

21 January 2020



Attention: Hon Premier of the Cayman Islands, Alden McLaughlin

c/o Cayman Islands Government
Government Administration Building
Grand Cayman KY1-9000
CAYMAN ISLANDS

LETTER TO THE PREMIER DETAILING OUR ANALYSIS OF THE IMPACT ON MINORITIES AND HUMAN RIGHTS BY THE PROPOSED CONSTITUTIONAL REFORM

Hon Premier Alden McLaughlin,

Colours Cayman is disappointed that you did not find the time to discuss our concerns regarding the detrimental impact on minorities and human rights that will inevitably be caused by the proposed constitutional reform.

Allow us then to illustrate in detail how the proposed constitutional reform threatens to undermine the rights of all minorities, our LGBTI community in particular, here in the Cayman Islands.

Please note that *Colours Cayman* has a legal opinion in file that supports this analysis. Unless our organisation finds itself in a position where we are constitutionally able to find an effective legal remedy in this jurisdiction, wherever the courts of the Cayman Islands recognise that there have been breaches of the Bill of Rights, we will be forced to take any legal action necessary to stop this constitutional reform. This constitutional reform will effectively force minorities to go to Buckingham Palace, i.e. 5,000 miles away, to seek effective legal remedy whenever local courts find that violations of human rights have been made by local legislators, unless you are able to articulate in law otherwise. This is, in our view, a violation of good governance and human rights in and of itself.

Respectfully,

Billie Bryan, Founder & President,
Colours Cayman

CC: HIS EXCELLENCY THE GOVERNOR, MARTYN ROPER

CONSTITUTIONAL REFORM

The Cayman Islands Government [the “CIG”] seeks to reform the Cayman Islands Constitution [the “Constitution”]. They request, among other things, to remove the power of the UK appointed Governor in Section 81 of the Constitution to legislate in circumstances where, notwithstanding consultation of the Governor with the Premier, the CIG refuses to act in accordance with the rule of law in areas within which the Governor is responsible under Section 55 of the Constitution. This includes a failure of the CIG to comply with international human rights law extended to the Islands [e.g. ECHR].

These powers are seldom seen in other British Overseas Territories’ constitutions, but are not unique [i.e. they can also be found in Section 72 of the Turks And Caicos Constitution]. However, in the case of the Cayman Islands they are not placed there capriciously; in fact, they have been carefully calculated to deal with a peculiar and anomalous feature of the Constitution.

THE CAYMAN ISLANDS RATHER ANOMALOUS CONSTITUTION REQUIRES SECTION 81

The Constitution divests the judiciary of the power to declare laws void and inoperative if they breach basic human rights, which are contained in Part 1 of the Constitution [the Bill of Rights]. In this regard, it adopts a system similar to the one featuring in the Human Rights Act 1998 of the UK, in order to deal with breaches of the Bill of Rights [i.e. the power of the courts in the Cayman Islands – which includes the Privy Council – is limited to declarations of incompatibility, with the effect that local laws found by the courts to be in breach of the Bill of Rights of the Constitution remain in force and rectification of any declared incompatibility is entirely left for the local legislature to address, if it wishes to do so]. The most evident anomaly lies in that it defeats the purpose of having a codified constitution, where this can be breached by the legislator without any effective legal mechanism to uphold the supremacy of the codified constitutional text once the law is on the statute book.

However, this system of constitutional control is anomalous for two further and no so evidently fundamental reasons. Firstly, this system is different for the remaining 8 Parts the Constitution: Section 2 of the Colonial Laws Validity Act 1865 applies to all 8 remaining parts; hence local laws that are found to be in breach of any of the other 8 Parts of the constitution are “repugnant” and are and shall remain “absolutely void and inoperative” by effect of the breach. It is therefore rather anomalous that the supreme law of the land deals in a rather lenient way with breaches of basic human rights and yet maintains such a harsh system of dealing with breaches of other and less fundamental parts of the constitution.

The disempowering of the judiciary to provide an effective legal remedy in cases of human rights violations is also unique and to the extent of its uniqueness, it is also again anomalous. It is unique in that it is the only constitution that adopts such a system amongst all British Overseas Territories [to which Section 2 of the Colonial Laws Validity Act 1865 applies without exception]. Even more disturbingly, such disempowerment cannot either be found in any nation of the American continent from Alaska to Tierra del Fuego [including all the English-Speaking nations of the Caribbean that inherited their constitutional framework from the Westminster Constitutional Model upon their independence].

All these series of anomalies explain therefore the role of Section 81 in the Cayman Islands Constitution: it provides essentially the only legal remedy, albeit discretionary, within the jurisdiction for declared violations of human rights by local courts.

SUBSTANTIVE AND PRACTICAL IMPLICATIONS OF THE PROPOSED REFORM

This proposed reform would affect substantially the already poor enforceability of the human rights chapter of the Constitution for two reasons.:

1. Firstly, no authority will be left in the jurisdiction with the ability to redress mistakes or misuse of power by the legislature in the Cayman Islands in relation to human rights.
2. Secondly, these reforms will also change dramatically the balance of powers in relation to London in that they would turn the legislature of the Cayman Islands into a quasi-sovereign parliament, albeit for human rights matters only (indeed, another aspect of the reform involves the renaming of the “Legislature” to a “Parliament”), and the ‘checks and balances’ that are fundamental in any system of good governance and a feature in the Westminster Constitutional Model is going to be severely curtailed, if not eliminated altogether within the Cayman Islands.

In relation to the practical implications, good governance is severely undermined in that any effective legal remedy for the violation of basic human rights by the CIG will have to be sought almost 5,000 miles away from the Cayman Islands (from either the UK Parliament or the Crown via Orders in Council).

Whatever the obligation of the UK for securing good governance in the Cayman Islands pursuant to Section 73 of the UN charter and section 5[1] of the West Indies Act 1962 means, this cannot mean to leave minorities in the colonial territory subject to the tyranny of the majority without an effective legal remedy to defend themselves within the jurisdiction.

In summary: if the proposed reform is carried over, it will have devastating consequences for the Bill of Rights, in particular, in that it will become obsolete as a means of securing effectively the rights of minorities within the jurisdiction. LGBTI people fall within a minority group that is likely to suffer most, but not uniquely, as a result of this proposed change due to the anti-LGBTI sentiment and ongoing discrimination they suffer in the hands of the Cayman Islands Government; a very long list of examples could be provided to illustrate basic violations of human rights against LGBTI people by the CIG in the last 5 years (many of which have yet to be rectified) of which the Premier is very much aware. Unless the Premier is willing to discuss ways of effectively protecting human rights within the jurisdictions, *Colours Cayman* will commence a campaign to lobby the UK parliament and, if the reform goes ahead, to challenge it in the High Court in London. If all this were to fail, *Colours Cayman* will challenge the United Kingdom government before the UN relevant bodies.