

BY E-MAIL

Attention of Hon. Wayne Panton
Premier of the Cayman Islands
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21st July 2021

Dear Hon. Premier Panton,

Re: Draft Amendments to the Misuse of Drugs Act (2017 Revision) for Decriminalisation of Cannabis

I write to you seeking to assist the PACT Government by submitting draft amendments to the Misuse of Drugs Act (2017 Revision) (“MDA”) to decriminalize cannabis for personal uses by adults in private and to provide information that may also be helpful for consideration of this topic.

I commend the PACT’s commitment to addressing issues relating, *inter alia*, to inequality and social justice. I note your remarks (Thursday, 15 July 2021) in Parliament, where you stated, *inter alia*, that:

‘While we look at eradicating the concept of the working poor, we must also reduce the number of our people who can unfairly be classed as unemployable. We must remove barriers and obstacles to employment, especially entry-level employment. An immediate step is to reduce discrimination against young people in education and employment through decriminalisation of marijuana. Far too many of our young people suffer unduly harsh punishments, Mr. Speaker, and have their futures permanently blighted by what are minimal misdemeanors. In far too many cases the punishment far outweighs the crime. As has been shown to good effect in Canada, the United Kingdom and a number of states in the United States, decriminalisation is an effective tool and has not proven to increase criminal activity.’

In seeking to assist with this task, please see the attached draft Misuse of Drugs (Amendment) Bill 2021 for the PACT’s consideration. The content in the draft amendments is in line with (and derived from) Bermuda’s Misuse of Drugs (Decriminalisation of Cannabis) Amendment Act 2017,¹ Jamaica’s Dangerous Drugs (Amendment) Act 2015, our Constitution (particularly section 9, Bill of Rights) and relevant case-law from Commonwealth jurisdictions supporting decriminalization of cannabis by adults² as well as ensuring that the draft amendments are compatible with the three United Nations drug conventions.³

UN Drug Conventions and Constitutional Fundamental Rights and Freedoms: On 22 January 2021 in New York, the Schedules of the United Nations Single Convention on Narcotic Drugs (as amended by the 1972 Protocol) were amended – in particular, ‘*cannabis and cannabis resin and extracts and tinctures of cannabis*’ are now only in Schedule I (recognized to have medical, therapeutic and scientific value, but remain a dangerous drug with potential to threaten public health: *e.g.* cocaine) and have now been removed from Schedule IV (consisting of dangerous drugs that are very harmful with no medical, therapeutic or scientific value: *e.g.* heroin).⁴ Therefore, this enables the Cayman Islands to pass legislation for decriminalization of cannabis and also gives stronger support for medical and scientific uses and functions.⁵

Moreover, the general obligations under the article 4 of the United Nations Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol) (“**1961 Convention**”) provide:

‘The parties shall take such legislative and administrative measures as may be necessary:

¹ 2017:48.

² *Ras Sankofa Maccabee v The Commissioner of Police* [2019] ECSC J0503-2 (Claim No. SKBHCV2017/0234) *per* Ventose J (Eastern Caribbean Supreme Court: St. Christopher & Nevis); *Minister of Justice and Constitutional Development* (unreported 18 September 2018: Case CCT 108/7) *per curiam* Zondo ACJ (South African Constitutional Court); *Ravin v State of Alaska* 537 P.2d 494 (Supreme Court of Alaska); *R v Parker* (2000) 188 DLR (4th) 385 *per curiam* Rosenberg JA (Court of Appeal for Ontario); *Allard v Her Majesty the Queen in Right of Canada* [2016] 3 RCF 303 *per* Phelan J (Federal Court of Vancouver); *R v Smith* [2015] 2 SCR 602 (Supreme Court of Canada).

³ United Nations Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol) (the “**1961 Convention**”); United Nations Convention on Psychotropic Substances 1971 (the “**1971 Convention**”); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (the “**1988 Convention**”).

⁴ See recent amended Schedule: *The International Drug Conventions: Schedules of the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, as at 22 January 2021* (United Nations, New York 2021: SvCND/1/Add.1/Rev.7).

⁵ See art.4(c), 1961 Convention.

- a) To give effect to and carry out the provisions of the Convention within their own territories;
- b) To co-operate with other States in the execution of the provisions of this Convention;
- c) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.' (my emphasis)

Article 28 of the 1961 Convention (headed "Control of Cannabis") reads:

- '1. If a Party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls provided in article 23 respecting the control of the opium poppy.
2. This Convention shall not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes.
3. The Parties adopt such measures as may be necessary to prevent misuse of, and illicit traffic in, the leaves of the cannabis plant.'

Article 36 of the 1961 Convention, which addresses penal provisions, reads:

- '1. a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.'

The penal provisions in the United Nations Convention on Psychotropic Substances 1971 ("1971 Convention"), in article 22, which are the same as article 36 of the 1961 Convention, also provides: '*Subject to its constitutional limitations...*'. Furthermore, article 3(2) of the United Nations 1988 Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 ("1988 Convention"), which deals with offences and sanctions, provides:

- 'Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.'

It is, therefore, clear that the 1961 Convention, 1971 Convention and the 1988 Convention (taken together the "UN drug conventions") were very careful in recognizing the sovereignty and supremacy of the constitutions of members states, because each treaty recognizes that compliance must be subject to constitutional principles of each member state. It is also noteworthy what the English Court of Appeal acknowledged, in *Quayle v R*, where Mance LJ (as he then was), when commenting on the UN drug conventions, quite helpfully noted that:⁶

- 'Under both the 1961 and the 1971 Conventions, any obligation to create punishable offences is subject to each state's "constitutional limitations". However, paragraph 8 of Chapter 1 of the Runciman Report indicates that, according to United Nations commentaries, the intention of these Conventions may not have been to cover activities of possession, purchase and cultivation when undertaken for personal use. The Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (The Vienna Convention) supplements and strengthens the international scheme in this respect. Inter alia, it requires breaches of conventions to be made punishable criminal offences, and it requires that each party establish as a criminal offence the possession, purchase or cultivation of illicit drugs for personal consumption. But it draws a distinction between the nature and severity of the sanctions which should follow from trafficking and from offences related to personal consumption. Sanctions are mandatory in the case of trafficking, but are "subject to [a state's] constitutional principles and basic concepts of its legal system" in the case of possession, purchase and cultivation for personal use.' (my emphasis)

It is, therefore, clear that the Cayman Islands, which has a very broad and robust Constitution, is perfectly poised to address the issues of decriminalization of cannabis for personal use by adults in private. In particular, the privacy rights in our Constitution's Bill of Rights are likely to provide the strongest case for decriminalization of cannabis or similar.⁷ In the CARICOM Marijuana Report (mentioned below), CARICOM's Marijuana Commission (under the heading "Human Rights Argument Against Prohibition") stated that:⁸

⁶ *Quayle v R* [2005] EWCA Crim 1415 at [15] per Mance LJ, as he then was, (English Court of Appeal).

⁷ See s.9(1)-(2), Bill of Rights (*Julius Baer Trust Company (Channel Islands) Ltd v AB et al* [2018] 2 CILR 1 at 10 per Kawaley J); *Ras Sankofa Maccabee v The Commissioner of Police* [2019] ECSC J0503-2 (Claim No. SKBHCV2017/0234) per Ventose J (Eastern Caribbean Supreme Court: St. Christopher & Nevis); *Minister of Justice and Constitutional Development* (unreported 18 September 2018: Case CCT 108/7) per curiam Zondo ACJ (South African Constitutional Court); *Ravin v State of Alaska* 537 P.2d 494 (Supreme Court of Alaska).

⁸ *Report of the CARICOM Regional Commission on Marijuana 2018: Waiting to Exhale – Safeguarding Our Future Through Responsible Socio-Legal Policy of Marijuana* (3 August 2018, Guyana) at p.48-49.

'The criminalisation of personal use of a natural substance which grows freely and existed for several thousand years, whether for medicinal or recreational use, may itself introduce considerations of human rights, but when coupled with uneven and inequitable enforcement of the law by targeting the disadvantaged, results in a gross human rights violations.

The threshold for limiting expressed human rights as contained in the various constitutions in the region is high, albeit the limitations are expressed differently in these constitutions. It requires a balancing exercise, measuring the necessity of the limitation as would be expected in a democratic society governed by democratic principles, such that the limitation must be reasonably required and proportionate. When viewed from such a human rights perspective, imposing harsh criminal penalties on a person for personal use of a plant, particularly when there is no scientific evidence to suggest that it causes harm to others, or even the extent of harm to the user, is difficult to justify. Important rights that are relevant here are the rights to private life, to privacy of the home, to dignity, to liberty, equality, health, security and the right to freedom of religion. The notion of freedom was very prevalent in the Constitution.'

Criminal penalization for an act that is not inherently criminal *per se*, which risks depriving a person of his or her liberty and security of the person,⁹ appears to be inhuman and degrading punishment,¹⁰ especially where (as you noted) in far too many cases the punishment far outweighs the crime. Furthermore, the right to life¹¹ and the right not to be deprived of life¹² are further strengthened by, *inter alia*, the right that Government respect every person's private life¹³ and privacy of the home¹⁴ (including right against unconstitutional 'entry, search and seizure' functions¹⁵), as well as article 12 of the International Covenant on Economic, Social and Cultural Rights recognizes '*the right of everyone to the highest enjoyment of attainable standard of physical and mental health*'¹⁶ and provides that parties to the Covenant take steps '*to achieve the full realization of this right shall include for those necessary for*', *inter alia*, the '*creation of conditions which would assure to all medical service and medical attention in the event of sickness*'.¹⁷

This is important, because it supports the PACT's stated belief that access to healthcare is a fundamental human right, with which I wholeheartedly agree and confirm that access to medical cannabis is a manifestation of the right to health.¹⁸ Furthermore, in relation to personal use of cannabis being decriminalized, many people use cannabis for medicinal value (for both medical and therapeutic purposes) to keep their endocannabinoid system at a homeostasis and healthy. The Supreme Court of Bermuda, in *Infinity Hemp Bermuda v H.M. Customs*, was instructive, where Hargum CJ correctly explained:

*'By way of background the cannabis plant (cannabis sativa or cannabis indica) contains over 80 so-called cannabinoids. The most important and most investigated cannabinoid is tetrahydrocannabinol (THC). This is the substance that is responsible for the psychotropic effects of cannabis...Another important cannabinoid that occurs in large quantities in the plant is cannabidiol (CBD). Unlike THC, it does not possess any psychoactive action. It interacts with various receptors and evidently also reduces the psychotropic effect of THC.'*¹⁹

Human beings have cannabinoid receptors in the cells located in the brain and in other parts of the body (namely, CB-1 and CB-2 receptors), which interact with cannabinoids, and, when a person's endocannabinoid system is at a homeostasis, their immune system is stronger and better able to fight off disease and infections.²⁰ As such, access to cannabis, whether or not prescribed by a medical doctor, is very arguably a fundamental human right of access to cannabis for medical and therapeutic purposes.²¹ In the Cayman Islands, it is '*lawful*' for a person to '*use cannabis extracts and tinctures of cannabis for medical or therapeutic purposes, where prescribed by a medical doctor*' (duly

⁹ See s.5(1), Bill of Rights. See also *Canada (Attorney General) v Bedford* [2013] SCJ No. 72 (Supreme Court of Canada); *Allard v Canada* [2016] 3 RCF 303 *per* Phelan J (Federal Court of Vancouver); *R v Smith* [2015] 2 SCR 602 (Supreme Court of Canada).

¹⁰ See s.3, Bill of Rights.

¹¹ See s.2(1), Bill of Rights.

¹² See s.2(2), Bill of Rights.

¹³ See s.9(1), Bill of Rights: '*Government shall respect every person's private and family life, his or her home and his or her correspondence.*'

¹⁴ See s.9(1)-(2), Bill of Rights.

¹⁵ See s.9(2), Bill of Rights: '*Except with his or her own consent or as permitted under subsection (3), no person shall be subjected to the search of his or her person or his or her property or the entry on his or her premises.*'

¹⁶ See art.12.1, International Covenant on Economic, Social and Cultural Rights (1976), 993 U.N.T.S. 3 ("ICESCR").

¹⁷ See art.12.2(d), ICESCR.

¹⁸ *Canada (Attorney General) v Bedford* [2013] SCJ No. 72 (Supreme Court of Canada); *Allard v Her Majesty the Queen in Right of Canada* [2016] 3 RCF 303 *per* Phelan J (Federal Court of Vancouver); *R v Smith* [2015] 2 SCR 602 *per* Johnston J (Supreme Court of Canada); *R v Parker* (2000) 188 DLR (4th) 385 *per curiam* Rosenberg JA (Court of Appeal for Ontario); *Cayman Islands Urgent Care Ltd v HM Director of Customs* (unreported 4 February 2021: Cause No. G 169 of 2019) *per* McMillan J (Grand Court).

¹⁹ *Infinity Hemp Bermuda v HM Customs* [2019] SC (Bda) 84 Civ (14 November 2019) at [4] *per* Hargum CJ (Supreme Court of Bermuda).

²⁰ See *Workplace Strategies: Risk of Impairment from Cannabis* (3rd Edition, September 2018, Canadian Center for Occupational Health and Safety) at p.8: '*Cannabis contains hundreds of chemical substances, among which over 100 are known cannabinoids. Cannabinoids are a class of chemical compounds that act on receptors in the brain and the body.*'

²¹ See art.4, 1961 Convention.

licensed under the Health Practice Act) ‘as part of a course of treatment for a person under that medical doctor’s care’.²²

Some persons, who are not prescribed cannabis extracts and tinctures, self-medicate with cannabis, whether for medical or therapeutic purposes, whilst, it is true, others simply use cannabis recreationally to have fun or just to get high – there is, however, a thin line in many cases between recreational use as compared with therapeutic use. The World Health Organization’s definition of “health”, which is broad in scope, is ‘a state of complete physical, mental, spiritual and social well-being and not merely the absence of disease or infirmity’.²³ The fundamental right to protection of the environment requires Government to ‘have due regard to the need to foster and protect an environment that is not harmful to the health or well-being of present and future generations, while promoting justifiable economic and social development’.²⁴

In a recent landmark case in the Grand Court, in *Cayman Islands Urgent Care Ltd v HM Director of Customs*, it was held (with the benefit of evidence of an established expert in medical science) that pharmaceutical-grade vapourisable cannabinoids, which are available in the Cayman Islands by prescription from a medical doctor, were proven to have an effective administration delivery system and to have medicinal value for medical and therapeutic purposes, and that it is highly likely that vapourising (pharmaceutical-grade) cannabinoids is not more injurious to health than smoking marijuana.²⁵

Constitution, Rule of Law and Human Rights: The Constitution, which is the supreme law of the Cayman Islands,²⁶ is of vital importance for present purposes²⁷ – especially since the ‘rule of law and the constitution are mutually reinforcing’ and, therefore, ‘there must be no difference between the theory and the reality of the rule of law’.²⁸ Moreover, the Bill of Rights, which ‘is a cornerstone of democracy in the Cayman Islands’,²⁹ ‘affirms the rule of law and the democratic values of human dignity, equality and freedom’.³⁰ ‘In any society, the rule of law represents fundamental value.’³¹

‘It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights’³² and any legislation that is incompatible with the Bill of Rights shall be declared incompatible.³³ I have, therefore, been cognizant to ensure compliance with PACT’s constitutional responsibility that ‘all decisions and acts’ (including failures to act³⁴) ‘must be lawful, rational proportionate and procedurally fair’.³⁵ This is to ensure these amendments are also drafted to have the PACT’s compliance with the constitutional duty to ‘uphold the rule of law’³⁶ and respect Constitutional supremacy.³⁷

²² See s.2A(1), Misuse of Drugs Act (2017 Revision). In the Cayman Islands, ‘cannabis extracts and tinctures of cannabis’, by definition, ‘means the separated resin, crude or purified, obtained from the cannabis plant’: see definition of “cannabis extracts and tinctures of cannabis” in Part IV of Schedule 1 to the Misuse of Drugs Act (2017 Revision) – this is almost the exact verbatim definition of “Cannabis resin” defined in art.1(d) of the 1961 Convention, which provides that ‘cannabis resin’, by definition, ‘means the separated resin, whether crude or purified, obtained from the cannabis plant’.

²³ WHO (1948/1998); *R v Parker* (2000) 188 DLR (4th) 385 at [177] per Rosenberg JA (Court of Appeal of Ontario).

²⁴ See s.18(1), Bill of Rights (Protection of the Environment).

²⁵ *Cayman Islands Urgent Care Ltd v Director of Customs* (unreported 4 February 2021: Cause No. G 169 of 2019) per McMillan J (Grand Court).

²⁶ See s.59, 124, Constitution; *Day and Bodden Bush v Governor of the Cayman Islands* (unreported 29 March 2019: Civil Cause No. 11 and 184 of 2018) at [14] per Smellie CJ (Grand Court); *Roulstone v Cabinet of the Cayman Islands* [2020] 1 CILR 442 at 484 per Owen Ag. J (Grand Ct).

²⁷ See art.36, 1961 Convention; art.22, 1971 Convention; art.3(2), 1988 Convention; *Quayle v R* [2005] EWCA Crim 1415 at [13]-[15] per Mance LJ, as he then was, (English Court of Appeal).

²⁸ *Layne v Attorney General of Grenada* [2019] UKPC 11 at [44] per Lady Arden (Privy Council).

²⁹ See s.1(1), Bill of Rights.

³⁰ See s.1(2)(a), Bill of Rights.

³¹ *Layne v Attorney General of Grenada* [2019] UKPC 11 at [44] per Lady Arden (Privy Council).

³² See s.24, Bill of Rights.

³³ See ss.23-24, Bill of Rights. See also *In the matter of the Petition of Borden* [2013] 2 CILR 444 at 448, where Smellie CJ stated that ‘the Constitution being the supreme law of the Islands—all laws enacted by the legislature (“primary legislation” defined by s.28 of the Constitution) must comply with and not be incompatible with the Constitution’.

³⁴ In the Bill of Rights, “act” by definition “includes failure to act”, and “contravene” by definition ‘in relation to any requirement includes failure to comply with the requirement, and cognate expressions shall be construed accordingly’: see s.28, Bill of Rights.

³⁵ See s.19(1), Bill of Rights. In *The Matter of an Application for Permanent Residence by Hutchinson-Green* [2015] 2 CILR 75 at 87 (Grand Court), Smellie CJ stated: ‘There can, moreover, be no doubt, as set out in s.19(1) of the Cayman Islands Constitution Order 2009, that the right to lawful administrative action is a fundamental right which demands that, at the very least, a high level of protective oversight by the court. Section 19(1), which is headed “Lawful administrative action”, provides that all decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.’

³⁶ See s.107, Constitution (read together ss.1(2)(a), 19, 23-24, BoR).

³⁷ See s.59, 124, Constitution; *Day and Bodden Bush v Governor of the Cayman Islands* (unreported 29 March 2019: Civil Cause No. 11 and 184 of 2018) at [14] per Smellie CJ (Grand Court).

I have also been careful to ensure that, as Premier, your constitutional obligation to carry out functions ‘in the best interest of the Cayman Islands’³⁸ is complied with. Furthermore, it is insightful to note the remarks of the Court of Appeal for Ontario in *R v Parker*, where Rosenberg JA stated:³⁹

‘It has been known for centuries that, in addition to its intoxicating or psychoactive effect, marijuana has medicinal value. The active ingredients of marijuana are known as cannabinoids. The cannabinoid that gives marijuana its psychoactive effect is tetrahydrocannabinol (“THC”). While less is known about the other cannabinoids, the scientific evidence is overwhelming that some of them may have anti-seizure properties. The most promising of these is cannabidiol (“CBD”). Smoking marijuana is one way to obtain the benefit of CBD and other cannabinoids with anti-seizure qualities...Consumption of marijuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol and there is no “hard evidence” that even long-term use can lead to irreversible physical or psychological damage. Marijuana use is not criminogenic (i.e., there is no causal relationship between marijuana use and criminality) and it does not make people more aggressive or violent. There have been no recorded deaths from consumption of marijuana.’

It is also important to note that, in recent times, there have been some landmark judgments in Commonwealth jurisdictions, which have held that (based primarily on constitutional privacy rights) consumption, possession and cultivation of cannabis by adults (not children) on private premises is a human right and fundamental freedom that should not be criminally penalized,⁴⁰ and that, based on the rights to health as well as liberty and safety of the person, persons should not be criminally penalized for personal use (including cultivation, possession and consumption) of cannabis for medical and therapeutic purposes.⁴¹

In 2018, the South African Constitutional Court held that, based on privacy rights, it is a human right of adults in private to consume, possess and cultivate small amounts of cannabis.⁴² In 2019, the Eastern Caribbean Supreme Court held that, based on privacy rights and freedom of conscience, adults in private may consume, possess and cultivate any amount of cannabis as well as Rastafarian adults use of cannabis as a religious sacrament.⁴³ The Cayman Islands have one of the strongest (if not the strongest) constitutional privacy rights provisions in the entire Commonwealth, which provides the PACT Government the benefit of very strong and broad constitutional justification to enact legislation for decriminalization of cannabis.⁴⁴

CARICOM’s Views on Cannabis Legislation: It is important to note the Report of the CARICOM Regional Commission on Marijuana 2018 (the “**CARICOM Marijuana Commission**”) entitled “Waiting to Exhale – Safeguarding our Future through Responsible Socio-Legal Policy on Marijuana 2018” (the “**CARICOM Marijuana Report**”). The Eastern Caribbean Supreme Court, in *Ras Sankofa Maccabee v Commissioner of Police*, recently quoted recommendations made in the section of the CARICOM Marijuana Report entitled, “The Way Forward”, where Ventose J stated, *inter alia*, as follows:

‘The Commission believes that the end goal for CARICOM should be the dismantling of (sic) prohibition in its totality, to be replaced by a strictly regulated framework akin to that for alcohol and tobacco, which are harmful substances that are not criminalised. However, it acknowledges that law reform can take many forms and should conform to national realities. This is particularly because the Commission is of the view that law reform should not adopt a laissez-faire, liberalised approach, but proceed within a responsible, controlled regime that will depend on focused (sic) and adequate resources to achieve the desirable objectives.’

The Commission is unanimous in its view that the current classification for cannabis/marijuana as a “dangerous drug” with “no value,” or narcotic, should be changed to a classification of cannabis as a “controlled substance.”

³⁸ See s.50, Constitution.

³⁹ *R v Parker* (2000) 188 DLR (4th) 385 at [2], [39] *per curiam* Rosenberg JA (Court of Appeal for Ontario).

⁴⁰ *Ras Sankofa Maccabee v The Commissioner of Police* [2019] ECSC J0503-2 (Claim No. SKBHCV2017/0234) *per* Ventose J (Eastern Caribbean Supreme Court: St. Christopher & Nevis); *Minister of Justice and Constitutional Development* (unreported 18 September 2018: Case CCT 108/7) *per curiam* Zondo ACJ (South African Constitutional Court); *Ravin v State of Alaska* 537 P.2d 494 (Supreme Court of Alaska); *R v Parker* (2000) 188 DLR (4th) 385 *per curiam* Rosenberg JA (Court of Appeal for Ontario); *Allard v Her Majesty the Queen in Right of Canada* [2016] 3 RCF 303 *per* Phelan J (Federal Court of Vancouver); *R v Smith* [2015] 2 SCR 602 *per* Johnston J (Supreme Court of Canada).

⁴¹ *R v Parker* (2000) 188 DLR (4th) 385 *per curiam* Rosenberg JA (Court of Appeal for Ontario); *Allard v Her Majesty the Queen in Right of Canada* [2016] 3 RCF 303 *per* Phelan J (Federal Court of Vancouver); *R v Smith* [2015] 2 SCR 602 (Supreme Court of Canada).

⁴² *Minister of Justice and Constitutional Development* (unreported 18 September 2018: Case CCT 108/7) *per curiam* Zondo ACJ (South African Constitutional Court).

⁴³ *Ras Sankofa Maccabee v The Commissioner of Police* [2019] ECSC J0503-2 (Claim No. SKBHCV2017/0234) *per* Ventose J (Eastern Caribbean Supreme Court: St. Christopher & Nevis).

⁴⁴ In *Julius Baer Trust Company (Channel Islands) Ltd v AB et al* [2018] 2 CILR 1 at 10 [para.14] (Grand Court), Kawaley J explained that ‘the privacy rights guaranteed in s.9(1) of the Constitution are fully fledged fundamental protections which are entitled to be broadly interpreted and given effect to in their own right. It is fair to assume that some fundamental freedoms have more general importance than others because they underpin the main pillars of a democracy... The various elements of the Bill of Rights form part of an interlocking system or code and must be construed so far as possible in a consistent manner.’

The Commission is unanimous in its view that children and young persons must be protected from possible adverse effects of cannabis. Consequently, prohibition for children and young persons within an appropriate age limit should be maintained except for medical reasons; however, young people who use marijuana should be directed to treatment and diversion programs rather than being prosecuted or criminalized.

The Commission is unanimous that the drug-driving laws and mechanisms should be put in place to prevent persons from driving under the influence. These are futuristic and mechanisms would need to be developed to enable this objective.

The law must also ensure unhindered access to cannabis/marijuana for scientific and medical research by approved institutions and researchers.

Given the clear scientific support for the medical benefits of cannabis/marijuana, its use for medical purposes should be legalised. This should occur within special regulatory conditions for the use of marijuana for commercial medicinal purposes, (despite the fact that other nutraceutical products are not regulated), the provision of public health facilities for users in need of it and well supervised supply, marketing, branding, packaging arrangements, etc.

The Commission recommends that cannabis/marijuana smoking and other uses should be banned in all public spaces. Whether in a decriminalised or legalised regime. CARICOM could consider the establishment of designated or contained public spaces for this purpose, as occurs in The Netherlands, Portugal and Spain. However, this was not considered a priority for the Commission. The exception to the ban on public use should be for Rastafarians who should be able to practice their faith.

The Commission is of the view that possession and use in private households and for personal use only should be decriminalised. In doing so, it concurs with the many law enforcement personnel who believe that effectively enforcing prohibitionist laws in private households is near impossible. It is an opinion reinforced by recent judicial precedents on the rights to health as demonstrated by upholding of the freedom to grow and use cannabis for personal medical use and on the right to privacy. Given these precedents, limited home-growing for a small number of plants should be permitted. A number of legislated models permitting home-growing already exist, including Uruguay, Colorado, and Washington and in the Caribbean, Jamaica, and Antigua and Barbuda.⁴⁵

It is important to highlight these recommendations in the CARICOM Marijuana Report, because they touch on topical issues considered by our regional partners in the Caribbean. I have, therefore, been careful to ensure that consideration of the recommendations of the CARICOM Marijuana Commission were brought to the PACT's attention. It is important that, as a hallmark of a modern democratic society, the Cayman Islands give due consideration to CARICOM's findings and views on legality issues concerning cannabis legislation.

The Way Forward for Cayman: Whilst you noted the issues relating to equality⁴⁶ and protection of young people, there is also another aspect of decriminalization that is important to bring into sharp focus. Out of all the things that were most surprising to me upon in-depth review of decriminalization of cannabis, one of the most important issues, which is a fundamental human right and which might not be so evident, is that this includes cultivation of cannabis on private premises by adults.⁴⁷

It is important to highlight that, if cultivation of cannabis on private premises (on a per household basis) is not included in cannabis decriminalization legislation, it still leaves open the issue of where an individual can obtain access to cannabis and, ultimately, still supports the supply of cannabis to be imported from other countries/jurisdictions. This is an important feature to highlight (especially in light of the recent tragic gun-related violence and deaths), because illegal importation of cannabis, whether by boat or airplane, from other jurisdictions (particularly from neighboring jurisdictions) also often bring along with it guns, ammunition, explosives and hard drugs, as well as sometimes illegal landing of persons who may have COVID.

Whilst this cannot eradicate the issue of guns/ammunition and hard drugs, it is submitted that authorised growing of cannabis locally is likely, ultimately, to have a direct correlation with saving lives,⁴⁸ protecting, *inter alia*, the social

⁴⁵ *Ras Sankofa Maccabee v The Commissioner of Police* [2019] ECSC J0503-2 (Claim No. SKBHCV2017/0234) at [35] *per* Ventose J (Eastern Caribbean Supreme Court: St. Christopher & Nevis).

⁴⁶ In *The Rule of Law* (2011, London: Penguin Books) at 55, Lord Tom Bingham (writing extra-judicially in the ordinary) remarked that, as relates to upholding the rule of law, it is right to 'regard equality before the law as a cornerstone of our society. There should not be one law for the rich and another for the poor.'

⁴⁷ See *Minister of Justice and Constitutional Development* (unreported 18 September 2018: Case CCT 108/7) *per curiam* Zondo ACJ (South African Constitutional Court); art.28, 1961 Convention; Emma Charlen Lubaale and Simangele Daisy Mavundla, "Decriminalisation of cannabis for persons use in South Africa" (2019) 19 *African Human Rights Law Journal* 819-842, <http://dx.doi.org/10.1996-2096/2019/v19n2a13>; *Ras Sankofa Maccabee v The Commissioner of Police* [2019] ECSC J0503-2 (Claim No. SKBHCV2017/0234) *per* Ventose J (Eastern Caribbean Supreme Court: St. Christopher & Nevis) – and also, in Cayman Islands law, see s.9, Bill of Rights (read together with art.8, European Convention on Human Rights); *Julius Baer Trust Company (Channel Islands) Ltd v AB et al* [2018] 2 CILR 1 at 10 [para.14] *per* Kawaley J (Grand Court).

⁴⁸ In our Bill of Rights, there is a right to life (s.2(1), BoR) and the right to not to be intentionally deprived of life (s.2(2), BoR) – both are absolute fundamental human rights.

and economic environment that is not harmful to the health and well-being of people in the Cayman Islands.⁴⁹ If, however, an individual can supply cannabis for personal use by cultivation on private premises, this leaves them no excuse to purchase it illegally from drug-dealers (or engage in import of cannabis themselves) because they can have access to a home-grown supply.

In Jamaica, possession of 2 ounces of cannabis in public has been decriminalized⁵⁰ and cultivation of cannabis of 5 trees per household has also been decriminalized.⁵¹ It is submitted that, in deciding what route to take in relation to legislation concerning personal use of cannabis by adults, an appropriate way forward for the Cayman Islands is to follow what Jamaica has done: decriminalize personal use of cannabis by adults, where possession in public attracts a monetary fine and/or substance abuse education or treatment, and on private premises (specifically on a per household basis) persons are authorised to grow no more than 5 trees at one time.

The general aim, it is submitted, should be for personal use of cannabis by adults to be allowed. However, the idea is to keep personal use of cannabis confined to private premises, and fines should be issued to those who use cannabis in public or in commercial areas (especially schools, churches, public parks, and sports facilities). As was repeatedly said, when we were experiencing community spread of COVID, “*stay home*”: this is just as applicable to personal use of cannabis by adults in private as it was for practicing social distancing and isolation to flatten the curve with COVID.

Protection of children and young persons should remain of paramount importance – it is vital to ensure that our children are protected.⁵² Public education about cannabis and providing access to treatment (especially as relates to children and young adults, because the human brain does not stop fully maturing and developing until about age 25, and before age 25 is when children are most vulnerable to problems associated with cannabis use, but it is less of a problem with adults over age 25).

Petition for a Voter-Initiated Cayman Cannabis Referendum (pursuant to s.70, Constitution): I write to bring to the PACT’s attention that, since April 2021, I drafted and circulated a Petition aimed at triggering a voter-initiated referendum (pursuant to s.70, Constitution).⁵³ Please find attached, for ease of reference and perusal, a copy of the Petition seeking to trigger a Cayman Cannabis Referendum, which is a product of a Cayman Cannabis Reform initiative.

The Petition calls for two things: first, decriminalization of personal use of cannabis by adults (not children) in private (including possession, consumption and cultivation on private premises) and, secondly, expansion of medical cannabis legislation to allow for a medical cannabis licensing authority, which issues licenses exclusively to businesses owned and controlled by Caymanians (including, *inter alia*, issuance of licenses for domestic cultivation and cannabinoid extraction, as well as research and development, and exportation to parties in lawfully authorised jurisdictions).

Given that you have indicated support for decriminalization as a policy initiative of the PACT Government, if the PACT were to enact legislation decriminalizing cannabis for personal use by adults, the decriminalization aspect of the Petition could become a moot issue. However, the Petition also concerns the expansion of medical cannabis legislation, which could still need to be addressed or, alternatively, anything that (if future decriminalization legislation were passed) still could need to be addressed, if such legislation did not cover all aspects of decriminalization that remain ripe for consideration.

Draft Misuse of Drugs (Amendment) Bill 2021: I hereby submit a draft Misuse of Drugs (Amendment) Bill 2021 (the “*Bill*”) for due consideration by the PACT Government. It is acknowledged that, when seeking to address legality issues as relates to personal use of cannabis by adults, there are different routes that can be taken to provide legislation to address these issues (including whether the policy focus is de-penalization, decriminalization and/or legalization).

Most importantly, since ‘*cannabis and cannabis resin and extracts and tinctures of cannabis*’ are only present in Schedule I to the 1961 Convention and taken together with our robust Constitution (especially our privacy rights provisions in the Bill of Rights: s.9(1)-(2), BoR), the Cayman Islands is equipped to tackle these very difficult and complex issues through constitutional principles, which allow for legislation for decriminalization of cannabis (or similar) to be promulgated and which, at the same time, is compatible with international treaty obligations under the three UN drug conventions.

⁴⁹ See s.18(1), Bill of Rights (read together with ss.3, 5, 9, 15, 17, 19-20, 24, BoR in conjunction with s.16, BoR and art.12, ICESCR); *R v Parker* (2000) 188 D.L.R. (4th) 385 *per curiam* Rosenberg JA (Court of Appeal for Ontario).

⁵⁰ See ss.7F-7G, Jamaica’s Dangerous Drug Act 1948 (as amended by the Dangerous Drugs (Amendment) Act 2015) and the provisions of the First Schedule.

⁵¹ See s.7B, Jamaica’s Dangerous Drugs Act (as amended by s.5, Dangerous Drugs (Amendment) Act 2015).

⁵² See s.17, Bill of Rights.

⁵³ *Roulstone v Cabinet of the Cayman Islands* [2020] 1 CILR 516 *per* Owen Ag J (Grand Court).

It is of significant importance to ensure that, in enacting cannabis legislation, the Cayman Islands should remain vigilant to ensure that any such legislation (whether proposed or enacted) shall be compatible with the three UN drug conventions and with our Constitution, because, if not, any such Bill (making its way through Parliament) or primary legislation passed by Parliament would not likely be given assent to by Her Majesty's representative (His Excellency the Governor).

Although Jamaica (in 2015) was the first jurisdiction to promulgate medical cannabis legislation (as well as providing for decriminalization) in the Caribbean, with the Cayman Islands (in 2016) being the second jurisdiction in the Caribbean region to promulgate medical cannabis legislation (with very narrow and restricted scope and without providing for decriminalization), which was very conservative in scope, but which is compatible with the three UN drug conventions and our Constitution – it is now appropriate and ripe for the Cayman Islands to take the next incremental steps to enact further cannabis legislation. However, taking such slower and incremental steps have provided the Cayman Islands with the opportunity to observe and identify through comparative analysis of what worked and what did not work in other jurisdictions.

So, for example, the British Virgin Islands' Parliament passed a Cannabis Licensing Act 2020 and a Drugs (Prevention of Misuse) Amendment Act 2020, but it appeared to not be compatible with the UN drug conventions (particularly the 1961 Convention) and, therefore, the UK could not give assent to such legislation. And, Bermuda's lower house of Parliament (the House) passed its Cannabis Licensing Act 2020, although Bermuda's upper house of Parliament (the Senate) rejected it, but, even if the Senate were to have passed it, it is said to not be compatible with the UN drug conventions and the Governor of Bermuda gave notice that it would not be given assent to by the UK.

The reasons for BVI's and Bermuda's cannabis legislation not being eligible to receive the UK's consent (especially for being incompatible with the 1961 Convention) was, *inter alia*, that it went too far into the realm of recreational cannabis (particularly in relation to commercial application, instead of sticking with the safe parameters of decriminalization of cannabis and medical cannabis legislation).

Given the Cayman Islands position, as a modern democratic society that seeks to uphold the rule of law, it is important that any decisions to enact cannabis legislation are compliant with our Constitution and international obligations (*e.g.* under the UN drug conventions). As an British Overseas Territory, if the Cayman Islands is in breach of an international treaty obligation, it would put the UK in breach of the said international treaty obligation. As such, it is important that we approach areas of cannabis legislation carefully and ensure that proper consultation with the UK is achieved to ensure that any such legislation is sure to receive assent. This is a responsible approach for the Cayman Islands to take, and it is also a hallmark of a democratic society upholding the rule of law.

Closing Remarks: The draft Bill, which I have presented, is only a suggested way forward and, no doubt, there may be others better equipped than I to weigh in on these issues and provide guidance on the best way forward. However, in remembering the words of John F. Kennedy – "*Think not what your country can do for you, but what you can do for your country*" – I submit this for your consideration and hope that it may be of assistance.

I would also like to add my depth of gratitude to the PACT Government for its noble focus on being people-driven, which is important because our most valuable resource is our Caymanian people, and it is our Caymanian people who democratically elect their representatives to Parliament. I believe and support the PACT's focus on having the private sector and the public sector working together for the greater good of the Cayman Islands and our people.

I hope this is of assistance to the PACT Government. If I can be of further assistance, please let me know. I will continue to pray for you all that God will give all decision-makers the wisdom, knowledge, understanding, discernment, and courage to make the best decisions and to act in the best interests of the Cayman Islands and, most importantly, our precious Caymanian people and all residents.

Respectfully submitted,



Orrie Merren
Attorney-at-Law

CC: Hon. Minister Bernie Bush
Hon. Minister Kenneth Bryan
Hon. Minister Andre Ebanks
Hon. Minister Sabrina Turner
Hon. Minister Johany Ebanks
Hon. Minister O'Connor-Connolly
Hon. Deputy Speaker Katharine Wilks-Ebanks
Mr. Isaac Rankine, Councilor and MP
Ms. Heather Bodden, Councilor and MP