted to practice Cayman Islands law, but who hold themselves out as experts in Cayman Islands law in overseas jurisdictions, with the attendant jurisdictional exposure arising from this unregulated and unlawful practice.

Having considered the LPB 2016 and the manner in which it has been promulgated, we do not, with considerable regret, believe that it is fit for purpose in its present incarnation. Furthermore, given that we consider the very premise of the LPB 2016 to be flawed, we cannot see how the LPB 2016 can be salvaged by the advancement of minor amendments. In the circumstances therefore, we propose that the LPB 2016 be replaced in its entirety by the Legal Practitioners Bill drafted in 2013 (the “LPB 2013”) and that the LPB 2013 then be used as the basis for further consideration and improvement.

We make this recommendation because, while the Cayman Islands Law Society (“CILS”) and the Caymanian Bar Association (“CBA”) were initially involved with the conception of the LPB 2013, the LPB 2013, unlike the LPB 2016, was then the subject of a comprehensive consultative process. In the course of the inclusive process applied to the development of the 2013 Bill, members of the judiciary, legal

officers in Government service and the full range of local practitioners were all provided with due and proper opportunity to provide their respective input.

This is in stark contrast to the secretive way in which the 2016 Bill has been developed largely by the CILS and the CBA. While we are respectful of the contributions that these two organisations have made to the profession over the years, as you will be aware, it is a widely held view that neither organisation now represents the interests of the entire profession and that both are, to all intents and purposes, dominated by the larger multi-jurisdictional offshore law firms and their discrete interests.

As a result of its broader consultation, the 2013 Bill has already received much of the input that you have belatedly requested in respect of the 2016 Bill. The 2013 Bill therefore builds upon the views of the CILS and the CBA and it is thus a more advanced draft than the 2016 Bill. In this light, it is both concerning and surprising that the Government appears to have simply jettisoned the LPB 2013 without any explanation.

Given the need for an explanation, the Government ought also to make available all drafting instructions issued for the 2016 Bill and the proposed Committee stage amendments that it intends to put forward, so that the profession as a whole, and indeed the general public, can review and evaluate the objectives behind the drafting of the 2016 Bill.

This transparency is important not least because the legislation and governance of the legal profession are cornerstones in the public interest in the fair and just administration of justice. So understood, the unprecedented manner by which the drafting of this key legislation has effectively been privatised to interests that have apparently for so long ignored and/or deliberately breached provisions of the current Law, we say, requires accountability and the fullest explanation. In the absence of such explanation, we cannot lend our support to the 2016 Bill.

In this regard, we draw your attention to the incontestable fact that, as matters now stand, in breach of section 10 of the Law, there are individuals holding themselves out as Attorneys who have not been generally admitted to practice Cayman Islands law. This fact was the subject of publication by Ian Paget Brown QC as long ago as January 2013 and, as of today, we are not aware of any steps taken by the offending individuals or their law firms to take remedial action to ensure compliance with the Law. This failure also requires accountability and explanation. Against this background, our considered view is that the proponents of the 2016 Bill are conflicted and lack the moral and ethical authority to be entrusted with its drafting and development.

It is no answer, in the face of these egregious breaches, to predicate the undue pace at which the 2016 Bill has been promoted on the premise of the passage of 15 years in respect of which, it is asserted that several previous attempts to modernise the Law have failed. Whilst advancing the argument in favour of expedition and urgency, what has not been addressed are the underlying reasons why previous iterations of the Bill have stalled, including the failure to provide adequate training and development opportunities for local Attorneys and a reluctance to accept appropriate and applicable sanctions for continuing breaches of section 10 of the Law. For our part, we are in agreement that the unregulated practice of Cayman Islands law overseas requires urgent attention, but we augment this objective by adding that we also believe that if the jurisdictional risk associated with such practice is to be properly addressed, this

solution will need to be arrived at through an open and transparent process – one in which truth and reconciliation is paramount.

Indeed, it is a matter of great irony that the momentum propelling the passing of this latest iteration is based on a fundamental need to comply with CFATF requirements, when, at its very core, the 2016 Bill fails to deal with offences committed under the existing law. It is impermissible that these matters can be simply swept under the carpet, without providing further explanation as to why it is in the public interest for a “blind eye to be turned” to what some may consider to be deliberate and calculated offences. Furthermore, insofar as compliance with CFATF recommendations is stated to be a proximate cause for the passage of the LPB 2016, because of the dearth of considered debate and the opacity of the process thus far adopted, we have no confidence that due consideration has been given to constitutional imperatives attaching to legislation that might infringe upon Attorneys’ concomitant duties of commitment to their clients and the enduring sanctity of legal professional privilege. So serious an issue, rejected by sophisticated jurisdictions as unconstitutional and which underpins the competitiveness of this jurisdiction’s legal service industry, should not be left to cursory consideration and negligible debate.

With nearly 700 Attorneys on the Roll, the practice of law in this jurisdiction has matured beyond the imagination of those who originally conceived the need for a regulatory framework for the legal profession in the Cayman Islands. Whilst there is common ground on the need for a modernised regulatory platform, our view is that ensuring equality of opportunity for all who are admitted to practice Cayman Islands law is of paramount importance. We consider that the 2013 Bill, with modification, embodies the principle objective of securing equality of opportunity for effective participation and the ownership of equity interests in the legal services industry.

Together with reasons earlier expressed, we do not therefore regard the LPB 2016 as advancing a framework which could be regarded as an improvement over that which is represented in the 2013 Bill. This point is amplified by the proposed Committee stage amendments to the LPB 2016, particularly to clause 25, which seek to sanction the ability of foreign lawyers to opine on Cayman Islands law in a manner that is otherwise unprecedented. Existential in nature, the proposal undermines the very privilege of the ability to practice Cayman Islands law; this amendment is incompatible with what should be the primary objective of the objective of the Law, namely the augmentation of provisions to ensure that Cayman Islands legal advice is to be dispensed only by Attorneys admitted to practice Cayman Islands law. Plainly, in our view, this proposed amendment underscores the lack of good faith of its proponents in a manner incompatible with the public interest.

We are equally concerned with the failure of the LPB 2016 to address the significant loss to the public purse engendered by a system which permits the outsourcing of the practice of Cayman Islands law to other jurisdictions. We see no reason why, in addition to paying for practicing certificates for each Attorney admitted to practice Cayman Islands law overseas, the equivalent work permit fee is not paid by the employing law firm to the Cayman Islands Government. The liability to pay such a fee strikes a proportionate balance between the asserted need to outsource legal services to meet market demand and the need to mitigate the risk of significant financial loss to the public revenue and local economy; the LPB 2016 in its current iteration fails to address this fundamental lacunae, which, given its focus on “protective and enhancing” immigration law mechanisms, is both surprising and untenable. If, which is

accepted, law firms in an increasingly competitive legal services landscape, need to be able to offer Cayman legal advice from overseas jurisdictions, requiring the payment of a work permit fee equivalent is entirely justified. Indeed, such revenue could be deployed locally to defray the costs to the Cayman Islands Government of its obligation to fund the local provision of legal aid, to support the construction of new court infrastructure and/or to facilitate the introduction of much-needed continuing professional development for all Attorneys practicing in the Cayman Islands (a development that would support the jurisdiction in maintaining its competitive edge and on which the LPB 2016 is noticeably silent).

For the reasons outlined above, we do not see any viable path for the passage of the LPB 2016 and, in its stead, we commend the LPB 2013 to you as a more advanced and appropriate alternative premise from which to build. We believe that the LPB 2013 achieves all of the stated objectives of the LPB 2016 and, to its credit, does so in a more balanced fashion, which will ultimately benefit the jurisdiction. We would be pleased to provide you with our considered views on how the LPB 2013 can be further improved in due course. In any event, having, by this letter, particularised the serious public policy and public interest deficiencies of the LPB 2016, you now bear the considerable burden of persuading all stakeholders, including members of the general public, why the LPB 2016, as opposed to the LPB 2013, represents the only path forward for a modern, viable and egalitarian framework for the regulation of the legal profession. Given our reasoned and forensic assessment to the contrary, we respectfully invite you to respond, in detail, to the several issues raised; the paramount objective of your reply will no doubt be to ensure that the public is assured that the proposed legislation appropriately meets the concerns that have been raised. We await your detailed reply.

Yours sincerely,

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