



# COMMONWEALTH OF THE BAHAMAS

Report of the Constitutional Commission into a Review of  
The Bahamas Constitution

Nassau, Bahamas

July 2013

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**PART I:**  
**INTRODUCTORY**

**Prologue**

8<sup>th</sup> July 2013

The Right Honourable Perry G. Christie, PC, MP  
Prime Minister of the Commonwealth of The Bahamas  
The Office of the Prime Minister  
Sir Cecil Wallace-Whitfield Centre  
West Bay Street  
Nassau, The Bahamas

Dear Prime Minister,

In August 2012 you appointed this Commission with the following broad mandate: “[T]o conduct a comprehensive review of the Constitution of The Bahamas, and to recommend changes to the Constitution in advance of the 40<sup>th</sup> anniversary of Independence next year. These changes will require a national referendum to be held in due course so that the will of the people can be determined on the matter.”

The appointment of this Commission was announced by you in a Communication to Parliament on the 1<sup>st</sup> August 2012, supplemented by individual letters of appointment subsequently issued by you to the said Commissioners.<sup>1</sup>

In addition to its overarching mandate, you directed the Commission to focus on thematic constitutional issues and specific questions (which are set out in the Communication to Parliament reproduced at **Appendix I**). These included, among others, the strengthening of the fundamental rights and freedoms of the individual, with a particular focus on citizenship provisions; a review of the provisions relating to the distribution of state power versus civil

liberties and individual rights; whether The Bahamas should evolve from a Constitutional monarchy into a republic within the Commonwealth of Nations; matters relating to the Judiciary, including whether the Privy Council should remain the final appellate court; the composition of both Houses of Parliament, and accountability of political representatives.

There was also a specific mandate to consider questions relating to our political system, which were as follows:

- Whether there ought to be constitutionally fixed dates for general elections;
- Whether there ought to be fixed term limits for Prime Ministers and MPs;
- Whether the electorate should be vested with limited rights to recall their MPs;
- Whether the Senate, being an appointed body, should be constituted differently to encapsulate a broader cross-section of national interests;
- Whether eligibility for service in the Senate should be lowered from 30 to 21, the same age that applies to the House of Assembly;
- Whether the unqualified right to free speech enjoyed by legislators needs to be modified so as to give the individual citizen either a limited right of reply to defamatory attacks against him in Parliament, or a right to seek redress against the offending legislator in a court of law; and
- Whether the constitutional power and authority over criminal prosecutions now vested in the Attorney General should be transferred instead to a constitutionally independent Director of Public Prosecution with security of tenure.

You directed us further to build upon the work that was done by the first Constitutional Commission (2002- 2007), and to engage in nation-wide public consultation and a “structured dialogue” with the general public on matters of constitutional reform.

The Commissioners have attempted to follow both objectives with the greatest of fidelity. As will be apparent from references throughout this report and from the acknowledgements toward the end, the Commission was able to build on the research, public consultation and scholarship of the first Commission. In particular, the educational booklet “*Options for Change*”,

which was published by the Commission in July 2003 as part of its public education campaign, and the “*Preliminary Report & Provisional Recommendations*” of that Commission published in 2006, proved to be invaluable resource material. In addition, the Commission had the benefit of continuity in institutional knowledge as three of its Commissioners had also served either as Commissioners or technical staff with the first Commission. Without the benefit of this foundational work, our job would not only have been more difficult, but could scarcely have been completed within the short timeline.

With respect to public consultation, the Commission engaged in a wide array of private and public forms of consultations with eminent persons in civil society, Government officials, special interest groups, the Church, representatives from international agencies and the general public in a series of town meetings held throughout Nassau as well as the major Family Islands. Members also participated in informational radio broadcasts and talk shows, and the Commission established a web-page on the Bahamas Government website to post information and obtain feedback. Indeed, it was primarily the desire to deepen this consultation that prompted the Commission to request of you an extension of the original reporting date from the end of March 2013 to the end of June, 2013.

I am happy to say, after long and mature consideration, we have achieved agreement on most of the recommendations and principles contained in this Report. This is not to say that the Commissioners were unanimous in all of their views; that would be remarkable in a body which in itself was something of a microcosm of society, with a mix of lawyers and laypersons, middle-aged and young, men and women, from Nassau and the Family Islands, and persons from opposing political parties, all of whom brought very different viewpoints to the table. The Commission agreed, however, that it would not issue any minority reports, although where members felt strongly enough about a particular issue which diverged from the views of the majority, they would be afforded an opportunity to appropriately memorialize their views in short reservations or dissenting statements, as indeed some members have done (**Appendices IV, V**).



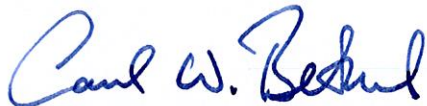
Accordingly, as Chairman of the Commission, I am pleased, along with my fellow Commissioners, to submit our report for the consideration of the Government.

Yours Sincerely,

  
**SEAN McWEENEY, QC**  
**Chairman**  
**Constitutional Commission**

**Members:**

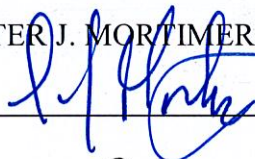
CARL BETHEL

  
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MADAM JUSTICE RUBIE NOTTAGE  
(RET'D.)

  
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LOREN KLEIN

  
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TARA COOPER BURNSIDE

  
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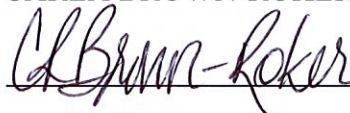
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CHANDRA SANDS

  
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MICHAEL ALBURY

  
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BRANDACE DUNCANSON

  
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## SECTION 1:

### Foreword

#### *Timeline for conduct of review*

- 1.1 At the outset, the Commission was fixed with the realization that the timeline for the conduct of the consultative review process and the production of the report would involve it in an undertaking that was extremely ambitious, if not of herculean proportions. Even without the complications of having to conduct public consultations in a multi-island state, the Commission would have been hard-pressed to comply, considering the sheer magnitude of matters put to it for consideration. And this remained the same whether it was the original formulation of the end of March 2013 or the extension to the end of June 2013 (**Appendix II**).
- 1.2 To put matters in perspective, the Commission was mandated to deliver in just under nine months a report which was the culmination of several years' work in many of the other Commonwealth countries that have embarked on similar reviews, and which in many ways were better resourced with full-time Commissions.<sup>2</sup> This point is memorialized not by way of complaint or protest, but because it is important to understand the context in which this Report was produced, and because the time constraints had important implications for the Commission's approach to its work and the structure and content of the report itself.
- 1.3 Be that as it may, the Commission understood the symbolic significance of completing its consultations and presenting its report before the 40<sup>th</sup> anniversary of Independence. It does so, however, with the caveat that the submission of this Report should not be the end of the process of constitutional review. Indeed the Commission regards some of the recommendations expressed in this Report as matters requiring further study by separate commissions, committees or working groups.

1.4 In approaching its work, the Commission was also soberly aware that constitutional review is just a precursor to constitutional reform, and that the most important part of this process lies outside of its remit or control—that is, obtaining the approval of a majority of the electorate in a referendum to translate any recommendations of the Commission into real change. The failed constitutional referendum of 2002 and the more recent referendum on the issue of regulating web-shop gaming (though not constitutionally required) are compelling reminders that without public support for recommended changes, this process may be rendered futile. If the outcome of this Report or any other that might follow it is to yield constitutional reforms, then its success will have to be assured by close attention to the lessons of 2002 and 2012, and the more recent examples of national referenda in some of our fellow Caribbean states.

#### *Public Consultations*

1.5 While required to engage in wide public consultation as part of its mandate, the Commission itself placed a high premium on the role of public consultations and felt it was a moral imperative to visit and speak with representatives from all of the major islands and communities before it could begin to write its report on the constitutional review process. This quest has often been at the vagaries of travel arrangements, the availability of Commissioners, and event-schedules of the local communities.

1.6 As testament to this unprecedented level of consultation, the Commission has included at **Appendices VI and VII** statistical tables on the presentations made to the Commission and the town meetings held throughout the archipelago. It has also been able to retrieve, from the archives of the Adderley-Tynes Commission (see paragraph 7.8 below), statistics on the public consultation undertaken as part of that Commission’s work, which were never published. We think it useful to include these to show the continuity of the efforts in engaging the public in constitutional reform (**Appendix VIII**).

1.7 Moreover, the Commission was afforded the unique opportunity to interview some of the persons who participated in the 1972 Independence Conference, and it was extremely

beneficial to have first-hand accounts from some of the original contributors to our constitutional text, now refracted through 40 years of political experience and governance under the constitution which they were instrumental in creating.

1.8 Overall, the Commission is satisfied that it received feedback and input from a wide and representative cross-section of Bahamian society. There may still be individuals or groups who feel that they did not get a chance to voice their opinions during this process, and in this regard the Commission has in mind Bahamians living abroad. The Commission regrets this but takes some comfort in the thought that those who did participate in the constitutional dialectic raised critical issues not only for themselves but also on behalf of their fellow Bahamians.

1.9 Thus, the Report attempts to summarize and record as far as possible the views expressed by Bahamians, not only the majority view but minority views as well, while indicating whether or not such views form the basis for recommendations for constitutional change. Needless to say, however, the Commission does not regard itself as a mere stenographer of the views of the public. Instead, the views of the public have been distilled, modified and enlarged by the views of the Commission which, in turn, have been informed by its own consultation, research and scholarship, comparative analysis, and expert advice, all within the four corners of its mandate.

*Educating the public on constitutional matters*

1.10 One of the issues that emerged during public consultations was the need for greater awareness and education generally about the Constitution. In fact, the opinion was expressed by none other than one of the distinguished Bahamians who participated in the 1972 Independence Conference at Whitehall, England, that perhaps constitutional reform should be deferred until the populace could be better informed and educated about basic constitutional precepts and the form of Government.

- 1.11 The Commission wholeheartedly endorses the call for further avenues to enhance education about the Constitution and our political system of governance. However, with the greatest of respect for the views expressed, it cannot agree that attaining a high public level of constitutional knowledge is an essential prerequisite for constitutional change. It also has to be remembered that the implementation of most of the recommendations contained in this Report requires not only the public debate of Bills for that purpose in both Houses of Parliament but the submission of the Bills containing the proposed amendments to the electorate for approval in a referendum. These provide further opportunities for public education on the issues.
- 1.12 Moreover, the Commission is pleased to record that it found, even in some of the remotest corners of the archipelago, an awareness of many of the pertinent issues arising in the context of constitutional reform. Though often not grounded on an academic understanding of the Westminster system, such awareness was productive of constructive dialogue and recommendations for reform.
- 1.13 Indeed the Commission's interaction with the public and various groups of citizens presented moments of great encouragement, for example: the residents of tiny Moore's Island, whose understanding of the death penalty jurisprudence and clarion call for removing the Privy Council was unparalleled; the comprehensive and scholarly presentation from the Bahamas National Council for Disability; the impassioned case made by the Local Government Association in Grand Bahama for local government to be afforded a greater role in our participatory democracy; the members of the Haitian community who took their courage in their hands and risked public scorn to raise questions often thought about but rarely articulated; and the enthusiasm and depth of knowledge shown by the students of NGM Major High School in Long Island.

*Scope of Report*

- 1.14 This report makes no pretense of being quite as wide-ranging in scope or presentation as the reports of some of the historic West Indian constitutional commissions (e.g., the 1974

Wooding Commission of Trinidad and Tobago, the 1979 Cox Commission of Barbados). These earlier commissions were taking the first critical look at the workings of the Westminster transplant model in this region, which extended to a critique of the body politic. Our Constitution was drafted with the hindsight of the experience of the earlier constitutions, and therefore our original draft contained some of the features that were added by amendment to the earlier Constitutions. A notable example of this is the provision for a Public Service Board of Appeal, which incidentally was one of the recommendations of the Wooding Commission and which was adopted in the 1976 republican Constitution of Trinidad and Tobago.

- 1.15 Yet in striving to produce this report, the Commission has not compromised on its objective to accurately capture the wisdom of the Bahamian people. It hopes further that this Report is received as a document that proposes positive changes for those aspects of our Constitution that have been found to be anachronistic or defective, and leaves intact those portions which have served us well. Those who were expecting recommendations for a wholesale rewriting of the Constitution or radical departure from some of the fundamental principles and conventions of the Westminster system will be disappointed. In fact, it was the view of the Commission that a number of the issues raised in respect of good governance or the functioning of the political system could be addressed through ordinary legislation, and only those matters that were regarded as constitutional essentials should be interpolated in the text of the Constitution.

*Constitutional revision, not rewriting*

- 1.16 Faced with the choice of reform or radical departure, the Commission, for the most part, opted for the former. The Commission is of the view that while the time may come for reforms that will include re-writing and re-enacting the Constitution, we have not yet attained the level of public debate, constitutional study, nor public support that would make such an effort worthwhile. As intimated earlier, the Commission bears in mind the two failed referenda here at home and the recent experience in St. Vincent and the

Grenadines where a six-year process leading up to the drafting of a new republican constitution ended with the new charter being defeated in a national referendum.

- 1.17 In fact, it was the view of an important demographic of the views canvassed, including one of the framers and at least one leading constitutional lawyer, that there was no evidence to show that there were any severe failings in the Bahamian Constitution that could not be remediated through judicial intervention, or proper operation of the constitutional conventions. The Commission appreciates that there may be something in this point, but it does not take so sanguine a view, particularly having regard to the passage of time and the need to modernize certain provisions of the Constitution.
- 1.18 Yet, we think that our recommendations go beyond mere conservative tinkering and modernizing, and tread new ground in constitutional development. All in all, the Commission is satisfied that its report creates a roadmap for the further constitutional evolution of The Bahamas, subject to the additions and refinements that will emerge during any further reviews and consultations.
- 1.19 With respect to the structure of this report, in addition to recording the views of the public and making specific recommendations to Government, the Report also sets out, where necessary, brief explications of the constitutional position in its legal or jurisprudential context, although such technical material is often relegated to endnotes. This is intentional, as the Commission did not want to add unnecessary technicality to its report.
- 1.20 The Commission has made very wide-ranging recommendations for reform, which run the spectrum from symbolic or decorative changes to meta-constitutional issues which go to the fundamental workings of the constitution or political system. It does not, however, mean to suggest that all of these recommendations should be accorded equal weight, or should be implemented contemporaneously.

1.21 While the question of what matters should be presented in a referendum and the timing of such a referendum (or referenda) is a question for the political executive, there are certain recommendations for reform which the Commission thinks are sufficiently important and imperative to require immediate attention. These are indicated in the Executive Summary of the Report. Others, while not insignificant or inconsequential, can be afforded the luxury of further study or a more protracted timeline for implementation.

1.22 It is against this backdrop that the Commission respectfully submits this Report



## SECTION 2:

### Conduct of the Review

#### Establishment of secretariat

- 2.1 The first task of the Commission was to find suitable premises from which to operate and to establish a secretariat to provide administrative and logistical support. After a few initial setbacks in finding proper accommodation, the Commission was finally able to occupy and outfit an office suite on the Second Floor of the British Colonial Hotel toward the end of 2012. Its work had already started in earnest, however, with meetings being held using the business facilities of the Hotel as necessary.
- 2.2 Mrs. Thelma Beneby, a retired Permanent Secretary with long experience working with various commissions, was appointed as Secretary to the Commission, assisted by a number of support staff, who are listed at **Appendix III**.

#### *Multi-media approach*

- 2.3 In its initial meetings, the Commission set about familiarizing itself with its terms of reference and planning the approach to its work. Several working sub-committees were also established to co-ordinate various aspects of the Commission's work, including a public relations and information committee, a drafting and research committee, and a public consultation committee. The Commission also conducted several internal briefings on the structure and content of the Constitution, particularly for the benefit of the non-legal members of the Commission.
- 2.4 Because of time constraints, the Commission took the decision not to publish any additional educational or other material. Instead, it was content to rely on the material published by the Adderley-Tynes Commission, in particular the booklet "*Options For*

*Change*”, which was an attempt to provide a conspectus of the provisions of the Constitution and to highlight some of the major issues for discussion. As indicated below, that publication, along with the first Commission’s “*Preliminary Report and Recommendations*” were published on the Commission’s website.

#### *Private Interviews*

2.5 The Commission began its public interviews by inviting a list of eminent persons in public and private life, civil society, the religious community, and special interest groups for interview sessions with the Commission. These interviews were held mainly at the Commission’s Secretariat and were covered by the media agencies, whose representatives were allowed to address questions to the presenters. A listing of the persons, organizations or groups which made presentations to the Commission is reproduced at **Appendix VI**.

#### *Town Meetings*

2.6 The next phase of the review was the conduct of a series of public town meetings in New Providence and throughout all of the major inhabited Family Islands. A complete listing of the dates, venues and attendance at these meetings is reproduced at **Appendix VII**. Altogether, a total of 30 public meetings were held, which were attended by an aggregate of some 2,183 persons. These town meetings constituted the meat of the review process, and were the primary source for obtaining public feedback on various points of constitutional reform.

#### *Multi-media approach*

2.7 In order to deepen the process of public education and consultation, the Commission, with the assistance of the Department of Information Technology in the Ministry of Finance, also set up a web-page on the main Government web-site. This facility allowed the Commission to post some of the material from the Adderley-Tynes Commission on

the web-page, provide links to useful sites (such as other Constitutions), and post the written submissions from some of the presenters online.

- 2.8 Representatives of the Commission also participated in informational broadcast and talk shows on several radio stations and delivered presentations at various forums. Additionally, private individuals, special interest groups, senior governmental representatives, non-governmental groups and civil society generally were invited to submit written recommendations to the Commission. In response to this invitation, the Commission received numerous written and electronic submissions and memoranda, either on specific aspects of the Constitution or containing general recommendations.

*Research and collation of data*

- 2.9 In addition to the data-gathering phase of the review, which was the most visible and public face of the review, it goes without saying that such a process also involved a significant amount of research by members of the Commission and the Secretariat.

*Production of Report*

- 2.10 During the month of June, the Commission spent several weeks in closed caucus drafting and revising this Report, which was presented to the Rt. Hon. Prime Minister on Monday, July 8<sup>th</sup>, 2013, in time for the 40<sup>th</sup> Anniversary of Bahamian Independence.

**PART II:**  
**EXECUTIVE SUMMARY**

**SECTION 3:**

**Structure of Report and Summary of Commission's Findings and  
Recommendations**

**Structure of Report**

- 3.1 This section is a condensed version of the Commission's major findings and recommendations, which are elaborated on in the following chapters. The recommendations are presented in capsule form.
- 3.2 The Report is divided into six Parts, which are briefly described below.
- 3.3 **Part I** of the Report deals with introductory matters. At the prologue is the letter transmitting the Report to the Rt. Honourable Prime Minister. *Section 1* contains a foreword by the Commission, which sets out the contextual background to the Report and the philosophical approach of the Commission to constitutional review and reform. *Section 2* discusses how the Commission went about its work. In *Section 3*, the Commission provides a brief historical overview of the history and constitutional evolution of the Bahamas. *Section 4* is a bird's-eye view of the current constitutional system, which provides perspective and context for some of the recommended reforms. In *Section 5*, the Commission sketches the political platform initiatives for constitutional change. *Section 6* contains a brief listing of the attempted constitutional reforms of 2002, which were all defeated at national referendum.
- 3.4 This Executive Summary is contained in *Section 3* of **Part II**. The recommendations are presented in capsule form in *Section 4* to provide a quick reference guide. **Part III**

contains an historical introduction and an overview of constitutional evolution in The Bahamas

*General Constitutional Features*

3.5 **Part IV** is entitled “General Features of The Constitution”, and in this part the Commission deals with several preliminary constitutional issues, such as the matter of the enactment of the Constitution and the issue of patriation; the Preamble; the relationship between international law and domestic law; and the entrenchment provisions. These occupy *Sections 9-12*. Notwithstanding the current political and academic fascination within the region with the concept of creating an indigenous constitutional order or patriating (by re-pealing and re-enacting) the Constitution, the Commission does not see such a change as being necessary or advisable at this time.

3.6 With respect to the Preamble, the Commission does not advocate a revising or re-writing at this point. Despite its symbolic value and moral force, the preamble is really a decorative part of the Constitution and non-justiciable. Any perceived deficiencies might be met by the inclusion of directive principles of state.

3.7 As to the treatment of international treaties and agreements, a constitutional provision prescribing the role and functions of the Executive and Parliament in relation to this process would bring clarity to this area of our law. Secondly, it would address what has been described as the “democratic deficit” in our constitutional positions, which allows the Executive to sign on to treaties without the involvement of the people or their elected representatives by way of parliamentary scrutiny.

3.8 The next section addresses the amending clause of the Constitution. The Commission is of the view that while the fundamental rights provisions and those provisions going to the fundamental structure of the Government should continue to be entrenched or specially entrenched, depending on their normative value, other provisions of lesser importance

should be amenable to change by a special majority of both Houses without any need for a referendum.

## **Chapters and Articles**

### *Supremacy of the Constitution*

3.9 In **Part V** (*Sections 13-23*) we look at the specific chapters and select articles of the Constitution. In *Section 13*, we examine what is called the ‘supremacy clause’ and indicate that to give greater efficacy to this clause and to promote constitutional development, there should be provisions for a ‘Constitutional Court’, which can hear complex matters of constitutional law (including magisterial references) and to which the Attorney General may refer questions of constitutional law and receive advisory opinions. Further, to enhance the ability of the citizen to expect and seek “constitutional behavior” of the Government, a provision should be included that would allow standing to seek review in respect of non-fundamental rights clauses (so called universal review).

### *National Symbols*

3.10 As the constitutive and foundational law of the state, the Constitution should proclaim the territory that comprises the state. It is notable, for example, that with the exception of the reference to “Family of Islands” and “rocks and cays” in the Preamble (and more obliquely in the article dealing with constituency boundaries), there is no recognition of the archipelagic nature of The Bahamas. In addition, the national symbols of The Bahamas and essential elements of statehood should be contained in a schedule to the Constitution. Moreover, the Constitution should declare that English is the official language.

### *Citizenship*

- 3.11 In *Section 14* we address the question of citizenship, which took second place only to the issue of the death penalty and the Privy Council in terms of its priority for citizens. This is, in many respects, the most singularly difficult subject the Commission had to consider. As might be expected, the Commission recommends that all of the provisions relating to the acquisition of citizenship and transmission to children or spouses be cast in gender-neutral language to provide for the equal attribution of the right of citizenship and to remove any discrimination against women in this and indeed in every other regard.
- 3.12 There are also recommendations intended to cure or mitigate some of the perceived unfairness in other provisions, such as clarification of the operation of the article relating to children born in The Bahamas where *either* parent is a Bahamian; the removal of any disabilities in the ability of a single or unmarried Bahamian man or woman to transmit citizenship to their children; a relaxation of the rules relating to dual nationality; and proposals for an Independent Board or Commission to consider applications for citizenship and asylum.
- 3.13 Save for those matters, however, the Commission regards its study of citizenship within the constitutional framework as being preliminary and necessarily incomplete. The Commission finds merit in the recommendation made by several of the contributors that, because of its national importance and the implications for very large numbers of persons residing in The Bahamas without status, the question of citizenship as it relates to children born in The Bahamas where neither parent is Bahamian should receive specialized and definitive study. The Commission therefore recommends that a special Task Force or Commission be appointed for this specific purpose with a mandate to complete its work within the shortest possible time. This must be made a matter of high priority for the government. The future peace and internal harmony of Bahamian society may well depend upon it. However, we wish to make it clear that the Commission does not recommend automatic citizenship by reason only of birth on Bahamian soil.

*Fundamental Human Rights*

- 3.14 In the next Section (15) the Commission considers the Bill of Rights provisions. Its main recommendations relate to the inclusion of “sex” as a ground of discrimination in article 26. It does not endorse the expansion of that clause to include additional factors such as disability, sexual orientation or language. These other rights are certainly worthy of protection, but the Commission believes that such concerns can be met through ordinary legislation which protects vulnerable groups from specific forms of discrimination.
- 3.15 The Commission recommends that the unqualified right to trial by jury when tried on indictment should be dis-entrenched, and that legislation should provide for the circumstances in which jury trials might be dispensed with. Additionally, the right of freedom of expression (art. 23) should specifically embrace the freedom of the press, and article 24 (“freedom of assembly and association”) should be expanded to include a right to vote in general elections and to do so by secret ballot. In other words, these existing legal rights should now be constitutionalized. Further article 29 which provides for a “proclamation of emergency”, should be amended to allow for an emergency to be limited to a specific geographic area (rather than having to extend to the entire Bahamas) and to specify the situations that would justify such a proclamation. To further protect the rights of citizens during such periods, provision should also be made for an impartial tribunal presided over by the Chief Justice to review cases of persons detained pursuant to emergency regulations.
- 3.16 The Commission does not recommend the inclusion of social and economic rights (so called “second-generation” rights) such as food, shelter, water, work, education) among the enumerated rights in Chapter 2. As these rights are universally declared to be progressively achievable, or realizable having regard to a state’s resources, giving them constitutional enactment would attempt to make justiciable rights which might be unattainable, even if legally recognized. However, the Commission does think that such



rights could be given constitutional recognition in a way that imposes a moral and political obligation on the state to use its resources for the welfare of its citizens.

### *Environmental rights*

3.17 The issue of according special constitutional protection to the environment (rights which are sometimes referred to as group or “third-generation rights”), and including a reference to inter-generational equity is embraced, although the Commission is of the view that the specific details should be left to primary legislation. This is addressed in Section 16.

### *Exceptions to non-discrimination clause*

3.18 The Commission also thinks the time has come for a closer examination of Article 26(4), which provides for exceptions to the non-discrimination clause. Firstly, the provision at 26(4)(e) empowers Parliament, rather uniquely, to make laws which can discriminate against the entire citizenry of The Bahamas in relation to gaming (although the existing law—the *Lotteries & Gaming Act*—technically discriminates on the basis of residence rather than citizenship). However repugnant the idea of Parliament discriminating against its own citizens on any matter may be, the Commission is not unmindful of the messages that were communicated by the electorate in the recent gambling referendum and feels, therefore, that it would not be appropriate at this time to alter the provisions of Article 26 (4) (e). However, whether Article 26(4)(e) stays in place or not is irrelevant to the question as to whether Bahamians should be allowed to gamble in casinos. This is not a matter that falls for constitutional address. Article 26(4)(e) does not prohibit Bahamians from gambling in casinos. All it says is that if Parliament enacts such a law, it is protected by the Constitution from challenge. Should it be decided by any Government that it would wish Bahamians to be allowed to gamble in casinos (or to engage in any other form of gaming), such a result could be achieved by the simple expedient of an amendment to the *Lotteries & Gaming Act* removing the current restrictions.

3.19 Secondly, while the Commission recommends the inclusion of “sex” as a ground of discrimination in article 26, it proposes the addition of a proviso to article 26(4) that would make it plain that Article 26(1) shall not apply to any law which prohibits or renders void same-sex marriage. Although this matter is dealt with in some detail later in this report it is as well to mention here that in all the public consultations and interviews conducted by the Commission not one person advocated that same-sex marriage should be constitutionally protected.

*Head of State/Governor General*

3.20 *Section 17* of this Part addresses the Office of Governor-General (Head of State). At this time, the Commission does not recommend any change in the Office of the Governor General as the representative of the Queen as Head of State under our system of constitutional monarchy. The Commission is nonetheless of the view that this is the inevitable terminus of constitutional evolution to full sovereignty and independence. Moreover, we cannot allow ourselves the delusional luxury of assuming that the Queen (or King) of England will forever be available to be Sovereign of The Bahamas.

3.21 As a small step towards this delinking process, however, the Commission recommends that the oath of allegiance of the Governor General, Prime Minister and Cabinet Ministers, Judges and other senior public officials be changed so that allegiance to the Constitution and the people of The Bahamas is sworn or affirmed in addition to the oath of allegiance to the Queen, her heirs and successors.

*Parliament*

3.22 *Section 18* considers the institutions of Parliament. With respect to the Senate, despite the groundswell of support for the abolition of the upper chamber, the Commission’s view is that it should be retained, although its composition should be enlarged to reflect a wider cross-section of demographical and pluralistic interests. It is also thought that the

appointment of some of its members devolved to the Governor General in his own discretion. Further, although there were deeply divided views on the matter, the Commission recommends that the current qualifying age of 30 be retained.

- 3.23 Despite hearing several proposals to modify the electoral system to allow for some form of proportional representation in the House of Assembly, the Commission does not endorse such a change. While it accepts that the “winner take all” approach of the first-past-the- post system has sometimes polarized and undermined government legitimacy in the region, the Commission still considers it the superior electoral system and therefore recommends its retention.
- 3.24 To further strengthen democracy, the Constitution should provide for a constitutionally independent Electoral and Boundaries Commission to replace the current Constituencies Commission, and the functions formerly performed by the Parliamentary Commissioner should be merged with this Commission. The Parliamentary Commissioner would be restyled as the Chief Electoral Officer and be an *ex officio* member of the Commission. Hand and hand with these changes should be constitutional provisions requiring Parliament to make laws for the regulation of political parties in the areas of campaign financing, broadcastings, etc., to ensure transparency and accountability and to discourage the corrupting involvement of special interest groups and persons and their money in the electoral process.
- 3.25 In an effort to promote transparency and accountability in the conduct of public affairs, the Commission recommends the establishment of a mechanism or Commission, such as an Integrity Commission, to supervise and investigate the conduct of Members of Parliament (MPs) and senior public officials.
- 3.26 Further, the Office of the Clerk to Parliament and a Deputy Clerk, responsible for the Senate, should be established as public officers under the Constitution.

*Executive Powers*

- 3.27 Next we look at the executive powers (Section 19). By and large, the people felt that the concentration of powers in the hands of the Prime Minister (PM) had to be curtailed or checked by some other arm or branch of government. In particular, it was thought that the powers of appointment of the Prime Minister were too pervasive and should be circumscribed. In this regard, the Commission recommends that some of the powers of appointment of the PM relating to public officers and the judiciary be transferred to the Governor General, or to the other permanent Commissions whose independence and security of tenure are already constitutionally secured.
- 3.28 There was overwhelming support for removing the flexibility of the Prime Minister to dissolve the House at a time of his own choosing in the run-up to general elections, and for prescribing instead a fixed time (or period) for the calling of general elections. The Commission supports the call for greater certainty with respect to the calling of elections, but would suggest a narrow fixed window rather than a specific date. The power of the Prime Minister to dissolve Parliament outside of the regular five year term, except in the circumstances prescribed by the Constitution (i.e., a vote of no-confidence), should, in the Commission's view, be eliminated.
- 3.29 A critical eye was also cast on the provision prescribing the composition of Cabinet. The Commission would recommend an amendment to provide for an upper limit (the current formulation sets a minimum number) while making it clear that not *all* Ministers need be members of Cabinet (there is, for example, no such requirement in the United Kingdom where a substantial number of ministers are not members of Cabinet). The Commission also recommends that limitations be placed on the number of persons that can be appointed as Parliamentary Secretaries from among the House of Assembly and Senate, as this has the tendency, in small states, to eliminate any "back benchers" and dissentient voices within a party. This cannot be good for a healthy democracy and is certainly in conflict with the Westminster model to which we subscribe.

- 3.30 The recommendations calling for the transference of the power over public prosecutions from an Attorney General who is a member of the political executive to a public Director of Public Prosecutions with constitutional independence and security of tenure is also supported. The caution of the present Attorney General that this transition should be calibrated with the reform of the judicial system is noted, but the Commission does not think that the constitutional devolution of such functions retards the ability of the Executive to continue with administrative and other reforms of the system.
- 3.31 Finally, the Commission recommends that the system of Local Government be given constitutional recognition, in the Chapter dealing with the Executive, and that the relationship between central and local government be set out, although the specifics can be left to ordinary legislation (i.e., Local Government Act).

#### *Judicature*

- 3.32 Under the rubric of the Judicature, the Commission looks at the judicial arm of Government (Section 20). There was a widespread call for delinking from the Privy Council (PC), although this issue was unfortunately conflated with the question of the death penalty, with many persons seeing the PC (rightly or wrongly) as the main obstacle to its implementation. The Commission does not recommend the abolition of appeals to the Privy Council at this time, although (like the position with the monarchy) this should be seen as an inevitable step in the continuum of constitutional development—one contemplated by the provisions of the Constitution itself. The Commission feels that we need to plan for this inevitability especially since it may be forced upon us in due course by the United Kingdom government itself
- 3.33 With respect to the retirement age of Judges of the Supreme Court and the Court of Appeal, respectively, the Commission recommends retaining the current retirement ages (65 and 68, respectively) as *optional* retirement ages, with new mandatory limits set at 70 and 72 respectively, but with no possibility for an extension.

- 3.34 To enhance the institutional position of the magistracy, it is recommended that the provisions dealing with the magistracy should be given constitutional recognition and included in the Chapter dealing with the Judicature, and that magistrates should be given some measure of constitutional security of tenure and independence similar (but not on the same level) of Judges of the Supreme Court.
- 3.35 Although strictly speaking the following recommendations could be subsumed under “Executive powers” they are listed here because of their close affinity with the workings of the judicial and legal system. These include the creation of the Office of Public Defender, as a public office with constitutional security and independence, and the institution of a system of Legal Aid. The Commission was heartened to hear from the Honourable Attorney General that the Executive is currently considering the former, even though the legal details and modalities have yet to be worked out.

#### *The Public Service*

- 3.36 Section 21 addresses the Public Service. The efficient functioning of the services commissions is extremely critical to the day-to-day provision of governmental services. Many complaints have been levied at these commissions, but these go more to the administrative inefficiencies, rather than any formal or structural weaknesses. There are several structural recommendations, however, that the Commission thinks would improve the system.
- 3.37 There was division, even within the ranks of the Commission, as to whether there should be a separate Teaching Service Commission. After considered debate, the Commission came down on the side of retaining the appointment, discipline and control of teachers under the Public Service Commission (PSC). Instead, the PSC should be enlarged with separate chambers or divisions to deal with specific sectors of the public service. As a corollary, the Police Service Commission should be re-constituted either as the Security Services Commission or Protective Services Commission, with responsibility for the Police (Fires Services), and the Prison Service. At the present time it is not

recommended that the Royal Bahamas Defence Force (RBDF) should be included in this group. Administrative control of the military force should remain with the National Security Council established by the *Defence Act*.

- 3.38 The Commission also gives its support to the establishment of the Office of Ombudsman (or complaints commissioners) to hear complaints from the Public. It does not think, however, that this Office need be a constitutional position, as the experience of other countries does not indicate any greater efficacy in a constitutional as opposed to statutory appointment. The Commission would also support the creation of the position of Contractor General, with tenure similar to that of the Auditor General.

#### *Finance*

- 3.39 The short Chapter of the Constitution dealing with finance is considered at Section 22. The Commission thinks that the office and independence of the Auditor General should be strengthened by provisions for independent funding and greater autonomy to that Office. Such provisions might enshrine the Public Accounts Committee in the Constitution with specific functions for parliamentary oversight of public funds. Among other recommendations to improve fiscal responsibility and governance was a novel suggestion from within the ranks of the Commission for a constitutional mandate to maintain a balanced budget. However, the Commission sees this more as a matter of governance as opposed to legislation, and fears that such a provision might not only hamstring a government in its ability to take necessary national fiscal measures but ultimately subject the executive discretion needed in this area to the control of the courts. Such a change to the Constitution is therefore not recommended.

#### *Interpretation*

- 3.40 In the final Section (23), the Commission considers a few issues relating to the interpretation of the Constitution. In order to correct the anomaly of the application of the 1967 *Interpretation and General Clauses Act* to the Constitution, it is recommended

that article 137(A) be amended to remove the application of that Act. Further, the much decried general savings law clauses (article 30), which has had such a stultifying effect on the approach to interpretation of fundamental rights, ought to be deleted from the Constitution, although this should prompt a general overview of all pre-independence laws for constitutional conformity. However, it is recommended that the partial savings law clause at 17(2) be retained at this point, if only to head off any potential constitutional challenges to the method of enforcing the death penalty.

### *Priorities for Reform*

3.41 The Commission rounds off its executive summary by highlighting those areas which warrant urgent reform. The Commission does not treat the selection of these issues as a simple function of the level of public support which they commanded. For example, the Commission does not recommend the replacement of the Privy Council as the final Court of Appeal at this moment, (for reasons given in the body of the Report) notwithstanding the large public support it attracted.

3.42 Those areas which the Commission would advocate as imperatives for reform, listed in descending order of priority, and which require articulation in the constitutional text are as follows:

- **The amendment of the citizenship provisions to achieve gender-neutrality and full equality between men and women with respect to the acquisition or transmission of their nationality.**
- **The expansion of the definition of discrimination in Article 26 to include “sex” as a prohibited ground.**
- **The creation of a constitutionally and operationally autonomous Director of Public Prosecutions with control over public prosecutions.**
- **The creation of an independent and constitutionally secure Election and Boundaries Commission, with responsibility for the conduct of elections and reviewing the boundaries of constituencies.**



3.43 Other changes or administrative actions which the Commission recommends for fast-tracking but which can be accomplished by ordinary legislation or executive action are as follows:

- **The establishment of a Working Group or Commission on Citizenship and Nationality to consider further questions relating to nationality, citizenship and status in The Bahamas, with a view to preparing recommendations for constitutional and other reforms that may be required.**
- **The establishment of the public office of an Ombudsman or Complaints Commissioner.**
- **The reformulation of the Oath of Allegiance to pledge allegiance to The Constitution of the Commonwealth of The Bahamas.**
- **Provision of a system of public defenders as well as a suitable system for the provision of Legal Aid.**

## SECTION 4:

### Listing of Recommendations

#### Enactment of the Constitution

1. The Commission recommends that no change should be made to the method of the enactment of the Constitution at this point, especially having regard to the very limited number of constitutional amendments proposed. So called ‘patriation’ would be of symbolic value only and necessitate a costly (and uncertain) referendum, as the wholesale repeal and re-enactment of the Constitution would require the observance of all the entrenchment devices. When the time comes to consider more fundamental changes—what the Commission describes as the meta-constitutional issues—then it would be appropriate to consider the question of enacting a new Constitution.

#### The Preamble

2. The Commission recommends that the Preamble be retained in its current form and that no amendments be made to its content at the present time. The Commission considers the preamble to be of “inestimable historical and symbolic value”—to adopt the formulation of the Adderley-Tynes Commission—and while non-justiciable it may currently represent the most indigenous feature of the Constitution. Any perceived deficiencies might be met by the inclusion of directive principles of State.

#### General Constitutional Features

3. The Constitution (or alternatively an Act of Parliament) should declare the relationship between international and domestic law, and in particular specify the roles of the Executive and Parliament in relation to the negotiation, signature and ratification of

treaties, and their transformation into domestic law. On balance, the Commission feels that an ordinary Act of Parliament might be the preferable option.

4. The Commission recommends that the existing system of entrenchment of the most important provisions of the Constitution should be retained, except that there should be a uniform parliamentary majority of  $\frac{3}{4}$  plus the referendum for altering any of these provisions. However, the other entrenched provisions that relate to executive or administrative functions need only be secured by a parliamentary majority of  $\frac{3}{4}$  and should not be encumbered by a referendum requirement.

#### **Founding Provisions**

5. The Commission recommends that the supreme law clause, as the basis for the review of the constitutionality of legislation, should be strengthened by providing for a 'Constitutional Court' (constituted by the Chief Justice and at least one other justice) to hear complex constitutional questions arising on magisterial references, as well as constitutional questions referred by the Attorney General. This does not require any alteration to the Constitution, but a change to the *Supreme Court Act* or Rules of Court. There should also be a provision for universal review by the citizen (i.e., on non-Bill-of-Rights clauses), subject to persons establishing that they have a sufficient interest to bring the action.
6. A declaration of the land and sea areas of The Bahamas should be a part of the Constitution, with further details contained in a schedule. That schedule should be amenable to amendment by the Governor-General by Order to take account of any delimitations in maritime boundaries that may be concluded between The Bahamas and neighbouring states.
7. The principal national symbols and essentials of national identity (coat-of-arms, national anthem, national flag, pledge of allegiance) should be referred to in the Constitution, and displayed in a schedule to the Constitution.

8. The Constitution should declare English as the official language of The Bahamas

### **Citizenship**

9. The Commission recommends that all of the Articles of the Constitution which provide for the acquisition of citizenship based on birth, descent, or marriage should be recast in gender-neutral language (by means of appropriate drafting formulae), with the goal of putting Bahamian men and women on an equal footing with respect to the acquisition and transmission of nationality.
10. Article 14(1), which erects the common law rule of *filius nullius*, (child of no father) should be deleted to remove any difference in treatment attributable to the marital status of the parent. This may necessitate a review of other pieces of legislation for constitutional conformity as a result of this amendment.
11. Bahamian men and women should have the equal ability to transmit citizenship to their foreign spouses under Article 10, except that there should be provisions (preferably in the Nationality and Immigration Acts) to guard against marriages of convenience.
12. With respect to the position of children born in The Bahamas after Independence neither of whose parents is a Bahamian (Article 7), the Commission recommends that this be the subject of further study, for the reasons set out in the body of the Report. To achieve this, the Commission recommends the appointment of a commission to consider further questions relating to nationality and the basis on which nationality should be acquired by children born in The Bahamas to non-Bahamian parents.
13. Moreover, it would recommend that the principles set out below in the body of the Report (at paragraph 14.51) could guide the approach.
14. Appropriate amendments should also be included to ensure that those persons born to Bahamians outside The Bahamas as well as persons born to non-Bahamians in The Bahamas would not be rendered stateless. The ability of a Bahamian father or mother to

transmit their citizenship to their children born overseas should be a right not conditioned on how the parent acquired citizenship. Thus, the proviso to article 8 "...otherwise that by virtue of this Article or Article 3(2) of this Constitution" should be deleted.

15. Consideration should be given to deleting the procedural temporal requirement at both Article 7 to apply within 12 months after attaining the age of 18 and in Article 9 to apply after 18 but before 21 to be registered, for the reasons given in the body of the Report. In any event, the appropriate amendment to Article 8 to make it applicable to both men and women would eliminate the need for Article 9.
16. The situation described under Article 6, which provides for children born in The Bahamas to acquire citizenship if either parent is Bahamian, while not discriminatory on its face, has been interpreted by the courts in a way that discriminates against men. The solution would be to repeal sub-paragraph 1 of Article 14 (which assimilates the father of a child born out of wedlock to the status of the mother), and therefore the Courts would be required to give full effect to the natural meaning of "either parent" in Article 6 (subject to proof of paternity in the case of men). The Commission recommends the deletion of sub-paragraph 1 of Article 14.
17. The position with respect to dual citizenship or nationality should be stated, and in particular persons who are eligible for Bahamian citizenship should not be denied registration simply because they possess another nationality. Renunciation of another citizenship should also not be made a condition-precedent to the grant of citizenship. However, a register should be retained of Bahamian citizens with dual nationality.
18. The Minister's discretion to refuse a request for registration, which under section 16 of The Bahamas *Nationality Act* is declared to be non-reviewable, should be subject to review by the Courts.
19. There should also be a statutory, independent Immigration Board or Committee with the responsibility to consider applications for citizenship and asylum requests, and make

recommendations. These should be ratified by Cabinet unless there are substantial policy or national security considerations to override the recommendations.

20. A proviso should be added to Article 7, along the lines suggested below, to exclude any nationality entitlement arising in respect of children born to foreign diplomats serving in The Bahamas: “Provided that a person shall not be entitled to be registered as a citizen of The Bahamas by virtue of this provision if neither of his parents is a citizen of The Bahamas and his mother or father possesses such immunity from suit and legal process as is accorded the envoy of a foreign sovereign power accredited to The Bahamas”

### **Fundamental Rights**

21. The Commission recommends that the constitutional right to trial by jury when charged with an indictable offence be dis-entrenched, and trial without jury should be available under circumstances prescribed by law.
22. Consideration should be given to expanding Article 23 to expressly include a reference to freedom of the press and the media.
23. Article 24, which grants a right of “protection of freedom of assembly and association”, should be expanded to constitutionalize the right to vote in general (and local) elections and referenda.
24. The Commission recommends that “sex” be included in the definition of “discriminatory” in Article 26(3) as one of the prohibited grounds of discrimination.
25. As a corollary to the recommendation at 24, the Commission also proposes that an amendment be made to Article 26(4) to provide that no law which makes provisions prohibiting same-sex marriage or which provides for such marriages to be unlawful or void shall be held to be inconsistent with the Constitution.

26. While it is essential for the protection of human dignity that all vulnerable groups be protected from discrimination, we do not think this necessarily requires expanding the list of grounds of discrimination in Article 26. Such protection could be accomplished effectively by providing for specific, limited protection under ordinary legislation (i.e., the *Employment Act, Disabilities (Bill)*).
27. Social and economic rights should be acknowledged in the Constitution in a way that does not make them enforceable, but imposes a moral and political obligation on the state to pursue such goals for the general welfare.
28. Article 29 of the Constitution dealing with declarations of emergency should be amended to amplify the circumstances in which a proclamation should be made and to provide for the geographical limitation of such a declaration. The Commission also recommends that there should be a procedure, such as that contained under the 1969 Constitution, for an impartial and independent tribunal established by law and presided over by the Chief Justice to review emergency detentions.
29. An amendment should be made to the Constitution to enable the implementation of the death penalty in appropriate cases, by precluding constitutional challenges based on criteria developed in the case law.

### **Environmental Rights**

30. The Commission recommends that the Constitution should recognize a right to environmental protection in general terms, although more specific provisions for environmental protection should be left to primary and secondary legislation, such as an Environmental Protection or Management Act.
31. Further, the Commission is aware that there is a draft *Environmental Protection Act*, which apparently has been under consideration for several years, and which is specifically intended to address most of the environmental concerns articulated. The

Government is urged to take the necessary steps to engage in public consultation on the Bill before introduction in Parliament for debate and eventual enactment, and to treat this as a matter of high priority.

### **The Governor-General/Head-of-State**

- 32.** The Commission does not at this time recommend that there should be any change in the Queen as the Head of State and the Office of Governor-General as the representative of the Queen under a constitutional monarchy. However, the Government should embark on a process of public education to prepare the public for a possible change to a republican form of Government at some point in the future. Should such a change be made, it would require amendments to the Constitution providing for a non-executive national President, as Head-of-State, to discharge the functions formerly vested in the Governor General, with the Prime Minister and Cabinet continuing to exercise executive powers.
- 33.** The provision of the Constitution which permits the Chief Justice and the President of the Senate to serve as acting Governor-General should be deleted to avoid potential conflicts of interest. Deputies should be appointed from among eminent citizens or retired parliamentarians to fill any vacancies in this office (as is already provided for in the Constitution).
- 34.** The Commission does not recommend the appointment of a standing Deputy Governor General, as there has been no indication that the appointment of deputies does not work well in practice. In any event, this would lead to duplication of public officers, with the attendant increase in administrative costs and bureaucracy.
- 35.** The oath of the Governor-General and those of the Prime Minister and Cabinet Ministers, Judges and other senior officials should be changed to include a declaration of allegiance to the Constitution and people of the Commonwealth of The Bahamas.



36. To remove all doubt it should be declared that the Governor General (Head of State) shall be a Bahamian citizen.

### **Parliament**

37. The Commission does not recommend the abolition of the Senate, as was called for by a number of contributors. On the contrary, the Commission recommends the enlargement of the composition of the Senate and the manner in which senators are appointed to make it a more representative body, while ensuring the Government always maintains the majority necessary to achieve its legislative agenda.
38. The number of senators should be increased to allow for representation based on geographical considerations and other interests.
39. With respect to changing the age requirement for the Senate, the Commission recommends that the qualifying age limit of 30 be retained, based on a vote of the majority of the members.
40. The Commission does not recommend the change of the electoral system to a mixed system of first-past-the post and proportional representation in the House of Assembly (a mixed-member proportional model (MMP)), as the experience of other countries does not indicate any huge democratic dividends over the first-past-the-post system
41. The Commission does not recommend that any limitations be placed on the privileges and immunities of members of the House of Assembly and Senate. However, citizens who are the subject of any unwarranted personal attacks should have the right to respond from the Bar of either House.
42. The Constitution should be amended to create a truly independent Electoral and Boundaries Commission, with constitutional autonomy and protection similar to the other service Commissions, which would replace the Constituencies Commission and assume

responsibility for the conduct and regulation of elections. Judges, parliamentarians and public officers should be ineligible for service.

43. The office currently styled Parliamentary Commissioner should be transformed into a Chief Electoral Officer, who should be *ex officio* a member of the Commission.
44. The Commission recommends that Parliament make laws for the establishment, regulation, and funding of political parties, to ensure transparency and accountability, which should also come under the superintendence of the Electoral and Boundaries Commission.
45. Consideration should be given to the establishment of a mechanism for Members of Parliament to be accountable to their constituents for the performance of their duties and accountable to Parliament with respect to their conduct and personal integrity (the latter extending to senior public servants). There should be agencies (such as an Integrity Commission) to investigate and take actions against parliamentarians who clearly fail to perform their duties, or violate the trust and ethics of their office.
46. The power of the Prime Minister to effectively dissolve Parliament at any time in the run-up to general elections should be modified by a procedure which requires that the Prime Minister give at least nine months' notice before calling a general election.
47. The Commission does not recommend that the procedure for determining the member who commands the support of the majority of a party in the House (or the majority of those in opposition to the Government) should be codified. This is a matter that should continue to operate as a constitutional convention.
48. The office of Clerk to Parliament and Deputy Clerk, with responsibility for the Senate, should be established by the Constitution as public offices, independent of the Executive.

The Commission also recommends the establishment of the Office of Chief Parliamentary Counsel, responsible for drafting of legislation and advising the Speaker of the House on the rules regarding the enactment of legislation.

### **Executive Powers**

49. The Commission recommends that there should be a limit on the size of Cabinet, and would suggest that the upper limit should be 15. It also makes the point that it does not seem to be the intention of Article 72(2) that every minister should be a member of the Cabinet although the historical practice in The Bahamas has always been to treat ministers as automatic members of the cabinet.
50. The Commission recommends the establishment of a number of standing parliamentary committees empowered to have oversight of various aspects of government affairs and to act as a check on the powers of the Executive.
51. The Commission recommends that the powers of appointment of the Prime Minister be reduced by transferring some of those powers to the Governor-General in his or her own right, or to other permanent commissions whose independence and security of tenure members are already secured by the Constitution.
52. Limits should be placed on the number of MPs and Senators who could be appointed as Parliamentary Secretaries (pursuant to article 81 of the Constitution) and Ministers of State (junior ministers). The potentially overlapping roles of Parliamentary Secretaries and junior ministers should also be clarified. As it stands, there is no constitutional provision which speaks to the appointment of junior ministers.
53. The Commission does not recommend placing any term limits on the tenure of the Prime Minister.
54. The Commission supports the recommendation to remove the responsibility for criminal prosecutions from a political Attorney General and transfer it to a Director of Public

Prosecutions with constitutional autonomy and independence in respect of prosecutions. Further, the proposed amendment creating the office of the DPP should be entrenched.

55. The Commission recommends the creation of the Office of Public Defender. This should be complemented with a suitable legal aid system. Both of these initiatives, however, could be accomplished by ordinary legislation.
56. The Commission recommends that local government be given constitutional recognition. A specific part of the Chapter on the Executive should set out the system of local government, assign the responsibilities between central and local government, and grant a greater degree of autonomy.

#### **Judicature**

57. The Commission agrees that the necessary steps should be taken to correct the anomalies in the Court structure with regard to the rebranding of the Supreme Court as the High Court, which along with the Court of Appeal would come under a Supreme Court of Judicature presided over by the Chief Justice as head of the judiciary.
58. The Commission recommends retaining the existing retirement age for Justices of the Supreme Court and Court of Appeal (respectively 65 and 68) but of making these an optional retirement age and raising the mandatory retirement age to 70 and 72 respectively, with no possibility for extension.
59. The Commission recommends that both the Chief Justice and President of the Court of Appeal should always be Bahamians (as indeed they presently are).
60. The Commission recommends that the provisions dealing with the appointment of magistrates should be dealt with in the Constitution under the Chapter on the Judicature. The magistracy should also be given a form of protection of tenure, not the same as superior court judges, but sufficient to achieve a constitutional guarantee of independence.

61. The Commission does not recommend the abolition of appeals to the Judicial Committee of the Privy Council at this time. But it sees this as an inevitable event that must take place at some determined time in the future in the continuing journey towards full sovereignty. We must also be cognizant that the imperative for this change might be driven by changes emanating from within the United Kingdom.

62. The Commission does not recommend the elevation of the Industrial Tribunal into a branch of the Supreme Court. However, administratively, it should be placed under the Judicature and removed from the Department of Labour, and some form of tenure given to the President and Members.

#### **The Public Service**

63. The Commission does not support the establishment of a separate Teaching Service Commission. It recommends instead the enlarging of the Public Service Commission and setting up divisions or sections to deal with specific sectors of the public service (e.g., Teaching Service Section). The specialist Commissions (Judicial and Legal Services Commission, Police Service Commission) should be retained, subject to the suggestion in respect of the Police Service Commission.

64. The Commission recommends that consideration be given to reconstituting the Police Service Commission into a Security Commission, which will be responsible for the Police (Fire Services) and the Prison Service. This will ease some of the burden on the Public Service Commission and allow it to devote additional resources to categories such as teachers.

65. The Commission recommends that the Royal Bahamas Defence Force, which is a military organization, continues to be governed by its Act and Regulations for the time being, and remain under the administrative control of the National Security Council.

66. The Commission recommends the establishment of the Office of Ombudsman, but it is not of the opinion that this Office needs to be a constitutional one and can be created by statute.
67. The Commission recommends the establishment of the office of Contractor General as a public office, with security of tenure, along the lines of the Auditor General. Such a person would be responsible for overseeing the award of Government contracts and ensuring that public funds are expended fairly and that value is received for money expended.

### **Finance**

68. The independence of the Office of the Auditor General should be strengthened by making provisions for the independent funding of that office out of the Consolidated Fund and for the appointment and control of the staff of the Auditor General's Office to be vested in the occupier of that office.
69. The Public Accounts Committee should be elevated to direct Constitutional standing by enshrining that body and its mandate in the Constitution. The Constitution should also declare the relationship of this body with the Auditor General.
70. Article 136(6) should be amended to provide for the accounts of the Auditor General's Department to be audited by an independent firm, appointed by the Minister in consultation with the Public Accounts Committee.
71. The Commission does not recommend including a clause in the Constitution requiring the Government to maintain a balanced budget.

### **Interpretation**

72. A. 137(13) should be amended to remove the application of the *Interpretation Act* of 1967 to the interpretation of the Constitution. Provision should be made simply for

regard to be had to the current *Interpretation and General Clauses Act* and for the Constitution to be interpreted in its own right.

- 73.** The general savings law clause at Article 30 should be deleted. However, the partial savings clause at Article 17(2) should be retained to head off any possible constitutional challenges to the manner of implementing the death penalty (by hanging).

**PART III:**  
**CONSTITUTIONAL BACKGROUND**

**SECTION 5:**

**Historical and Constitutional Background**

**Early beginnings**

- 5.1 Discovered in 1492 by the Spanish, The Bahamas remained uninhabited for more than a century following the decimation of the native Arawak Indians by the Spanish explorers. It was re-peopled by British settlers from Bermuda in 1647 and England, and loyalists from the American colonies in 1783 and the ensuing years.
  
- 5.2 The British connection with The Bahamas began in 1629, when King Charles I of England granted the islands to Sir Robert Heath by royal charter. Of the early British settlers, the most notable was a group called the Eleutheran Adventurers. Seeking religious freedom, they established a colony at Eleuthera in 1647, and made the first systematic attempt at colonization and development of the islands. As a consequence of the relatively continuous settlement by British subjects—despite brief periods of interruption and challenge by Spanish, French and even American forces between 1680 and 1783—The Bahamas became a British colony.
  
- 5.3 In 1670, by way of another royal grant, the islands were ceded to six Lord Proprietors of Carolina. Thirteen Proprietary Governors were appointed between 1671 and 1715. It should be noted that during the Age of Discovery (16<sup>th</sup>-17<sup>th</sup> century), European powers frequently made such grants, by way of patents, to individuals or companies for the purpose of administering and governing colonies on their behalf.



5.4 Under the Lord Proprietorship system, a regular system of government was established. This featured a parliament, an elective House, and a Governor appointed by the Lords Proprietor. This system continued until 1717, when the government of the islands was resumed by the Crown under Woodes Rogers, the first in a line of British Governors. It bears noting, however, that an assembly, in one form or another, has sat in The Bahamas almost continuously since the late 1600's, well prior to the advent of Woodes Rogers

### **The “Old Representative System”**

5.5 The Bahamian House of Assembly met for the first time on the 29<sup>th</sup> September 1729, making it the third oldest Assembly in the Western Hemisphere—after Bermuda (1627) and Barbados (1639).

5.6 From this point and throughout most of its colonial history, The Bahamas had the old system of “representative government”, which existed in many of the Crown colonies. Under this system, executive government was vested in a Royal Governor, appointed by the Crown. There were two bodies which composed the Legislature: an elected Assembly (equivalent to the House of Commons in England) and the Council (loosely modelled on the English House of Lords), which had legislative and executive functions but served in the main as the Governor's advisory body). The Council was largely composed of official members appointed by the Governor. The Assembly, on the other hand, was an elective body with 29 members, although this was increased to 33 in 1960.

5.7 Although the power to enact subsidiary legislation was vested by law in the Governor, he had no control over the activities of the Legislature, except for the power to “veto” laws and the power to remove certain laws from the books (the so-called power of ‘disallowment’) which was usually only exercised at the direction of the Secretary of State for the Colonies in England. The Queen's constituent power (the power to establish, amend or revoke constitutions) was exercised through the Governor by Letters Patent and Royal Instructions. For example, The Bahamas Letters Patent dated 8 September 1909 made provision for the re-constitution of the Council into two separate

councils: a Legislative Council (with law-making functions) and an Executive Council (which remained the Governor's advisory body but was also in many respects the forerunner to the modern day cabinet).

### **Constitutional Development**

- 5.8 The formal constitutional history of The Bahamas may be traced back to the 1729 constitution formalized under the Governorship of Woodes Rogers. However, The Bahamas entered the modern era in its constitutional development in 1964, when a new Constitution providing for internal self-government took effect. The new constitution was made by Order in Council under *The Bahamas Islands (Constitution) Act, 1963*, following a constitutional conference held in the United Kingdom in May 1963. In addition to providing for a ministerial system of government, it also established the principle that before any Order in Council to revoke or amend the Constitution was made, the Government of the day in The Bahamas would be consulted in advance with a view to giving reasonable notice to the Legislature. If the proposed changes were major, another representative Conference would be called.
- 5.9 The 1964 Constitution gave executive responsibility to those local representatives who controlled a majority in the House of Assembly. The bicameral Legislature (formerly an executive and legislative council) was reconstituted into an Upper House (Senate), which consisted of 16 appointed members and a Lower House (the House of Assembly), whose 38 members were elected under universal adult suffrage. Executive control was vested in the Cabinet, which consisted of a Premier and at least eight other members. The remaining members were appointed by the Governor on the advice of the Premier. Following British constitutional convention, the Governor appointed as Premier the person best able to command the majority of members of the House.
- 5.10 The Governor himself held certain executive powers of great importance, including power over external affairs, defence, internal security and the control of the police. On other matters he acted on the advice of Ministers. He was assisted in his duties by a

Chief Secretary (or Colonial Secretary), who was the Governor's right-hand man and normally succeeded to the duties of administration in the Governor's absence being styled "Administrator" during such periods.

5.11 While the new constitution wrought significant legal changes, the internal affairs of The Bahamas had been dominated for many years by the United Bahamian Party (UBP), controlled by a minority class of white merchants and professionals. In January 1967, the Progressive Liberal Party (PLP), which had been the official opposition to the United Bahamian Party for several years, assumed the government, under the leadership of Sir Lynden Pindling. Both parties actually won 18 seats, but the PLP obtained the majority after Sir Randol Fawkes, the Leader of the Labour Party, joined their ranks. At subsequent elections held on 10<sup>th</sup> April 1968, the PLP won 29 seats to the UBP's seven, consolidating its position as the ruling party.

5.12 Further modifications were made to the Constitution at a Constitutional Conference in September 1968, which were incorporated in the *Bahama Islands (Constitution) Order 1969*. These changes brought The Bahamas one step closer to independence. This 1969 Constitution provided for the following: the appointment of a Governor General to represent the Queen; the retention of the Cabinet system, consisting now of a 'Prime Minister' and not less than eight ministers; the retention of a bicameral legislature; and the expansion of the senate to 16 members. However, the conduct of foreign affairs, defence and internal security remained in the Governor's hands, although he was required to consult a security council of Bahamian ministers.

### **The Road to Independence**

5.13 Independence, and the new constitution that came with it, was not a sudden achievement. It evolved with the gradual relinquishing of the powers of the United Kingdom Government through successive constitutions (1964 and 1969 and then, of course, the 1973 Independence Order).

5.14 Proposals for Independence were presented by the Pindling Government to Parliament in 1972 in the form of a Green Paper which, in addition to setting out proposals for the constitutional document, set out principles for the “orderly development” of the new country. The question of early Independence was a major platform issue during the 1972 election, in which the PLP won 29 of the 38 seats. The remaining nine seats were won by the comparatively new opposition party, the Free National Movement (FNM). Following debate on a Government White Paper, both Houses of Parliament passed a unanimous resolution supporting a move to Independence in 1973. Pursuant to this goal, a Conference met in London from 12<sup>th</sup> to 20<sup>th</sup> December 1972. In addition to fixing a date for Independence, the Conference agreed the principles that were to form the basis of the Independence constitution. The Bahamas became independent on 10<sup>th</sup> July 1973, ending over 300 years of British rule.

## Section 6:

### The Existing Constitutional System

- 6.1 The following section is intended only to provide a snapshot of the constitutional system. Several of the features are elaborated on further in this Report
- 6.2 The current Constitution of The Bahamas is derived from *The Bahamas Independence Order* (Great Britain S.I. 1973, No. 1080), made by the Queen's Most Excellent Majesty in Council on the 20<sup>th</sup> June 1973, which entered into force on 10<sup>th</sup> July 1973. It was made under the authority of the *Bahama Islands (Constitution) Act 1963*. The Constitution itself is contained in a Schedule to the Order in Council (which is an order made by the Sovereign). It bears noting that The Bahamas gained its independence not by the Constitution but rather by an Act of the UK Parliament (*The Bahamas Independence Act 1973*). That Act provided that after 10<sup>th</sup> July 1973, Her Majesty's Government would no longer have responsibility for The Bahamas, which was to have full responsible status within the Commonwealth.
- 6.3 The Constitutional system of The Bahamas is a monarchy (or more accurately a *constitutional* monarchy), with Her Majesty the Queen as Head of State and the Sovereign. This monarchical model creates a mainly ceremonial head of state and an executive head of government, the Prime Minister. The system of government established is the Westminster system of parliamentary democracy which basically requires that only persons who are members of the legislature (the Senate or House of Assembly) may be appointed to ministerial office.

#### Structure of the Constitutional Document

- 6.4 The Bahamas Constitution, like many of the Constitutions of the Commonwealth Caribbean, follows a set pattern. It begins, after a Preamble, by establishing the state and

declaring the constitution as the supreme law. Then, there is a chapter which deals with how citizenship is determined, and another which defines fundamental rights and freedoms of the individual. Another chapter sets out how government is to be organized, and makes provisions for the various organs of government, including the office of the Governor General, the Executive (i.e., ministers and cabinet), the Legislature and Judicature. These are followed by provisions for the Public Service, finance and miscellaneous matters (e.g., interpretation). Finally, there are provisions which ensure that only the less important of the constitutional provisions can be altered by the ordinary legislative process.

### **Head of State**

6.5 In The Bahamas, the Queen is the titular Head of State, and the executive authority of the state is vested in Her Majesty. Because the Queen is physically located in England, to fulfil her role in the constitutional monarchies in which she is Head of State, she is represented by a Governor-General. The Constitution provides that executive authority may be exercised on behalf of Her Majesty by the Governor General, either directly or through officers subordinate to him. In reality, this means that executive power is exercised by the Prime Minister and Cabinet. Though formally appointed by Her Majesty, the Governor-General is in reality appointed on the advice of the Prime Minister, and serves during “Her Majesty’s pleasure”, a euphemism for being legally removable at will (on the advice of the Prime Minister).

### **Parliament**

6.6 The Bahamas has a bicameral Legislature, which means it is made up of two chambers, a nominated or appointed Senate (the upper chamber) and an elected House of Assembly (the lower chamber). Although it is common to speak of Parliament as if it consisted of the two Houses only, strictly speaking Parliament consists of Her Majesty the Queen, whose representative is the Governor General, and the two Houses. Indeed the Royal

Assent (under the hand and seal of the Governor-General) is the final component of the legislative process once a bill has passed both houses of Parliament.

- 6.7 The Senate, or Upper House, consists of 16 members appointed by the Governor General as follows: nine on the advice of the Prime Minister, four on the advice of the Leader of the Opposition and three on the advice of the Prime Minister after consultation with the Leader of the Opposition. It is notable that in the appointment of the three senators on consultation, the Prime Minister is to ensure that the political balance of the Senate reflects that of the House. Thus, the idea that there are “independent” senators is essentially misconceived.
- 6.8 The Constitution provides for the House of Assembly to have at least 38 members, though this number may be increased on the recommendation of the Constituencies Commission, which will at intervals of not more than five years, review the number of boundaries of the constituencies into which The Bahamas is divided. The membership was increased from 38 to 43 in 1982, to 49 in 1992, reduced to 41 in 2007 and further reduced to 38 in 2012. Members of Parliament are elected on the first-past-the-post system by secret ballot under universal adult suffrage.

### **The Prime Minister and Cabinet**

- 6.9 The Prime Minister is appointed by the Governor-General, as “the member of the House of Assembly who is the leader of the *party* which command the support of the majority of the members of that House”, or where no party has a majority, the person who is likely to command the support of the majority of that House. The Prime Minister chooses his Cabinet mainly from the House of Assembly, and may include three persons from the Senate (where one of three is the Attorney General). The Attorney General is both a member of the political executive and the person responsible for all criminal prosecutions in the country.

## **The Judicature**

- 6.10 The provisions dealing with the legal system establish mainly a three-tier system—a Supreme Court, a Court of Appeal and the Judicial Committee of the Privy Council as a court of final appeal. The remuneration of Justices of the Court of Appeal and the Supreme Court is a charge on the Consolidated Fund and cannot be diminished while they are in office. The Chief Justice and Justices of the Court of Appeal are appointed by the Governor-General on the advice of the Prime Minister after consultation with the Leader of the Opposition. All of the other justices are appointed by the Governor-General on the advice of the Judicial and Legal Services Commission. Judges serve until they reach the relevant mandatory retirement age or the prescribed extension, and may only be removed from office for misbehavior or inability to perform the functions of their Office, following a process that includes referral to the Privy Council.
- 6.11 The remaining tier of the Judiciary is the magistracy, which constitutes the first and basic level of the courts, although it is accorded no place in the Constitution. Its members are appointed by the Governor-General on the advice of the Judicial and Legal Services Commission. They serve “at pleasure” which means they lack security of tenure and may be removed for cause (similar to other public servants). However, the position of magistrates is not addressed by the Constitution. Instead, it is regulated by the *Magistrate’s Act*.

## **The Public Service**

- 6.12 This chapter contains detailed provisions dealing with public officers, and attempts to ensure impartiality in their appointment and the protection of their tenure in office. This is achieved by the establishment of several permanent service commissions to carry out functions relating to particular areas of the public service: (i) the Public Service Commission (for the wider public service); (ii) the Judicial and Legal Service Commission (for public legal officers, judges and magistrates); and (iii) the Police



Service Commission (for the Police Force). The power to appoint, discipline and remove public officers is wielded by the relevant service commissions.

## Section 7:

### Background to Constitutional Reform

#### Regional Initiatives

7.1 As far as constitutional reform goes, The Bahamas is following in the footsteps of several of its Caribbean neighbours who have either completed such reforms or are currently engaged in the process. In two Caribbean countries, these reforms have resulted in the replacement of their monarchical constitutions with republican forms—Trinidad and Tobago (1976) and Guyana (1980). In 1991, Jamaica set up a Joint Select Committee on Constitutional and Electoral Reform to report to the Government; in 1996 a Constitutional Review Commission was appointed in Barbados. Similar exercises have taken place in several of the other Caribbean nation-states, including Antigua & Barbuda (1999), Grenada (2003), St. Vincent and the Grenadines (2002), Guyana (1999); Belize (1999); St. Lucia (2005).<sup>3</sup>

#### *Political Platform Promises*

7.2 Not surprisingly, the impetus for constitutional reform in The Bahamas has come from within the political parties. These recommendations are extracted here to record the recommendations for reform that have been made, and to illustrate that the issue of constitutional reform has been agitated as part of the political agenda long before any Commission was actually established to formally consider the matter.

#### *FNM Initiatives*

7.3 The Free National Movement (FNM) hinted at constitutional reform in its *Manifesto '92* with respect to certain proposals for Parliament and elections, but the issue was addressed frontally in the 1997 Manifesto. In that Manifesto (*Manifesto II: Agenda to and for the 21<sup>st</sup> Century*), the FNM promised to undertake a Constitutional Review during its second term in office to: “Cause to be appointed, after consultation with the Official Opposition,

a broad-based non-partisan Constitutional Review Committee, comprising distinguished persons, to review the Constitution and to make recommendations.” The FNM also made specific proposals for Constitutional reform, which are extracted at **Appendix IX**.<sup>4</sup>

- 7.4 Although the Constitutional Review Committee was never appointed, the FNM Government in 2002 nonetheless introduced a series of proposed constitutional amendment Acts, most of which foundered at the stage of referendum.

#### *PLP Platform*

- 7.5 In its 2002 platform “Our Plan: Platform 2002”, the Progressive Liberal Party (PLP), as one of its eight major pledges, promised to establish a bi-partisan constitutional commission to spearhead constitutional reform on the basis of widespread consultation with the Bahamian people. Some of the areas the PLP proposed for consideration for reform are at **Appendix IX**.

#### **Other Political Parties**

##### *Coalition + Labour*

- 7.6 In its “Contract 2002”, the Coalition + Labour party listed as one of its objectives, the amendment of the Constitution to “bring about a more fair and just society” and to create equity between the three branches of government (**Appendix IX**).

##### *Bahamian Democratic Movement*

- 7.7 As one of its ten ‘covenants’ with the Bahamian people, the Bahamian Democratic Movement promised to “implement a new constitutional order in The Bahamas, by revising and reforming the existing one.” Although the BDM did not offer any specific proposals for constitutional reform, it did so indirectly by outlining several ideas for

parliamentary reform. The primary thrust of these recommendations was to increase the accountability of parliamentarians (see **Appendix IX**).

### **The ‘Adderley-Tynes’ Commission**

7.8 The *Adderley-Tynes* Commission was appointed on the 23<sup>rd</sup> December 2002, and was co-chaired by the late Hon. Paul Adderley and Harvey Tynes, QC. It consisted of a membership of 22 persons, drawn from civil society and the legal fraternity. Significant accomplishments of the Commission were the publication of the information booklet “*Options for Change*” and the “*Preliminary Report & Provisional Recommendations*” (referred to above), produced after extensive public consultation.

#### *Mandate*

7.9 The broad mandate of that Commission was “To carry out a comprehensive review of the Constitution of The Bahamas and related consequential amendments to other laws where necessary and the method of adopting and amending the new Constitution”. The specific terms of reference were to examine the Constitution with a view to considering amendments to make provision for the following:

- “(a) to strengthen the human rights and fundamental freedoms provisions of the Constitution and the civil and political rights of the individual;
- (b) to retain the Westminster Model System of Parliamentary Democracy together with maintaining democratic institutions such as Parliament and multi-party democracy, and make recommendations as to the structure of Executive Authority for The Bahamas that is best suited to protect the independence and authority of Parliament and the rights and freedom of the citizen;
- (c) to examine the structure and functions of Parliamentary institutions in order to ensure the transparency and accountability in the expenditure of public funds; the retention or otherwise of the Senate in its present form and to examine the alternative methods of determining the composition of Parliament; and
- (d) To devise means of ensuring the independence of the Judiciary [and] administration of the Executive functions of the Government.”

7.10 The Commission was allocated a two-year term in which to conduct the review and provide a preliminary report. This was to be followed by a second period of consultation before the presentation of a finalized report. The Commission commenced its work in January of 2003, and submitted its Preliminary Report in 2006. A second round of consultation was to follow before the presentation of the final report. However, the Commission never completed the proposed final round of consultations, nor was a final report ever presented.

### **The present Commission**

7.11 The process leading to the appointment of the current Constitutional Commission has been described above. Its mandate and terms of reference may be discerned from the transmittal letter under which this report is submitted and the Prime Minister's communication announcing the Commission, at **Appendix I**.

## Section 8:

### Post-independence amendments & 2002 Constitutional Referendum

8.1 The Constitution of The Bahamas has remained virtually unaltered in the now 40 years of its existence. The only amendments to date have been minor, such as the change in the definition of “financial year” brought about by the *Financial Administration and Audit (Amendment) Act 1992* (No. 43 of 1992). This changed the definition of financial year from the calendar year beginning on the 1<sup>st</sup> January (art. 130(7) (a)) to a period beginning on the 1<sup>st</sup> July in any year. Other changes include several revisions to the numerical composition of the House of Assembly—as provided for by order of the Governor General under Art 46<sup>5</sup>—and changes to subsidiary legislation under the Constitution. Needless to say, all these changes related to non-entrenched provisions of the Constitution and thus did not require a referendum.

#### *2002 Constitutional Referendum Process*

8.2 More substantive amendments were proposed just prior to the general elections of 2002, when a compendium of Bills to amend the Constitution were tabled and passed in both Houses with the requisite Parliamentary majorities but failed to attain the required majority at the ensuing referendum and therefore never became law. Nevertheless, several of the proposed amendments to the Constitution were printed in the consolidated text of the Constitution in the 2000 Revised Edition of the Statute Laws<sup>6</sup> and erroneously represented as being in force.<sup>7</sup> The amendments were subsequently removed from the Statute Laws under the authority of section 6A of the *Law Reform and Revision Act* (Ch. 3).

8.3 Each of the Bills was described in its long title as “A Bill to Amend the Constitution of The Bahamas”, but they are referenced here below by their short titles, which referred to their intended status as “Acts”. A short description of each follows:

- (1) *The Bahamas Constitution (Amendment) Act, 2001*. This Act sought to remove the discriminatory provisions from the citizenship provisions in respect of women, and to include “gender” as a prohibited ground of discrimination in Article 26.
- (2) *The Bahamas Constitution (Amendment) (No.2) Act, 2002* (No. 8 of 2002). This Act sought to establish the office and functions of the Parliamentary Commissioner. The Act additionally sought to make provisions for the appointment and removal of the Parliamentary Commissioner, his security and constitutional guarantee of independence.
- (3) *The Bahamas Constitution (Amendment) (No. 3) Act, 2002* (No. 12 of 2002). This Act sought to transfer the Attorney General’s powers relating to criminal proceedings to the Director of Public Prosecutions (except for certain powers reserved to the Attorney-General) and for the Attorney General in his or her legal capacity as principal legal advisor to the Government to exercise overall responsibility for legal affairs in The Bahamas
- (4) *The Bahamas Constitution (Amendment) (No. 4) Act of 2002* (No. 13 of 2002). This Act sought to establish the office and functions of the Director of Public Prosecutions. The Act additionally sought to provide for the method of appointment and removal of the DPP, the remuneration and tenure of the office and the constitutional guarantee of independence.
- (5) *The Bahamas Constitution (Amendment) (No. 5) Act of 2002* (No. 9 of 2002). This Act sought to provide for the establishment and composition of a Teaching Service Commission. Additionally, it sought to make provision for the appointment, removal and exercise of disciplinary control over members of the Teaching Service.
- (6) *The Bahamas Constitution (Amendment) (No. 6) Act of 2002*. This Act sought to make several amendments to the Constitution of The Bahamas, *inter alia*, to amend the Constitution so that the Teaching Service Commission would be on par with the other Public Service Commissions and to entrench the amendments creating the Commission.

- (7) *The Bahamas Constitution (Amendment) (No. 7) Act of 2002.* This Act sought to establish the office of Parliamentary Commissioner on the same level as Permanent Secretary and to entrench the provision creating this office.
- (8) *The Bahamas Constitution (Amendment) (No. 8) Act of 2002.* This Act sought to establish a Boundaries Commission to carry out the functions exercised by the Constituencies Commission of The Bahamas, and to make provision for the appointment, and removal of the members of the Commission.
- (9) *The Bahamas Constitution (Amendment) (No. 9) Act of 2002.* This Act sought to extend the retiring age for judges of the Supreme Court to age sixty-eight with a possible extension to age 72 and the retirement age of justice of the Court of Appeal to age seventy-two, with a possible extension to age 75.

8.4 It is not the place of this Commission to attempt to speculate as to the reasons for the failure of the 2002 national referendum. Observers of the process, including academics, political scientists, and voters have referred to a confluence of events—contamination of the referendum by other political controversies; the imminence of a general election; decidedly mixed feelings among the electorate as to the citizenship-related aspects of the gender-equality issue; the complexity of the Bills; and the lack of public education—all of which may have played a part in varying degrees of importance. The Commission merely records these observations in passing because, as has been highlighted in the foreword, the 2002 referendum (as well as the more recent gambling referendum) has important implications for the process of constitutional reform on which we have embarked. This is particularly so when illuminated by the recent response of Caribbean electorates to referenda (some of which are referred to in the body of the report). The Commission has taken onboard the lessons of these failed processes. They dare not be ignored.



## **PART IV:**

### **GENERAL FEATURES OF THE CONSTITUTION**

#### **Section 9:**

#### **Enactment of the Constitution**

- 9.1 One of the general issues that has attracted a great deal of academic and legal discussion in the context of constitutional reform in the region is the historical fact that almost without exception the independence constitutions were legislatively derived from an Act of the British Imperial Parliament—or more accurately, an Order made by Her Majesty, either under the prerogative or the Independence Acts declared for that purpose. In other words, these constitutions bore the imprint of “made in England” and did not express the constituent will of the people as the true “law-givers”.
- 9.2 The Commission notes that this matter was addressed by the Adderley-Tynes Commission and that Commission provisionally recommended that “reforms to the present Constitution be achieved by repealing the Order-in-Council (Bahamas Independence Order) to which the Constitution of The Bahamas is scheduled, and simultaneously replacing it with an Act of the Parliament of The Bahamas entitled The Bahamas Constitution Act, subsequently approved by Referendum.” The present Commission, with the greatest of respect, does not endorse this approach, and briefly records its reasons below.
- 9.3 Before launching into these reasons, however, it is appropriate to note that the majority of presenters and contributors did not address this issue. This may be largely attributable to the technical issues of law and jurisprudence involved in this debate. After all, terms such as “autochthonous” and “patriation” (in the sense in which it is used here) are not terms commonly used even in the parlance of the non-specialist lawyer. However, there were some calls, particularly in the presentations of younger persons, for the Constitution

to be “of the people” and “by the people” and thus to be patriated and enacted as a direct act of the Bahamian people.

*The concepts of “autochthony” and “patriation”*

9.4 The debate around the manner of constitutional enactment has largely focused on whether such constitutions can be considered ‘autochthonous’, in the sense of being indigenous or homegrown, and consequently whether they can be ‘patriated’ to or by the people they were meant to govern.<sup>8</sup> These topics have become fashionable as part and parcel of the debate in the region over whether to replace the monarchical form of government with some form of republicanism. A more esoteric point is the academic discussion over whether there exists any possibility, if only as a matter of legal theory, that the UK Parliament and Her Majesty in Council may retain any legislative competence in respect of these instruments such as might entitle them to revoke the Independence conferred upon their former colonies.

*Patriation*

9.5 The concept of patriation—which has been described in some of the literature as “bringing it home”—has its modern origin in Commonwealth constitutionalism in the Canadian experience of 1982, when the Canadian House of Commons adopted the British North America Act (1867) as the Constitution Act, 1982. This may be an atypical example, however, as the 1982 constitutional changes came about as a result of the need to make “important repairs” to Canada’s constitutional law, perhaps most importantly by adopting a *domestic* formula to amend the Constitution Act 1982, as the B.N.A. Act lacked a general amendment clause. Amendments could only be enacted by the imperial parliament, and therefore the process of legal devolution was incomplete. This unsatisfactory state of affairs continued even after the passing of the 1931 Statute of Westminster which provided that British laws no longer applied to the Dominions because of the inability of the national Parliament and constituent provinces to agree how to amend it.<sup>9</sup>

9.6 The Caribbean does possess one example, novel in Caribbean constitutional jurisprudence, of a Constitution enacted by the local legislature—the Constitution of Belize, which was enacted by an Act passed by the Parliament of Belize (Act No. 14 of 1981), declared to be “A Constitution for the Independent State of Belize”. This has prompted one Caribbean constitutional scholar to note in respect of Belize that “the most interesting aspect of the independence constitution is that it was an Act of the Belize Parliament that brought the Belize Constitution into being.”<sup>10</sup> However, this formal act of patriation is diminished by the fact that Belize elected to retain the British monarchy as Head of State. Of course, much earlier in the development of Caribbean constitutionalism, Trinidad and Guyana had also replaced their independence constitutions with new Constitutions by Acts of the local legislature (1976 and 1980, respectively).

*‘Authochthony’*

9.7 Without descending into any hyper-distinctions of law and technicalities, the concept of patriation and authochthony are related but distinct concepts. Noted constitutional lawyer and formerly legal advisor to the Commonwealth Office, Sir William Dale, explained the concept thus: “Autochthony, in its full sense, implies not merely an enactment of a new and indigenous constitution, but the severing of all legal links through which authority may be traced back to the Parliament of the mother country...”.<sup>11</sup> And Sir Kenneth Roberts-Wray, in his leading text on Commonwealth and Colonial Law (1966), described it as an aim “to enact a constitution which can be said to owe nothing to external law.”<sup>12</sup>

9.8 The production of authochthonous constitutions has been achieved most notably in countries which received their sovereignty through revolution (of which the United States is the classic example) or by a complete legal break (as occurred in several Commonwealth countries),<sup>13</sup> which followed a “*we the people formula*” to repose the constitutive power in the people. Nothing like this has been accomplished in the English

Caribbean in a real legal sense. The closest attempt occurs in the draft Constitution of Grenada, which adopts the “we the people formula” as follows in its Preamble:

**“We the People of Grenada, Carriacou and Petite Martinique, with the assurance of God’s Blessings, and in this solemn exercise of our Sovereign Constituent Power, do hereby re-enact and ordain this Basic law as the Constitution of the Commonwealth of Grenada....”.**

This draft will have to be put to the people in a referendum which is reportedly scheduled to take place in 2015. Its ultimate fate is therefore still to be determined.

*Retention of U.K. legislative competence*

9.9 The Commission sees no practical legal issues arising from the question of whether the UK retains any legislative competence in respect of its independent former colonies. The constitutional jurisprudence seems to be clear that on the attainment of independence, the Order in Council becomes the law of an independent state, and the British courts will not impugn the validity of the constitution or laws of an independent sovereign state.<sup>14</sup>

9.10 Further, it should be noted that the effect of the *Independence Act* was to break any UK legislative competence for The Bahamas, as provided by s. 1(2) as follows:

**“No Act of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend to The Bahamas as part of their law; and on and after that day the provisions of Schedule 1 to this Act shall have effect with respect to the legislative powers of The Bahamas”**

Notably, the Canada Act of 1982 contained a formulation similar to that at s.1(2),<sup>15</sup> and therefore Canada was formally achieving in 1982 what most of the countries in the Caribbean had accomplished at Independence.

*Conclusions*

9.11 Although the ‘patriation’ movement—if it might be called that—has its adherents in the Caribbean, the Commission is not so swayed. The Commission finds instructive the

views of Dr. Oswald Harding, Q.C., that “any re-enactment of the Constitution would only be of symbolic significance and of no legal effect whatsoever...”.<sup>16</sup> He points out that Parliament’s authority to enact laws—including those dealing with constitutional change—is derived from the Independence Constitution, a creature of the order-in-council. Further, even if the matter of patriation were looked at from the point of view of approval by way of popular referendum, even the referendum laws have their foundation in the constitution. In other words, the legal act of patriation itself can only derive its source of legal authority from the existing constitution.

9.12 The Commission wishes in no way to diminish the symbolic significance of having a Constitution of purely local origin and pedigree. But we agree with the suggestions, made to this Commission and coming from within its ranks, that the proper way to make our Constitution ours is by the reshaping of its contents and guiding principles to reflect our unique development and aspirations as a people (something which we think will be helped by the establishment of a ‘constitutional court’).<sup>17</sup> As has been said by Professor James Read of the University of Guyana: “In short, ‘patriating the constitution’ cannot end with the abolition of the monarchy and appeals to the Privy Council, but is best achieved by *autochthony* that is, a constitution that addresses the social and economic realities of the society.”<sup>18</sup>

9.13 The idea of re-enactment is also fraught with other practical difficulties. Wholesale repeal would require the observance of entrenchment devices at all levels—alteration of the Constitution is defined to include “re-enactment with or without amendment or modification...”<sup>19</sup>—and therefore would be a most costly and impractical exercise. The Commission notes, also, that in those countries where there has been wholesale repeal and re-enactment of the Constitutions (i.e., Trinidad and Tobago and Guyana), there was no requirement for a referendum in the case of the former,<sup>20</sup> although the latter required a referendum for certain types of constitutional change.<sup>21</sup> (The complications that can result from a requirement of referendum are mentioned elsewhere in this Report)

9.14 Further, the philosophical rationale for patriation overlooks other important historical and legal facts. For example, all of the Commonwealth Caribbean countries received their sovereignty and constitutions by a process of evolution, each succeeding Constitution providing for increasingly responsible government, culminating in eventual independence. Further, the independence constitutions were the outcome of consultations and discussion, and many, like The Bahamas', were preceded by several full-scale constitutional conferences involving the elected representatives of the people, including members of the opposition. Additionally, the drive to re-enact the basic law overlooks the fact that the bulk of the other laws by which we continue to be governed have been directly transplanted from the United Kingdom by various reception devices, and many remain in operation virtually unaltered. Indeed it bears noting that under the Declaratory Act of 1799 (affirming a pre-existing jurisprudential reality) the common law of England is the bedrock of Bahamian law except insofar as it has been modified or replaced by statutes of the Bahamian legislature. Independence has not altered this reality nor would patriation do so.

## §

### **Recommendation(s)**

1. The Commission recommends that no change should be made to the method of the enactment of the Constitution at this point, especially having regard to the very limited number of constitutional amendments proposed. So called 'patriation' would be of symbolic value only and necessitate a costly (and uncertain) referendum, as the wholesale repeal and re-enactment of the Constitution would require the observance of all the entrenchment devices. When the time comes to consider more fundamental changes—what the Commission describes as the meta-constitutional issues—then it would be appropriate to consider the question of enacting a new Constitution.

## Section 10:

### The Preamble

- 10.1 One of the most riveting topics during the public debate on constitutional reform was the wording of the Preamble to the Constitution. Indeed, it is correct to say that, with the possible exception of the discussion revolving around the death penalty and retention of the Privy Council (which were sometimes unfortunately conflated)<sup>22</sup> and the question of citizenship in the Haitian immigrant context, no other aspect of the Constitution came close to garnering the kind of attention as the Preamble did.
- 10.2 At issue was the question of whether consideration should be given to changing the preamble to avoid any appearance of a constitutional-bias towards Christianity, notwithstanding the substantive guarantees of freedom of religion in the fundamental rights provisions. It was the ardent view of many that The Bahamas is a ‘Christian nation’ and therefore it was fitting for the framers to include a reference to “Christian” and “Spiritual Values” in the Preamble, as indeed they did.

#### *Views from the People*

- 10.3 The Commission notes that an overwhelming majority of persons who spoke to this issue thought that there was no need to change the preamble. The Commission agrees with this view. There were a few voices, notably from younger persons, calling for the Preamble to be rewritten to correct purported historical inaccuracies (e.g., the reference to the “re-discovery of the New World”) and to include a reference to the racial ancestry and struggles of our forebears as slaves.
- 10.4 In contradistinction to any proposals for change or to revise the Preamble, there was a particularly striking recommendation, emanating mainly from Dr. Myles Munroe of

Bahamas Faith Ministries, and taken up by some others, for the Preamble or aspects of it—in particular the reference to Christian and spiritual values—to be enshrined as part of the substantive articles of the Constitution. The submission was as follows:

**“We submit that the Preamble should be incorporated into Chapter 1 of the Constitution as a new Article 2, because of its importance and to reinforce its importance as the fundamental guiding principle on which the country was founded and thus give the full weight of the law that may not necessarily apply to a preamble. It is therefore our recommendation that the preamble be enshrined in the constitution with the full weight of constitutional law so as to assure its abiding role as a standard and reference in the interpretation and application of the rule of law in the Commonwealth of The Bahamas”**

- 10.5 For reasons given below, the Commission does not accept this submission. But it wishes to first comment on the call that the Preamble should be left unchanged, a view with which it agrees (subject to what is said below). On a textual analysis of the preamble, it is clear that the preamble does not directly declare The Bahamas to be a ‘Christian’ nation. Rather, it acknowledges the supremacy of God (in two places), recites respect for “Christian values” and provides for a nation founded on “spiritual values.”
- 10.6 Two brief observations need to be made. Firstly, the reference to Christian values is not tantamount to Christianity. Judaeo-Christian principles, which some would argue are simply natural law precepts, inform the moral basis of most modern monotheistic societies, and the majority of the constitutions in nations which adhere to Judaeo-Christian traditions include some preambular reference to God. Most notably, the use of the word “spiritual” at another place in the Preamble to define the national value system can only be a deliberate attempt to embrace a wider notion of religious beliefs extending beyond Christianity.
- 10.7 Indeed the foremost surviving framer of the Constitution, the Hon. Arthur D. Hanna, gave credence to this point of view in his presentation to the Commission, explaining that the reference to “Christian values” is contained in a recital to the operative preamble, and is really only intended to provide the historical and social context for the “operative part”, which refers to “spiritual values”.



- 10.8 Thus, as far as its approach to religion is concerned, it might be said that the Preamble is all-embracing and does not necessarily favour any particular group. The Commission, therefore, does not find that the reference to “Christian values” is exclusionary or discriminatory to other religions. Even if it could be interpreted as being pro-Christianity, there could be nothing wrong with the framers stating in the Preamble what they thought should be the defining spiritual basis of their state. The important thing is that the Constitution itself guarantees freedom of religion to all, which is unimpeded by anything in the Preamble.
- 10.9 With respect to the call to enshrine the Preamble as a separate article, not only would this be inimical to the inherent nature and function of a Preamble, it would also likely set up possible conflicts with the freedom of religion provisions and attract litigation concerning the meaning of “spiritual values”. However, the Commission points out that, even though the Preamble is not a justiciable part of the Constitution, this is not to say that the values embodied therein cannot be used for interpretive purposes. Indeed courts have frequently relied on preambular statements as complementary to other parts of the Constitution in determining rights.<sup>23</sup> Further, consideration may be given to including some references to some of the principle and values contained in the preamble, either in a statement of directive principles of state or a statement of fundamental duties of the citizen. For example, the draft Constitution of Grenada includes as one of such duties, “generally, to strive towards the fulfillment of the aspirations contained in the Preamble of this Constitution.”

*A new Preamble?*

- 10.10 The Commission realizes, however, that the call to revise or create a new preamble transcends the discussion about its religious or moral content. In particular, the views expressed by the younger generations seemed to be a call to have a hand in conceiving a unifying national statement that captures the spirit, soul and ethos of the Bahamian people, and a participatory role in the fashioning of our foundational law. There was also a representation—particularly interesting because of its source—for a revision of the

Preamble to state its aspirations in a positive form, with goals which are forward-looking and not anchored to our past experience, not that these are unimportant. This came from one of the founders who is known to have played a major role in the crafting of the initial preamble.

10.11 Thus, although the Commission does not recommend the altering, repealing or adding a new Preamble at this point, it would recommend that this question be re-visited in a subsequent review.

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**Recommendation(s)**

2. The Commission recommends that the Preamble be retained in its current form and that no amendments be made to its content at the present time. The Commission considers the Preamble to be of “inestimable historical and symbolic value”—to adopt the formulation of the Adderley-Tynes Commission—and while non-justiciable it may currently represent the most indigenous feature of the Constitution. Any perceived deficiencies might be met by the inclusion of directive principles of State.

## Section 11:

### Treaties and International Agreements

#### Transformation of Treaties and International Agreements

- 11.1 This section deals with another area of the review that is somewhat academic and which did not feature prominently in the public debates. But the matter was raised by several contributors, in particular with regards to the signing of international rights treaties by The Bahamas, without the knowledge or participation of the Bahamian citizenry. Several members of the Commission also raised it during the presentation by the Honourable Attorney-General, particularly in light of the somewhat puzzling and seemingly inconsistent approach that the Executive has taken to the signing and ratification of some of these instruments.
- 11.2 This inconsistency is exposed most strikingly in the approach to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which The Bahamas acceded to on the 6 October 1993, attaching a reservation to Article 2(a), the clause requiring removal of laws which formally discriminate on the grounds of sex. Notwithstanding this position, The Bahamas in 2009 signed and ratified the International Covenant on Civil and Political Rights (ICCPR)<sup>24</sup> without any reservations to specific requirements in the latter to provide for equality before the law without any discrimination, including on the grounds of sex. Indeed, the inconsistency in these positions was drawn to the attention of the Commission in the presentation from the representative of the United Nations High Commissioner for Refugees (UNHCR).
- 11.3 The Commission notes that this issue was broached in the booklet “Options for Change”, although it does not seem to have been the subject of a specific recommendation in the Preliminary Recommendations. It was observed in the booklet that all of the Constitutions of the Caribbean are silent on the relationship between international law

and domestic or municipal law. Instead, these matters are left to be regulated by the prerogative powers of the Crown, or by common law. However, in the several decades since the majority of Caribbean countries attained their independence, international law has become more pervasive and intrusive in the domestic system, as evidenced by the sheer volume of matters that are now regulated by international law, a trend that is more likely to intensify in coming years rather than abate.

11.4 There are several dimensions to this discussion which are worthy of comment. The first is that because international instruments have the ability to affect the rights and freedoms of the citizens, they should have a right, through their elected representatives in Parliament, to have a voice in the international obligations that the executive arm of government adopts on behalf of the nation. The lack of participation by the people in the process of treaty-making has sometimes been described as the democratic deficit

11.5 At the very least, the Commission thinks there should be some advance notice to the public of any treaties which the government is considering accepting international obligations thereunder that might have significant national implications. Issues involving the ability of the executive to enter into and enforce certain international obligations have arisen in The Bahamas before, most notably in respect of the extradition treaties.<sup>25</sup>

11.6 The second limb is somewhat of the converse: even though the State may become signatory to various international treaties and conventions, the citizens never enjoy the benefit of these instruments which depend on transformation into domestic law to be enforceable.

*Constitution should declare process*

11.7 The Commission is of the view (subject to what is said below) that the Constitution should bring some clarity to the process by which international instruments are to be domesticated, and, in particular, should prescribe the functions of the executive and

legislature with respect to the conclusion of international treaties. In this regard, the Constitution would be emulating the Constitutions of many developed countries, including Commonwealth countries (e.g., South Africa).

- 11.8 Indeed, one can hardly approach the re-drafting or comprehensive reform and amendment of a constitution in modern times without giving consideration to the relationship between international and domestic law. It should also be noted that prescribing the relationship between international and domestic law does not effect any changes to the substantive law. It merely codifies the principles that are currently applied within The Bahamas and the Commonwealth Caribbean which adopt the incorporation theory with respect to customary international law,<sup>26</sup> and the transformation theory with respect to treaties.<sup>27</sup>
- 11.9 The caveat to be expressed, hinted at above, is whether such rules need to be constitutionally prescribed or can be sufficiently codified in ordinary legislation. In this regard, it is noted that in at least one Caribbean country, the matter is addressed by legislation.<sup>28</sup> However, the rationale for constitutionalizing the relationship is twofold: (i) because treaties often deal with human rights, which are matters of concern to the Constitution, these should be regulated by an instrument with the same normative value; and (ii) it allows safeguards against the democratic deficit by subjecting all laws to the scrutiny of the democratic process, the positive law-making authority of Parliament, and the principles of the Constitution.

### *Recommendations*

- 11.10 The Commission recommends that the Constitution should include as part of the founding principles the following statement of this relationship:
- (1). That the negotiation and signing of treaties is a matter for the executive, but that treaties generally (subject to the exception below) must be laid before Parliament for prior approval.

- (2). Exceptions should be made for certain types of treaties, generally those of a technical or administrative nature (e.g., those that do not affect the rights of citizens but provide for technical and administrative arrangements between states) to be concluded subject to subsequent Parliamentary approval.
- (3). In all cases, treaties and executive agreements should not be contrary to the Constitution of The Bahamas

11.11 By way of example, and to illustrate a possible approach to the rule at (1) above, the draft Constitution of Grenada provides as follows (Section 188 (2):

- “(2) The Executive of the Commonwealth of Grenada shall have the authority to negotiate and sign all international treaties, conventions and agreements with foreign States or international organizations, and submit them to the National Assembly for approval; and, upon approval by the National Assembly, by a vote of not less than two-thirds of all the members of that House, the Executive may ratify the treaty, convention or agreement, as the case may be.
- (3) (a) The National Assembly may not grant approval to any international treaty, convention or agreement containing clauses contrary to this Constitution.
  - (b) International treaties are approved by the National Assembly in the form of Acts of Parliament.”

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**Recommendation(s)**

3. The Constitution (or alternatively, an Act of Parliament) should declare the relationship between international and domestic law and, in particular specify the roles of the Executive and Parliament in relation to the negotiation, signature and ratification of treaties, and their transformation into domestic law. On balance, the Commission feels that an ordinary Act of Parliament might be the preferable option.

## Section 12:

## Changing the Constitution: Entrenchment

### *Entrenchment devices*

- 12.1 Of the 137 articles of the Constitution, 104 of those can only be changed by an act of the Legislature with a  $\frac{2}{3}$  or  $\frac{3}{4}$  weighted majority followed by the approval of a majority of the Bahamian electorate voting in a referendum, sometimes referred to (respectively) as ‘entrenched’ and ‘specially entrenched’. These entrenchment devices also extend to provisions of the *Independence Order* and the *Independence Act*, insofar as the provisions of the latter form part of the laws of The Bahamas.<sup>29</sup> Francis Alexis has pointed out that the purpose of the entrenchment devices was to ensure that changes to the Constitution could “not be brought about by accident”.<sup>30</sup> He comments further that: “It is not always easy to explain why a particular provision is more heavily entrenched than another related provision. But as a whole, the level at which a particular provision is entrenched reflects the fondness which the framers had for it and their determination to have their outlook prevail over the thinking of posterity.”
- 12.2 A more fundamental historical reason for such levels of entrenchment is hinted at by Sir Kenneth Roberts-Wray in his seminal work on constitutional law (already cited) as follows:<sup>31</sup>

**“[I]f it is true doctrine that a political party, having control of the legislature and sufficient support among the population to secure a favourable result in a referendum of their own devising, can entirely replace an agreed constitution by one more suited to their own interests, then negotiated safeguards for minorities, for individual freedom and for the rule of law, however deeply entrenched, may prove to have no more value than the proverbial scrap of paper.”**

Needless to say, the author of this statement could never have appreciated the heterogeneous, culturally complex nature of these societies, the fierce independence of their peoples, and their staunch political alliances.

12.3 Be that as it may, the Constitution of The Bahamas is among the most heavily entrenched in the entire Commonwealth Caribbean, and sometimes the rationale for this is difficult to discern. For example, it seems counter-intuitive to require two different weighted parliamentary majorities, depending on particular provisions, and then make them all subject to the same standard for final approval—the approval of the simple majority of electors voting in a referendum. In The Bahamas, as in many of the constitutional monarchies with the Westminster transplant model, the Constitution is supreme over Parliament. But its alteration largely depends on the will of the people, and in that sense, the people are supreme over them both.

12.4 While it is undoubtedly correct that constitutional provisions should not be easily disturbed, the Commission is of the opinion that the amending provision in the Constitution is far too rigid, and may have the effect of making the Constitution almost immutable. Parliament is able to change only a few of its provisions without a referendum. In fact, the Commission takes note of a recent article in the Jamaica Observer which observes that a Caribbean law expert was cautioning against putting matters relating to the future of the Caribbean Court of Justice in the hands of the public through a referendum, citing the 2002 Bahamas Constitutional Referendum process as the classic example of how such matters can turn into a debate about extraneous political issues rather than the subject which they are intended to address.<sup>32</sup> Governments must have room to govern, and no government can govern effectively by a process of referendum that is too pervasive.

### *Recommendations*

12.5 The Commission recommends that the most important features of the Constitution remain entrenched at the highest level. Those provisions that the Commission considers deserving of being entrenched at the highest levels include the basic features, such as citizenship, the fundamental rights, the form of the state, the structure of government, the separation of powers, and those provisions relating to the protection of the judiciary and



security of tenure, and the service commissions. On the other hand, constitutional provisions which only relate to the functions (as opposed to the basic construct) of executive government should be entrenched at a level which requires a high parliamentary majority but no referendum.

12.6 The legal approach to entrenchment should also be simplified, so that it is not done by enumeration of articles, but by global reference to chapters or sections of the Constitution. The Belize Constitution approaches this matter by declaring a weighted majority for much of the Constitution, and then by excepting those sections that are to be governed by a different formula.<sup>33</sup>

12.7 Before leaving this subject, it is important to point out a rather striking irony: the amending clause of the Constitution, Article 54, despite creating such onerous conditions for changing the Constitution, is not itself entrenched, and can therefore be changed by a simple majority, subject to complying with the other procedural requirements for constitutional amendments.

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### **Recommendation(s)**

4. The Commission recommends that the existing system of entrenchment of the most important provisions of the Constitution should be retained, except that there should be a uniform parliamentary majority of  $\frac{3}{4}$  plus the referendum for altering any of these provisions. However, the other entrenched provisions that relate to executive or administrative functions need only be secured by a parliamentary majority of  $\frac{3}{4}$  and should not be encumbered by a referendum requirement.

## **PART V:**

### **SPECIFIC CHAPTERS OF THE CONSTITUTION**

#### **Section 13:**

##### **Chapter I of The Constitution:**

##### **Founding Provisions**

#### **The Supreme Law Clause**

13.1 Article 2 of the Constitution of The Bahamas declares the primacy of the Constitution over all other laws, which are invalidated if inconsistent and to the extent of the inconsistency. The jurisprudence is clear, however, that even without such a specific declaration the supremacy of the Constitution would be inferred.<sup>34</sup> It is this clause which provides the written basis for the superior courts to review and question the legality of primary legislation against the standard of the constitution at the request of an aggrieved person. The importance of the supreme law clause for the purposes of discussion here and the context of our review has to do with the mandate to “strengthen the fundamental rights of the individual.” Rights are worthless without some effective legal machinery for their enforcement.

#### *The requirement of standing ('locus standi')*

13.2 However, the courts are limited in their ability to ‘enforce’ the supreme law clause, as the courts have no power to review legislation of their own initiative. They can only review at the behest of someone who is claiming an infringement, actual or threatened, of *that person’s* enumerated fundamental rights under Article 28(3). Article 28, commonly called the enforcement provision, is very personalized in its approach to enforcement. Challenges may also be brought on other specific grounds prescribed by the Constitution. Examples of the latter include the right to challenge the composition of Parliament.

13.3 The inherent weakness in this system is that the Constitution does not say *who* has the standing to litigate the constitutionality of legislation when challenged on grounds outside those described above. Although there appears to be a move towards a more liberal interpretation of standing, or *locus standi* to use the technical legal term, there is no consistency in approach. The courts of several Caribbean territories, including those in The Bahamas, continue to take a very narrow view of standing, although there is a clear trend to liberalization.<sup>35</sup> The Commission is obliged to point out that even within its own ranks there were sharply differing views on this question with some members, most notably Michael Stevenson, contending for a more liberal, non-traditional approach to the *locus standi* issue, one that would create judicial discretion to allow cases to be brought notwithstanding that the applicant might not himself have been personally affected by the matters complained of (**Appendix V**). Instead the only requirement would be for him to demonstrate that there is a sufficient interest in having the matter litigated for the benefit of the public or some class of persons.

#### *Recommendations*

13.4 The Commission advocates the making of provisions for a process whereby constitutional questions could be referred from the Attorney-General to a ‘Constitutional Court’, as described in a later section and advisory opinions obtained.<sup>37</sup> The Commission is also of the opinion that the enforcement provision of the Constitution should be enlarged to provide for broader rights of access to the courts on constitutional issues subject to the applicant establishing a sufficient interest.<sup>38</sup> For example, the constitution of St. Lucia provides as follows (A. 105):

**“Subject to the provisions of [certain excepted provisions] any person who alleges that any provision of this Constitution other than a provision of Chapter II [Fundamental Rights] has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section.”**

### **Territorial declaration**

13.5 It is also notable that the Constitution of The Bahamas makes no reference to the territorial limits of The Bahamas. Most newer and modern constitutions contain a general statement of the territory of the country, which may normally be amplified by a schedule.<sup>39</sup> Interestingly, the only reference to the territory of The Bahamas is to be found in the *Independence Act*, s. 6(1) of which proclaims:

**“In this Act and in any amendment made by this Act or any other enactment, “The Bahamas” means the territories which immediately before the appointed day constituted the Colony of the Commonwealth of the Bahama Islands and which on and after that day are to be called the Commonwealth of The Bahamas.”**

13.6 However, the Commission is of the opinion that a matter so fundamental as the territorial limits of the State should be included in the constitutional document. This is tacitly recognized by its placement in the Independence Act, which incidentally entrenches this provision at the highest level of the Constitution. However, the effect of such provisions may have been to crystallize the statement of national territory, notwithstanding the developments which have occurred allowing the state to claim expanded maritime territories, and which have been exercised by The Bahamas.<sup>40</sup> Note, also, that in 2008 The Bahamas formally declared itself as an archipelagic nation, in accordance with international law, and this concept should also be given constitutional recognition.<sup>41</sup>

13.7 Given the central importance of this particular matter to national identity, the Commission is of the view that it ought not be left to ordinary legislation but should instead be dealt with constitutionally. This may be accomplished by one of two formula: (i) either a general reference (normally in art. 2) stating that the Commonwealth of The Bahamas shall comprise the land and sea areas referred to in a schedule (the Belize model); or (2) a provision setting out the territory—i.e., “The territory of The Bahamas shall consist of...” (the Grenada model). It is important, moreover, to ensure that any such description includes a reference to all of the resources in, on, or under the territorial land and seabed as being an integral part of the national patrimony. It should be noted that Commissioner

Mortimer disagrees with the need to include a specific territorial reference in the Constitution.

### **National symbols**

13.8 Although the national symbols are described in the *Flags and Coat of Arms Act*, the Commission is of the view that the foundational symbols—national flag, anthem and pledge—should be referred to in the Constitution and exhibited in a Schedule. This approach is commonly adopted in many of the world’s constitutions, including many in the Caribbean. The Commission thinks the rationale for this recommendation is self-evident and really does not require further elucidation.<sup>42</sup>

### **Official language**

13.9 There should also be a provision declaring that English is the national language of The Bahamas. The Commission believes the rationale for this recommendation is self-evident and does not require further elucidation.

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### **Recommendation(s)**

5. The Commission recommends that the supreme law clause, as the basis for the review of the constitutionality of legislation, should be strengthened by providing for a ‘Constitutional Court’ (constituted by the Chief Justice and at least one other justice) to hear complex constitutional questions arising on magisterial references, as well as constitutional questions referred by the Attorney General. This does not require any alteration to the Constitution, but a change to the Supreme Court Act or Rules of Court. There should also be a provision for universal review by the citizen subject to persons establishing that they have a sufficient interest to bring the action.

6. A declaration of the land and sea areas of The Bahamas should be a part of the Constitution, with further details contained in a schedule, including an assertion of dominion over the resources in, on or under the land and seabed. This schedule should be amenable to amendment by the Governor-General by Order to take account of any delimitations in maritime boundaries that may be concluded between The Bahamas and neighbouring states.
7. The principal national symbols and emblems or indicia of national identity (coat-of-arms, national anthem, national flag, pledge of allegiance) should be referred to in the Constitution, and exhibited in a schedule to the Constitution.
8. The Constitution should declare English as the official language of The Bahamas

## Section 14:

### Chapter II of The Constitution:

## Citizenship

14.1 As previously noted, the public discourse on citizenship attracted considerable focus and feedback from Bahamians. The question of citizenship engages the Commission's scrutiny, as per its mandate, from two critical aspects: (1) the issue of gender discrimination; and (2) the general question relating to the entitlement to, and acquisition of, Bahamian citizenship.

### *Views from the public*

14.2 Generally, the views with respect to the first limb—the issue of gender inequality—achieved consensus. Most persons who spoke to the Commission or made presentations were of the view that the discriminatory provisions ought to be removed, although there were occasional instances of a clinging to some of the patrilineal provisions in the current Constitution. The point on which there was the greatest divide related to the general provisions providing for citizenship. There could be found no agreement on this issue, particularly with regard to how to treat persons born in The Bahamas to non-Bahamian parents—the situation described by article 7—a group that includes the numerically large native-born children of Haitian immigrants to The Bahamas

14.3 This situation provoked recommendations spanning a wide spectrum of options, several of which are listed below:

- (i) Operate the doctrine of *jus soli* (birth in territory) without qualifications, thereby granting full citizenship on the basis of birth within The Bahamas, without reference to any other criteria.

- (ii) Select a certain cut-off date for persons born in The Bahamas (whether the parents are legal or illegal) to acquire citizenship; persons born after that date should be deported.
- (iii) Deport all persons in The Bahamas who were born here to illegal immigrants.
- (iv) Reduce the waiting period for registration as citizens in relation to persons born here to non-Bahamian parents

14.4 Not all of the recommendations related to specific proposals for reform of the existing provisions. An interesting proposal (which the Commission finds attractive) was for the establishment of a further Commission or Committee to look at citizenship issues and immigration reform. One articulation of this proposal was as follows:

**“That due to the complexities, sensitivities, and the potential national security concerns relative to this issue, the Government should establish a non-partisan ‘Commission on Citizenship and Immigration Reform’. The purpose of the Commission is to conduct research and make recommendations to the Parliament of ways to define and change the nation’s policy on citizenship and immigration matters in the Constitution and the law.”**

The Commission will say more about this proposal later in this Report.

14.5 Before attempting any analysis of the citizenship provisions, the Commission thinks it appropriate to commence with a brief description of how the Constitution provides for citizenship to be acquired in a post-independent Bahamas. In this regard, the Commission has drawn some assistance from the overview which was provided in the first Commission’s booklet “*Options for Change*,” although it has been necessary to considerably expand that brief analysis.

### **Pre-independence citizenship**

#### Articles 3-5

14.6 Articles 3-5 deal with questions of nationality regarding persons born in The Bahamas before Independence in 1973, such as persons “deemed to belong to The Bahamas” under



the 1967 *Immigration Act* (by virtue of being a British subject born in The Bahama Islands) and persons with “Bahamian status” under the 1969 Constitution of The Bahamas<sup>43</sup>

- 14.7 The Commission does not think it necessary to spend a lot of time on these articles. Many of them were meant to be transitional, and indeed are mostly spent, although there are still a few cases where persons claim entitlement to registration as Bahamian citizens through persons who became entitled under those provisions. However, to the extent that the article 3(2) provides for the acquisition of citizenship by persons born outside The Bahamas prior to the 9<sup>th</sup> July 1973 only if that person’s *father* was (or, but for his death, would have become) a Bahamian citizen, that provision would now have to be amended to reflect gender-neutrality. Similar amendments would also have to be made to article 5 which provides for women who were married to persons who were or would have become citizens (or who subsequently became citizens) to be registered as citizens. For example, the proposed Bill of 2002 had attempted to amend these provisions by replacing *father* with “*father or mother*” and *any woman* with “*any man or woman*”, along with other consequential and related amendments.

### **Post-independence citizenship**

- 14.8 The Constitution basically provides for three categories of citizenship: (i) those who qualify at birth (automatic citizenship); (ii) those who qualify after prescribed periods or fulfilling further criteria (deferred citizenship); and (iii) those who may be eligible for registration as a citizen. It should be noted in this regard that a distinction is being drawn between the use of “registration” in (ii)—in which case it refers to the *process* by which is a person who is entitled becomes a citizen—and at (iii), where the person has no original entitlement to citizenship by birth or descent, but may nonetheless be registered at the discretion of the Minister.

(i) Automatic Citizenship

14.9 With respect to this category of persons, the Constitution uses the formula “shall become a citizen...at the date of his birth.” This class encompasses persons who are born in The Bahamas if either parent is a citizen; persons who are born overseas legitimately to a Bahamian man (if he himself is native born); and persons born overseas to an unwed Bahamian mother (by virtue of article 14 (1), which interprets all references to “father” to mean “mother” for children born out of wedlock). It should be noted, incidentally, that although the *Status of Children Act* generally abolishes the concept of illegitimacy it excludes matters of citizenship from the purview of the Act.

(ii) Citizenship after fulfilling time or further criteria

14.10 Provisions are made for the following persons to be registered as citizens:

- (a) a person born in The Bahamas neither of whose parents are Bahamian (application to be made at 18 years of age and within 12 months);
- (b) a person born legitimately outside The Bahamas if his mother is a citizen (also at 18 years of age and before 21); and
- (c) a *woman* who has married a Bahamian citizen.

The entitlement to registration is subject to national security or public policy considerations, and renunciation of the citizenship of any other country in the situation mentioned at (a) and (b).

(iii) Citizenship by Registration

14.11 Additional provisions for the registration of Commonwealth citizens or British protected persons (i.e., persons with status conferred by the 1948 *British Nationality Act*) are contained in the *Nationality Act*. Stipulations require roughly a minimum of seven years ordinary residence in the 10 year period preceding the date of application for registration, or government service for six years, good character, knowledge of English, and intent to

reside in The Bahamas permanently or enter/continue in Government service. Provisions are also made for the registration of minors and naturalization of aliens, at the discretion of the Minister responsible for Nationality and Citizenship.

### Loss of Citizenship

14.12 The capacity to grant citizenship is within the jurisdiction of the state and, therefore, it may revoke such citizenship.<sup>44</sup> Under the Constitution, deprivation may be made by the Governor-General in cases of dual nationality where a person voluntarily acquires another citizenship or exercises rights exclusively accorded to citizens of another state. Also, a person may renounce Bahamian citizenship at the age of 21 if he has citizenship of another country or intends to acquire citizenship of another country. Parliament is also able to legislate for the acquisition and deprivation of citizenship in specified cases. An example of such legislation is the *Nationality Act*, which provides for the loss of citizenship in the following circumstances: where persons have been convicted of treason or other serious crime; where they have been disloyal to The Bahamas; where they have engaged in business transactions with an enemy with whom The Bahamas is at war; or where they have done anything to prejudice the safety or public order of The Bahamas”

14.13 Against the foregoing summary, the Commission now turns its attention to the main articles regulating the acquisition of citizenship in a post-independent Bahamas.

### Article 6: Children born in The Bahamas where either parent is Bahamian

14.14 The Commission is of the view that this provision is not discriminatory. It adopts a hybrid position between acquisition of citizenship based on birth in territory and descent, and the combination of each grants automatic entitlement at birth. However, it seems to have been susceptible to an interpretation that it is discriminatory in its effects. This results from what the Commission considers—and with the greatest of respect for the Courts—to be the erroneous interpretation of the word “parents” in this provision to include an unmarried Bahamian mother but not an unmarried Bahamian father.

- 14.15 In several cases, the courts have construed the reference to “parents” in art. 7 to be caught by the definition of “father” in Article 14(1), and therefore the potential benefit of this article to a child born out of wedlock in The Bahamas to a Bahamian male is removed.<sup>45</sup> However, it seems fairly clear that the intention of article 6 is to grant automatic citizenship to a child born in The Bahamas (an objective condition) where at least one parent is Bahamian (another condition that is capable of being objectively determined). The only difference in the case of a male parent is that the common law—eminently rooted in common sense—has always required proof of paternity before those other rights can attach, as it is not readily clear who the father is. Automatic transmission of citizenship through patrilineal descent could produce absurd results. But an unmarried Bahamian man whose paternity of a child has been legally established or acknowledged should be fully able to transmit his citizenship to his offspring.
- 14.16 The Commission is of the opinion that a similar entitlement to trace citizenship through descent must be given to the unmarried father whose child is born overseas, after establishment of paternity, since this is what pertains (by virtue of article 14) in respect of a child born overseas to an unmarried Bahamian woman. Incidentally, this is another of the few provisions in which the Constitution discriminates against men in their ability to transmit citizenship.

Article 7: Children born in The Bahamas where neither parent is Bahamian

- 14.17 This article, which relates to children born in The Bahamas where neither parent is a Bahamian and entitles them to apply for citizenship at the age of 18, is the most problematic of all the citizenship provisions of the Constitution. As described below, because of the large immigrant population living within The Bahamas, most of whom originate in the neighbouring island of Haiti, it encompasses a very large class of persons with potential claims to citizenship.

14.18 There are also other unresolved legal issues which arise from this provision, such as: (1) What are the rights of such persons born in The Bahamas in the interim?;<sup>46</sup> (2) Is there a requirement for the person to be ordinarily resident during the 18-year period?; and (3) What is the position if the person fails to make the required application within 12 months following his attainment of the age of 18? We return to these issues later in this Report

Article 8: Children born overseas where the “father” is a Bahamian

14.19 Children born *legitimately* to Bahamian men overseas are automatic citizens, provided that the father himself was native-born (either after Independence, or in the former Colony of the Bahama Islands). The position of children born to unmarried Bahamian men overseas, however, is not governed by a specific provision but instead is left to be implied from the interpretation of Article 14(1), which assimilates the status of a child’s father (born out of wedlock) to that of the mother. The effect of that provision is that a child born overseas to an unmarried Bahamian woman has an automatic entitlement to citizenship. This shift from patrilineal to matrilineal transmission reflects the common law protection given to an unmarried female.

Article 9: ‘Legitimate’ children born overseas to Bahamian mother

14.20 Children born overseas to a Bahamian woman married to a foreign man have a right to be registered at the age of 18 and before 21 (Art.9). This is one of the provisions that clearly espouses a gender bias, and which should on that account be changed. Interestingly, the Court of Appeal of Botswana found that s. 5 (1) of the Botswana Constitution (which is very similar to art 9 of the Bahamian Constitution), when construed with section 15(3), which corresponds to 26(3) of the Bahamian Constitution), had the effect of discriminating against women.<sup>47</sup>

14.21 To make matters worse, anecdotal evidence has been led before the Commission of Bahamian women overseas who, in order to evade the provisions of article 9, have deliberately deferred entering into marriage with their chosen foreign partners until after

having children. It is regrettable that citizens of The Bahamas would have to resort to making fundamental moral and life choices because of constitutional strictures.

Article 10: Citizenship by marriage

14.22 Notwithstanding the misleading marginal note to this article—“Marriage to *citizens* of The Bahamas” (emphasis supplied)—it only provides for foreign women who marry Bahamian men to be entitled to be registered as citizens, subject to certain qualifications and during the subsistence of the marriage. There is no similar provision for Bahamian women who marry foreign men, although their foreign spouses may acquire a right to a spousal permit and residency under the *Immigration Act*. In fact, it is significant that successive Governments of The Bahamas have attempted in varying degrees to equalize the position of both foreign spouses married to a Bahamian by various legislative and administrative measures.

14.23 Chief among these is the provision of the *Immigration Act* which provides (at s. 14) for the grant of a certificate of permanent residence to the spouse of a Bahamian citizen, provided certain conditions are met. Notably, a spousal permit granted under this section is precluded from containing “any condition restricting the right of the holder to engage in gainful employment.” In the normal case, the holder of a residency certificate (whether permanent or annual) would require a “work permit” to engage in gainful occupation or employment (s. 13 of the *Immigration Act*).

14.24 There was also some concern that granting automatic citizenship to foreign citizens married to Bahamians might be abused such as to cause a proliferation of marriages-of-convenience. However, this could be guarded against by a provision imposing additional qualifications, such as making citizenship by marriage contingent upon the person completing a requisite qualifying period of residence in co-habitation with the Bahamian spouse. In fact, this is already attempted to some extent in the provisions relating to the grant of a spousal certificate under the *Immigration Act*, under which a

foreign husband must be able to demonstrate that he has “lived continuously with the other party to the marriage for a period of not less than five years” (s. 14(1)(d)).

14.25 Alternatively, there could be the more direct approach, taken in the Jamaican Constitution, which adds the following proviso to the provision providing for acquisition of citizenship by marriage:

**“A person may be denied registration under this section if -**  
**a. there is satisfactory evidence that -**  
**i. the marriage was entered into primarily for the purpose of enabling that person to acquire Jamaican citizenship; or**  
**ii. the parties to the marriage have no intention to live permanently with each other as spouses, after the marriage;**  
**b. the person has been convicted in any country of a criminal offence specified in any law which makes provision for such denial on the ground of such conviction.”**

*Gender discrimination in the acquisition/transmission of citizenship*

14.26 Many of the citizenship provisions outlined above describe a patrilineal and male-oriented Constitution, one that relegates women to an inferior status in civil and social life because of gender. The Commission is unequivocal in its view that there ought to be no difference in the ability of Bahamian men and women to transmit their citizenship to their children and spouses. To provide for different treatment on the basis of gender is tantamount to saying that there are classes or degrees of citizenship, and that the citizenship of a woman is somehow less than that of a man. Such thinking must be relegated to the annals of history. It can have no place in a modern Bahamas.

14.27 With respect to international norms, the Commission notes that the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) requires states to take all appropriate measures—legislative, judicial and administrative—to promote the advancement of women and eliminate all forms of discrimination against them. The Bahamas has the dubious distinction of being one of the last countries in the western hemisphere to sign this Convention. When it was ratified in 1993, The Bahamas attached significant reservations, effectively opting out of the requirement for

constitutional modification to give effect to the convention and to grant women equal rights with men with respect to their ability to pass nationality on to their children.

14.28 However, as is explained in greater detail in a later section of this Report, The Bahamas has signed and ratified later human rights instruments, mainly the International Covenant on Civil and Political Rights in which it has accepted the obligations to prohibit discrimination on the grounds of sex. We must therefore make the necessary amendments to our Constitution not only to satisfy a moral and social imperative of the first magnitude but also to enable us to comply fully with international norms and obligations.

14.29 In any event, the appropriate amendment to article 8 to make it applicable to both men and women, along with the deletion of Art. 14(1), would provide for automatic citizenship and eliminate the need for article 9, which could then be safely deleted—as indeed was proposed in one of the defeated 2002 Constitutional Referendum Bills.

### **The Issue of Statelessness**

14.30 The Commission notes, and it has also been drawn to its attention in the presentation from the United Nations High Commissioner for Refugees (UNHCR), that several provisions of the Constitution might have the effect of creating a class of persons who are stateless. The 1954 Convention Relating to the Status of Stateless Persons defines a stateless person as “a person who is not considered as a national by any State under the operation of its laws.” As was further indicated in the submission from the UNHCR, these provisions of the Constitution are not only “contrary to the ICCPR and CEDAW, but also problematic in light of The Bahamas’ obligations pursuant to the CRC [Convention on the Rights of the Child].”<sup>48</sup>

14.31 The most significant of these under our Constitution is Article 7 which operates to reduce many persons to a situation of effective statelessness, as the persons who are primarily affected are either unwilling or unable to avail themselves of the other nationality to



which they are entitled.<sup>49</sup> Needless to say, the majority of persons who fall into this category are children born in The Bahamas to Haitian parents.

14.32 The issue of statelessness arises in respect of this category of persons as set out below. The Haitian Constitution provides for persons to acquire nationality through descent but only if either of their parents is native-born, and have never renounced their citizenship (Article 11, 1987 Constitution of Haiti). Thus, those persons born in The Bahamas to a native-born Haitian parent who has not renounced Haitian citizenship would become Haitian nationals at birth and retain it indefinitely thereafter. But if their parents are not native-born or have renounced, they would effectively be stateless. Thus the right to claim Haitian citizenship by descent is limited to the first generation. Even where persons falling into this category are entitled to Haitian citizenship, most choose not to acquire Haitian passports, as in any event they would be required to renounce that citizenship at 18 to acquire Bahamian citizenship. The Haitian Constitution forbids dual Haitian and foreign nationality.

14.33 Children born abroad to a Bahamian parent in circumstances where they are unable to acquire the nationality of the Bahamian parent (the situations described under articles 8 and 9) may also be at risk of statelessness, at least until they reach the age of majority. For example, under Article 8, the right of a father to transmit his citizenship is not available if he himself acquired his citizenship by descent and was not native-born (Articles 8 and 3(2)). Similarly, with respect to a Bahamian female married to a foreign man (Article 9), the child may be rendered stateless (at least until 18), if the father is unable by the citizenship rules of his country to transmit his citizenship, and if citizenship is not available by birth in the place where the child is born.

#### *Effects of Statelessness*

14.34 The Commission cannot overstate the enormous psychological, socio-economic and other ill-effects that result from leaving large groups of persons in limbo in relation to their aspirations for Bahamian citizenship. Not only are the affected individuals badly

damaged and marginalized, the entire society is put at risk and its future compromised by having within its borders a substantial body of persons who, although having no knowledge or experience of any other society, are made to feel that they are intruders without any claim, moral or legal, for inclusion. Such feelings of alienation and rejection are bound to translate into anti-social behavior among many members of what is, in effect, a very large underclass in our society.

- 14.35 The representatives from the Haitian community, in a most frank and open way, shared some of the effects they and others in the Haitian community have suffered (reproduced verbatim):

**“Discrimination**

**Unable to open a bank account**

**Feeling no sense of belonging and feeling rejected**

**You feel as if you are the problem**

**Stateless people are not allowed to work in certain jobs (unless a Bahamian passport can be shown)**

**Young people going through the transitory state are taken advantage of and abused by the authorities**

**Many stateless young people feel like aliens not just because they are not automatically entitled to citizenship in their birth country but they also do not feel welcome in the country of their parents’ birth.**

**Essentially, these people become virtually stateless in their own country of birth, the consequence is despair and frustration.**

**The classification at issue deprives a group of children of the opportunity for Scholarships afforded to all other children simply because they have not been assigned a legal status due to a violation of law by their parents.**

**These children are cursed to a lifelong penalty and stigma.”**

- 14.36 This is obviously a most untenable position in which to place individuals who were born in The Bahamas, have no connection (other than ancestral) to any other country, and have no intention of residing anywhere else. In this regard, the Commission notes the warning of noted Bahamian social scientist, Dr. Dawn Marshall, in her classic study on Haitian migration to The Bahamas Although published in 1979, it as timely today as it was then.<sup>51</sup>

**“The study of Carmichael Road Haitians indicates that many children are being born in The Bahamas who in a decade or two will be claiming their rights as Bahamian citizens. Not all of these native-born Haitians will docilely accept the denial of their rights. It is time, then, that The Bahamas Government begin to**

**think about the future of these potential citizens and not condemn them to personal destinies of isolation and relative deprivation.”**

*Addressing some of the issues*

14.37 It was frequently suggested to the Commission that persons born in Bahamas to non-Bahamian parents should be given a more formal status, such as permanent residence, until they reach the age of majority and are able to apply to be registered as citizens. The difficulty with this is that permanent residence (with limited exceptions) is only available to persons who are of the age of majority,<sup>52</sup> which is also when the entitlement to citizenship arises under Article 8.

14.38 In light of emerging international standards, the Commission is of the opinion, shared by many of those persons canvassed, that the 18-year period for persons born in The Bahamas to non-Bahamian parents to become eligible for citizenship is too long. Obviously, this period is intended to coincide with the age of majority, when the claimant is *sui juris* (of the age of majority) and capable of choosing which nationality they wish to take (or continue). However, it is premised on the assumption that during the interval, the person would be able to hold the nationality of some other country (i.e., through descent), which he or she may decide to renounce in favour of Bahamian nationality at 18.

14.39 For example, one finds the following explanation of the intended position in respect of the Article 7 position in the White Paper that preceded Independence:<sup>53</sup>

**“33. After the day of Independence any child born in The Bahamas of parents neither of whom is Bahamian may enjoy dual nationality. Such a child, on reaching the age of 18 years, would be required to elect within a reasonable period (to be determined as one or two years) either to register as a Bahamian citizen or to retain the nationality acquired by descent.”**

This makes it clear that it was never the intention of framers of the Bahamian Constitution that persons in those circumstances would be rendered stateless.

### Timeline for applying to be registered

14.40 One issue of procedure that has fallen for consideration has to do with the procedural requirements for registering after an entitlement to citizenship arises: under Article 7, within 12 months after attaining the age of 18, and in Article 9 to apply after 18 but before the age of 21. (Many persons expressed the view that those persons who failed to apply within the allotted period should not thereby lose their entitlement). Firstly, the rationale behind the different timeframes for applying to be registered under the two articles seems arbitrary. Moreover, it is unlikely that it was the intention that mere non-compliance with these procedural provisions should disentitle a person otherwise entitled to be registered, especially where that person has not availed himself of the protection of another nationality. By contrast, it is noted that there are no prescriptive timelines for persons who may have had an entitlement under Articles 3-5.

### **Other issues relating to Citizenship**

#### *Minister's Discretion to refuse registration*

14.41 Section 16 of the *Bahamas Nationality Act* gives the Minister a discretion to refuse registration, which is said not to be reviewable by the courts. The Commission is of the opinion that such preclusive provisions can be misused by the executive for political or other reasons to deny registration to persons who are entitled to be registered as citizens. The Commission is therefore firmly of the opinion that the Minister's decision should be subject to review for breach for natural justice, and thinks that this was the tenor of the decision of the Privy Council in *Attorney-General v. Ryan* [1980] A.C. 719. There, the Privy Council invoked the *ultra vires* doctrine, holding that any decision of the Minister which offended natural justice was outside the jurisdiction of the decision-making authority and therefore subject to review by the courts.

14.42 Even outside that context, the Commission is of the opinion that the current system under which the grant or refusal of citizenship is a purely executive power exercised directly by

the political directorate, specifically the Cabinet, is inherently unfair and arbitrary. Serious consideration should be given to modifying the system to provide for the use of an independent, statutory board invested with powers to consider and recommend the grant of citizenship or asylum requests according to criteria consistently and, as far as practicable, objectively applied. Alternatively, a system involving consideration of citizenship claims by a judge might be worthy of consideration.

*Statutory Immigration/Citizenship Board?*

14.43 There was one written suggestion to the Commission that the Immigration/Citizenship Board should be composed of the following: a Judge as chairman, the Minister and Director of Immigration, the relevant Permanent Secretary, and the Commissioner of Police. While there may be some merit in such a mix, the Commission would recommend that the judge should exercise a determinative function in a judicial capacity, not as part to the executive board. In any event, even if some sort of independent Board is used, the recommendations of that Board should be ratified by the Executive unless it is able to justify, why on the grounds of public policy or national security, citizenship or asylum should not be granted. An alternative would be to require the relevant department (i.e., Immigration) to have the entitlement to citizenship decided by a judge, a model that has been used to good effect in many countries.<sup>54</sup>

*Dual citizenship*

14.44 Another aspect of the citizenship provisions that needs to be addressed and clarified relates to the situations in which the Constitution permits dual citizenship or nationality—that is where a citizen of The Bahamas may retain the citizenship of another country concurrently with Bahamian citizenship. It is left to be implied from the citizenship provisions that in all cases where the acquisition of citizenship is automatic by birth, the Constitution countenances dual citizenship. However, where there is only an entitlement to register as a citizen, this is invariably subject to renunciation of any other citizenship. The Commission feels that the circumstances in which dual nationality is permitted

should be made clear in a single provision of the Constitution. For example, this is how the situation is dealt with in the Belize Constitution (Article 27):<sup>55</sup>

**“A citizen of Belize by birth or descent who acquires the citizenship of any other country may, if the laws of the other country so permit and at his option, retain his citizenship of Belize.”**

14.45 In any event, the Commission does not think that the renunciation of another citizenship should be required as a condition-precedent to the grant of citizenship. There is a saying that international law frowns upon dual or multiple citizenship because of the potential for conflicting national obligations and the conflict over nationality claims in international law.<sup>56</sup> However, conflicts over nationality of claims are rare, and the rules of international law are fairly clear on how these are to be resolved.

*Children born overseas to persons serving in a diplomatic or consular capacity*

14.46 Another issue, raised by a retired career foreign service officer, was the rule applied by most countries which prohibits children born to diplomats serving in their country from gaining an entitlement to citizenship. The operation of this rule is, of course, exacerbated by the articles that currently provide for the acquisition of citizenship by children born overseas to Bahamian parents, particularly in those situations where the father may be unmarried and the mother married to a foreign person (Articles 8 and 9). Naturally, the proposed amendments to article 8 that would allow men and women to equally transmit their citizenship, whatever their marital status, to their children born overseas would eliminate any problems in the foregoing regard.

14.47 However, the point was that there should be provisions providing for children born to Bahamians while serving abroad in a diplomatic capacity not to be disadvantaged because of their parent’s posting. The more modern approach would be to specifically prescribe for this situation, along the following lines:

**“A person born outside of The Bahamas after 9<sup>th</sup> July 1973 shall become a citizen of The Bahamas by birth, if at the time of that birth, that person is**

**born to a citizen who is in the service of The Bahamas in a diplomatic or consular capacity.”**

14.48 The converse of this is that there does not seem to be a provision in the Bahamian Constitution or in any of the laws of The Bahamas prohibiting children born in The Bahamas to foreign diplomats from claiming an entitlement to citizenship once they are willing to renounce their other citizenship. Perhaps there should be a proviso to Article 7, along the following lines:

**“Provided that a person shall not be entitled to be registered as a citizen of The Bahamas by virtue of this provision if neither of his parents is a citizen of The Bahamas and his mother or father possesses such immunity from suit and legal process as is accorded the envoy of a foreign sovereign power accredited to The Bahamas”**

### ***Conclusions***

14.49 As has been clearly indicated above, the issue of gender-discrimination in The Bahamas can be remedied by the appropriate amendments to the Constitution to make citizenship entitlements gender-neutral, as has been recommended above. Less easy to fix is the issue of how to treat persons born in The Bahamas where neither parent is Bahamian. The Commission notes that many of the newer Constitutions give full effect to the *jus soli* principle and grant citizenship by virtue of birth in the territory. Considering the profound implications this would have for The Bahamas, the Commission does not recommend automatic citizenship by reason only of birth on Bahamian soil. We do, however, recommend that this issue be included in the terms of reference of the citizenship commission recommended below (see Recommendation 12).

14.50 The Commission is of the opinion that this situation requires a deeper study involving assessment of empirical data on the numbers of such persons who might fall into this category, and a myriad of other factors—psychological, sociological, economic, health, national security, etc. In addition, careful study should be made of the nationality laws and policies of other countries with similar legal systems who struggle with immigration problems (such as the United Kingdom) and their experiences. As we have been at pains

to point out, such a study could not be properly undertaken in the short window of time in which the Commission had to perform its functions.

- 14.51 Moreover, the Commission finds instructive the approach taken by other countries with similar immigration issues.<sup>57</sup> For example, provision may be made for persons born in The Bahamas to non-citizens to be registered if: (i) the child spends the first 10 years of life in the country; (ii) either parent has permanent status (akin to permanent residence or ordinary residence), or subsequently becomes a citizen or acquires permanent residence; (iii) or where the child would otherwise be stateless if unable to claim nationality in the place of birth.

## §

### **Recommendation(s)**

9. The Commission recommends that all of the Articles of the Constitution which provide for the acquisition of citizenship based on birth, descent, or marriage should be recast in gender-neutral language (by means of appropriate drafting formulae), with the goal of putting Bahamian men and women on an equal footing with respect to the acquisition and transmission of nationality.
10. Article 14(1), which erects the common law rule of *filius nullius* (child of no father) should be deleted to remove any difference in treatment attributable to the marital status of the parent. This may necessitate a review of other pieces of legislation for constitutional conformity as a result of this amendment.
11. Bahamian men and women should have the equal ability to transmit citizenship to their foreign spouses under Article 10, except that there should be provisions (preferably in the Nationality and Immigration Acts) to guard against marriages of convenience.
12. With respect to the position of children born in The Bahamas after Independence neither of whose parents is a Bahamian (Article 7), the Commission recommends that this be the



subject of further study, for the reasons set out in the body of the Report. To achieve this, the Commission recommends the appointment of a commission to consider further questions relating to nationality and the basis on which nationality should be acquired by children born in The Bahamas to non-Bahamian parents.

- 13.** Moreover, it would recommend that the principles set out in the body of the Report (at paragraph 14.51) could guide the approach.
- 14.** Appropriate amendments should also be included to ensure that those persons born to Bahamians outside The Bahamas as well as persons born to non-Bahamians in The Bahamas would not be rendered stateless. The ability of a Bahamian father or mother to transmit their citizenship to their children born overseas should be a right not conditioned on how the parent acquired citizenship. Thus, the proviso to Article 8 “...otherwise that by virtue of this Article or Article 3(2) of this Constitution” should be deleted.
- 15.** Consideration should be to given to deleting the procedural temporal requirement at both article 7 to apply within 12 months after attaining the age of 18 and in Article 9 to apply after 18 but before 21 to be registered, for the reasons given in the body of the Report. In any event, the appropriate amendment to Article 8 to make it applicable to both men and women would eliminate the need for Article 9.
- 16.** The situation described under Article 6, which provides for children born in The Bahamas to acquire citizenship if either parent is Bahamian, while not discriminatory on its face, has been interpreted by the courts in a way that discriminates against men. The solution would be to repeal sub-paragraph (1) of Article 14 (which assimilates the father of a child born out of wedlock to the status of the mother), and therefore the Courts would be required to give full effect to the natural meaning of “either parent” in Article 6 (subject to proof of paternity in the case of men). The Commission recommends the deletion of sub-paragraph (1) of Article 14.

- 17.** The position with respect to dual citizenship or nationality should be stated and in particular persons who are eligible for Bahamian citizenship should not be denied registration simply because they possess another nationality. Renunciation of another citizenship should also not be made a condition-precedent to the grant of citizenship. However, a register should be retained of Bahamian citizens with dual nationality.
- 18.** The Minister's discretion to refuse a request for registration, which under section 16 of The Bahamas *Nationality Act* is declared to be non-reviewable, should be subject to review by the court.
- 19.** There should also be a statutory, independent Immigration Board or Committee with the responsibility to consider applications for citizenship and asylum requests, and make recommendations. These should be ratified by Cabinet unless there are substantial policy or national security considerations to override the recommendations.
- 20.** A proviso should be added to Article 7, along the lines suggested below, to exclude any nationality entitlement arising in respect of children born to foreign diplomats serving in The Bahamas: "Provided that a person shall not be entitled to be registered as a citizen of The Bahamas by virtue of this provision if neither of his parents is a citizen of The Bahamas and his mother or father possesses such immunity from suit and legal process as is accorded the envoy of a foreign sovereign power accredited to The Bahamas"

## Section 15:

### Chapter III of The Constitution: Fundamental Rights

- 15.1 The Commission was required under its terms of reference to examine how to better secure the fundamental rights and freedoms of the individual, in particular the need to end gender-based discrimination, and to protect the individual from abuses of power by the state, while ensuring that the collective security needs of the many were not compromised by individual actions.
- 15.2 As explained below, this was an area in which the Commission had to tread carefully, as it produced extremely emotive debate, exposed deep-rooted prejudices, and at times a simple apprehension about the implications of change. The greatest challenge to strengthening fundamental rights are those provisions of Chapter III (Fundamental Rights and Freedoms of the Individual)<sup>58</sup> which do not expressly afford protection from discrimination on the grounds of sex.
- 15.3 We have already peeled back the veneer of discrimination as it relates to the acquisition and transmission of citizenship as between women and men. But the treatment of women under the citizenship provisions is enabled by a more fundamental defect in the Constitution: the limited scope of those protected against discrimination, and in particular the approach to “sex” as a ground of discrimination.
- 15.4 Naturally, the discussion in this area focused around Article 26 and the lion’s share of this section is therefore devoted to that. However, several other issues came up relating to several of the other rights which the Commission comments on in passing.

Article 20:

*Constitutional Right to Jury Trial*

- 15.5 Several presenters, including former Chief Justice Sir Burton Hall, made a case for the dis-entrenchment of the right to trial by jury in certain cases, which he described as “...inefficient, prodigal of resources, and ultimately, unfair.” This view was supported by the Hon. Attorney-General in her presentation to the Commission. The Commission notes, however, that there was not unanimous support for the abolition of jury trials from within the senior ranks of the judiciary.
- 15.6 Our Constitution, almost uniquely among the Constitutions of the Commonwealth Caribbean, guarantees the right to trial by jury “when charged on information in the Supreme Court” (Article 20 (2) (g)).<sup>59</sup> That alone should signal that it might be necessary to look seriously at the utility of retaining such a provision. But importantly it was never suggested that removing the constitutional right to trial by jury would introduce any unfairness in the system. To the contrary, the argument was that jury trial had the tendency to be arbitrary and unfair, in addition to the administrative evils associated with it. The Commission agrees that the criminal justice system would be better served if there were not an automatic right to a trial by jury when charged on information in the Supreme Court. In our view, the Constitution should authorize Parliament to prescribe by ordinary legislation the exceptional circumstances in which criminal matters may be tried by a Judge alone.

*The right to vote*

- 15.7 The Commission received several representations for the right to vote to be enshrined as one of the fundamental rights.<sup>60</sup> It cannot be denied that the right of a people to vote freely and secretly to elect their representatives to Parliament is the very bedrock of democracy. The legitimacy of every government depends upon it. All of the other

political powers of the state flow from the exercise of the right to vote. Currently, Parliament can curtail that right by ordinary legislation imposing restrictions and qualifying conditions and, in the not-too-distant past, women and persons without property did not possess this right at all. The Commission agrees with the recommendation that the right to vote should be enshrined and entrenched in the Constitution.

- 15.8 Obviously, however, it needs to be appreciated that unlike the other fundamental rights, which are granted basically to “everyone within The Bahamas”, the right to vote is a limited one, and can only belong to citizens of The Bahamas.

Article 22:

*Freedom of Religion: Rastafarians*

- 15.9 The Commission received several presentations from representatives of the Rastafarian community, who also alleged that their rights were not accorded sufficient recognition and that they were discriminated against, mainly in their interaction with the Police and rules relating to dress in schools which prohibited dreadlocks. In this respect, representations were made to recognize the use of “sacramental herbs”—a reference to the use of small quantities of marijuana—but the Commission merely observes that this is a matter regulated by the criminal law, and any changes would necessitate a change in the criminal law. With respect to the attendance of children in school, it was determined that the cases referred to were with respect to purely private schools, which were not caught by the protective provisions. In fact, litigation in the Supreme Court has established the right of children to attend public schools (or government-subsidized schools) wearing dreadlocks.<sup>61</sup>

- 15.10 However, the Commission is of the view that while there is certainly a need for a change of the attitudes of society and, in particular, law enforcement towards Rastafarians, the protection of freedom of religion and conscience affords sufficient guarantee against

formal discrimination against this group. In fact, in a recent Bahamas Supreme Court ruling the Chief Justice held that forced participation in Christian prayers by a Defence Force marine who had converted to Islam was unconstitutional (although the case is now on appeal).<sup>62</sup>

## Article 23

### *Freedom of Information*

15.11 A corollary of the right of free speech is the right to have access to public information. The right of free expression embraces the right to impart and receive information. Thus it is not surprising that some Constitutions link the right of freedom of information to that of free speech. Some provide for extensive rights of freedom of information, such as the South African model, which provides a right of access to information held by the state (art.32). Others do not elevate it to a constitutional right, but have adopted freedom of information laws. It would be difficult in a common law system, where legislation dealing with official secrets, breach of confidence legislation and the regulations governing the public service still pertain, to grant a constitutional right to government-held information. But the Commission is of the view that some form of statutory regime should provide the citizen with the access to information needed for the proper functioning of a democracy.

### *Freedom of the Press*

15.12 The Commission also heard from a number of advocates for freedom of the press to be included as part of the principle of free expression. It cannot be denied that a free and unbridled press is one of the most important institutions in a democratic society, and is deserving of constitutional protection. However, it should be noted that the European Court of Human Rights (ECHR), in construing Article 10 of the European Convention on Human Rights 1950, which is the template for Article 23 of the Bahamian Constitution,

has held that the principle of free expression applies equally to the press, both electronic and the media.

## Article 26

### **Legislative approaches to protecting against discrimination**

15.13 Before looking at the specific issues relating to discrimination on the grounds of sex, the Commission wishes to set out by way of background the different ways in which Constitutions may seek to protect against discrimination. This may be discerned from the legislative approach taken in a few representative countries. The Commission wishes to emphasize, however, that the examples given below are just for illustrative purposes, and are not intended to indicate any preference for any one or more of the models. The Commission is also cognizant that there are many variations that exist on the main approaches set out below.

#### *Broad statement of equality*

15.14 The first approach is to frame a broad, positive guarantee of “equality before the law” or “equal treatment” without specifying any particular group. An example of this approach is provided by the 1996 Constitution of South Africa, whose constitution begins with the simple proclamation that “Everyone is equal before the law and has the right to equal protection and benefit of the law.” The formulation in the Trinidad and Tobago Constitution is not as broad, but also guarantees “the right of the individual to equality before the law and the protection of the law” (s. 4(d)).

#### *Non-exhaustive list of proscribed grounds*

15.15 A second example, (which may be combined with the first) is to specify a list of grounds of discrimination, which is clearly not intended to be exhaustive. Again, an example may be found in Section 9(3) of the 1996 South African Constitution, which states: “The

[S]tate may not unfairly discriminate directly or indirectly against anyone on one or more grounds, *including* race, gender, sex, pregnancy, marital status, ethnic or social original, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth” (emphasis supplied.) Naturally, such provisions have been interpreted as giving the courts some discretion to add to the list by applying established rules of interpretation.

*Fixed category of proscribed grounds*

15.16 The third approach, which partly describes the approach taken in the Constitution of The Bahamas, is to commence with a broad statement of guarantee of rights without discrimination on the basis of sex, race, and so on, but then list a fixed category of proscribed distinctions in a definition of what is “discriminatory”. Obviously, this approach does not lend to the same flexibility of the courts to extend the categories to other groups outside the fixed categories, although in some cases the courts have strained their interpretive powers to accomplish this.<sup>63</sup>

*Statutory protection of rights*

15.17 A further approach is to specify a list of unlawful grounds of discrimination in anti-discrimination legislation, which is the approach taken by the United Kingdom. Provisions may be contained in various pieces of legislation (e.g., in the UK there are various Acts dealing with discrimination in respect of the various subject areas).<sup>64</sup>

*Discrimination on the grounds of “sex”*

15.18 The problem in the context of the Bahamian Constitution with respect to sex as a ground of discrimination arises in the following way. While the opening provision of Chapter III (in Article 15) include “sex” as one of the prohibited grounds in the declaration of certain basic rights, the definition of what is “discriminatory” at Article 26 is limited to “affording different treatment to different persons, attributable wholly or mainly to their



respective descriptions by race, place of origin, political opinions, colour or creed...”.*Sex* as a ground is noticeably absent. Article 26 also excludes from the protection against discrimination matters of personal law (adoption, marriage, divorce, burial, devolution of property on death) and discriminatory laws that are “reasonably justifiable in a democratic society”.

- 15.19 Naturally, the relationship between these two articles—15 and 26— (which also appear in several of the other Constitutions), and the question of whether Article 15 is intended to have stand-alone force, has generated considerable legal uncertainty and controversy. The answer often depends on the particular formulation contained in the Constitution. In a line of cases the Privy Council has distinguished between the enacting formulae of the various constitutional provisions examined to determine whether or not they were merely declaratory or had justiciable force (i.e. capable of being taken to court for enforcement). Generally, those Constitutions which used the enacting formula “*Whereas...*” (as does The Bahamas, and Jamaica) were found to *not* have independent force, though they might be used as aids to interpretation where there was ambiguity.<sup>65</sup>
- 15.20 For example, in *Campbell-Rodrigues and Others v. Att-Gen of Jamaica* [2007] UKPC 65, in construing the Jamaican equivalent to Articles 15 and 28 of the Bahamian Constitution, the Privy Council held as follows (at paragraph 12):

**“...Their Lordships are satisfied that section 13 does not confer any freestanding rights and that on the clear interpretation of the provisions of Chapter III the rights and freedoms enforceable under section 25 are to be those set out in sections 14 to 24 inclusive. They agree with Cooke JA when he said (Record, p 379) that “a ‘generous and purposive interpretation’ does not permit a distortion of the explicit relevant constitutional provisions.”** [Emphasis supplied.]

- 15.21 The issue was fought in this jurisdiction in a recent judicial review application that went to the Court of Appeal challenging the construction of an electricity plant in Wilson City (the “Wilson City” case) where the Court of Appeal concluded, following the approach of the Privy Council, that the general statement is declaratory or preambular, although it might be used to aid in the interpretation of the enumerated rights in Articles 16-27.<sup>66</sup>

*Expansion of the categories of grounds of discrimination*

- 15.22 The scheme of the Bahamian constitution in its approach to discrimination, and the cases which have interpreted those provisions, leave little room for doubt that the inclusion of “sex” as a prohibited ground of discrimination has to come about by way of statutory intervention, not judicial activism.
- 15.23 This is the backdrop against which the Commission came to consider whether the current prohibited grounds of discrimination contained in Article 26(3)—*race, place of origin, political opinions, colour or creed*—should be expanded to include additional grounds mentioned in several human rights instruments and which have been adopted by many constitutions. For example, the grounds which are advocated by the Council of Europe in respect of the Convention for the Protection of Human Rights and Fundamental Freedoms are sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>67</sup>
- 15.24 The Commission wishes to state at once that, other than the recommendation to include “sex” in the definition of “discriminatory”, it does not advocate any expansion of the list of grounds, and its recommendations in this regard are fleshed out more fully below. However, it will briefly elaborate on several of these grounds, not in any particular order.

**Sexual orientation**

- 15.25 While the majority of persons who made presentations to the Commission or presented views at town meetings were clearly of the opinion that there should be no discrimination in respect of rights as between men and women, there were deeply divided and conflicted views on the effect of including sex as a ground in Article 26. In particular, there was a fear that the interpolation of “sex” into Article 26 would open the door for constitutional interpretations to embrace other collateral rights—i.e., a right to same-sex marriage and recognition of other rights for lesbian, gay, bisexual and trans-gender persons (LGBT). This was opposed by many persons as being fundamentally repugnant to the established

moral code, and indeed to guard against such a possibility there were calls for constitutional protection to be given to the institution of marriage, which will be addressed later.

- 15.26 Indeed, similar concerns have been agitated in neighbouring countries, which led them to take a radically different approach. An example is provided by the recent experience of Jamaica, which out of similar fears that such a ground would provide fodder for constitutional challenges to other laws, which discriminate on the basis of sexual orientation, took the novel approach of using the terms “being male or female” as opposed to “sex”.
- 15.27 To further guard against the possible infiltration of developing jurisprudence on same-sex marriages in its legal system, s. 18 of the Charter provides that no law which restricts marriage as limited to one man and one woman shall be held to be inconsistent with the Charter. More frontally, St. Vincent and the Grenadines, in the “Guiding Principles of State Policy” included in its 2009 Draft Constitution, provided for the protection of marriage and the affirmation that marriage is a legal union between a person who is biologically male at birth and a person who is biologically female at birth.
- 15.28 The Commission cannot, of course, predict how the courts might approach a particular issue when it comes to construe it. There are examples within the Commonwealth where the Courts have given recognition to same sex-marriage: see, in particular, *Minister of Home Affairs v Fourie* (2006) (3) BCLR 355 (CC), in which the Constitutional Court of South Africa held that the exclusion of same-sex couples from the common law definition of marriage was unconstitutional. But it has to be remembered, as explained above, that the Constitution of South Africa expressly prohibits discrimination on the grounds of sexual orientation, and its grounds of discrimination are not closed.
- 15.29 There was also an attempt by the Namibian High Court to construe Article 10 of its Constitution, which provided for “equality before the law and prohibit of discrimination on any ground, including sex...” together with other provisions of the Constitution as

recognizing same-sex relationships. The word “attempt” is used because the High Court finding was promptly overturned by the Supreme Court, which held that the Constitution did not recognize same-sex relationships: *The Chairperson of the Immigration Board v Frank & Another*, 2001 NR 107 (SC), p. 108.) (In fact, the holding would have been difficult to reconcile with the fact that the laws of Namibia, like many of the African countries, still criminalizes sodomy.)

15.30 In a recent case from Gibraltar, which has a Constitution which prohibits discrimination on the ground of sex but goes further to include “other grounds which the European Court of Human Rights may, from time to time, determine to be discriminatory”, the Privy Council held that denying certain housing benefits to same-sex couples was unconstitutional. However, in coming to its finding, the Privy Council said that it “*would also like to stress that this decision does not oblige Gibraltar to introduce same-sex marriage or civil partnerships.*”<sup>68</sup>

15.31 Considering all of these developments, the Commission does not think that sexual orientation should be included in the definition of discrimination. In fact, the Commission cannot but note that none of the Caribbean countries, even in the proposed reforms to create new and positive charters, have embraced an inclusion of sexual orientation in any of their Constitutions, although many now include sex (or the more ambiguous “male or female” settled on by Jamaica.) In fact, it bears true to the records of the Commission, that there were hardly any calls for such a change (in signal contrast to the many calls against). Even the spokesperson on behalf of the LGBT (lesbian, gay, bisexual and transsexual) community, while advocating recognition of rights for such persons, was rather cautious and equivocal on this point. Indeed, her view was that the Bahamian public were not ready to countenance such a change, that there needed to be far more public education and sensitization, and that an incremental approach to change might work best.

*Statutory protection of rights*

- 15.32 However, while the Commission wholeheartedly agrees that all vulnerable persons groups in society should be protected and not discriminated against, this does not necessarily mean that this has to be accomplished by expanding the constitutional grounds of discrimination. It is of the view that the necessary, limited protection can be provided by ordinary legislation. As was indicated in the opening section, several countries use the statutory method as their main form of protecting human rights.
- 15.33 In The Bahamas, the constitutional protection is also augmented by statute. For example, the 1991 *Sexual Offences and Domestic Violence Act* recognizes that adult, consenting homosexual relations in private are lawful, and thus gives explicit legalization of homosexual relations, thereby giving adult persons the legal right to freely choose and practice their sexual orientation. In fact, The Bahamas was the first country in the Commonwealth Caribbean to legalize same-sex relationships. In this regard, it might be useful to return to the Jamaican example, as the extraordinary steps taken by that country to not include *sex* within the ambit of the discrimination grounds was partly to avoid any challenges to its anti-sodomy laws, as Jamaica (along with several of the other Caribbean countries) remains one of 41 Commonwealth countries where such laws remain. However, The Bahamas is not faced with a similar situation.
- 15.34 Statutory protection against discrimination in the field of employment is also provided for. For example, section 6 of *The Employment Act* (No. 27 of 2001), prohibits discrimination with respect to employment and pay on the basis of race, creed, sex, marital status, political opinions, age or HIV/AIDS. The Act also extends similar protection to disabled persons, unless the physical requirements of the job would justify different treatment being meted out to them. In some respects, the protection afforded by statute against discrimination in the workplace may be more important than any constitutional right, as the statute is of general application and applies to Government as well as private employers.

*Birth or other status*

15.35 The Commission also looked at whether the non-discrimination provision in the Constitution should be augmented by adding “birth out of wedlock” or “birth or other status” as one of the prohibited grounds.<sup>69</sup> In this regard, it notes that St. Kitts and Nevis Constitution contains “birth out of wedlock” as one of the grounds on which discrimination is prohibited (A. 15(3)). One of the reasons for undertaking this inquiry is that it is doubtful whether legislation intended to ameliorate the position of the child born out of wedlock (in particular the *Status of Children Act*), had succeeded in placing all children on an equal footing. As has been pointed out earlier, this was not the case as such legislation is specifically not declared not to affect citizenship matters. However, if the appropriate amendments are made to the Constitution, to provide for citizenship to be inherited irrespective of birth status, such a clause would not need to be included in the Constitution.

*Ethnicity*

15.36 The need for protection against discrimination on these grounds is clearly of great relevance in societies that are multi-ethnic and multi-lingual. In the Bahamian context, we cannot turn a blind eye to the significant ethnic minority constituted by Haitians. However, the Commission thinks that the current formulation, which prevents discrimination on the grounds of race or place of origin, is sufficient to protect this group.<sup>70</sup> Race is commonly defined as one of the major divisions of humanity, but it also includes a group of people sharing the same culture, language, such as an ethnic group.

*Disability*

15.37 The Commission was the beneficiary of an extremely well researched and documented written submission from the representatives of The Bahamas National Council for Disability. In particular, the report provided a review of statistics on the demographics of

disability in The Bahamas, the international law framework, the comparative approach of various countries in domesticating their international obligations, and recommendations for Constitutional amendments in The Bahamas. For example, it was noted that the 2000 Census on Housing and Population revealed that there were over 12,986 persons with reported disabilities in The Bahamas, the majority of whom were elderly. Reference was also made to the various countries which had begun to make constitutional provisions for the protection of persons with disabilities, including Commonwealth countries such as Fiji, Gambia, Malawi, South Africa, and Uganda, and in the Caribbean, Guyana and Belize (in its preamble).

15.38 Specific recommendations for change advanced by the National Council included, inter alia, the following: (a) include a statement in the Preamble of the Constitution regarding disability; (b) add disability to the list of general fundamental rights in Article 15 (and presumably 26 (3)), and (c) include provisions which recognize the human dignity and potential of such individuals.

15.39 As acknowledged by the proposal, the Government of The Bahamas has publicly indicated its intention to sign and ratify the Convention on the Rights of Persons with Disabilities, and has committed to passing a Disabilities Act during this year to implement these obligations. This was confirmed to the Commission during the presentation by the Hon. Attorney General, who indicated a similar intention in her address to the United Nations Human Rights Council during the Universal Periodic Review held between January and June of this year. In fact the Commission has had sight of the Bill, and will refrain from quoting from it in deference to the legislative process, but simply wishes to refer to the long title, which is: “A Bill for an Act to Achieve Equalization of Opportunities for Persons with Disabilities; to *Eliminate Discrimination on the Basis of Disabilities*; to Provide Rights and Rehabilitation of Persons with Disabilities; to Establish the National Commission for Persons with Disabilities; and for Connected Purposes.” (Emphasis supplied.)

15.40 Thus, notwithstanding the call for the inclusion and integration of disability rights into the Constitution, the Commission is of the view that adequate protection can be granted persons with disabilities by the Government taking the steps to sign and ratify the Convention and enact the Disabilities Act. As has been noted, this is primarily the approach taken in the United Kingdom. Additionally, the point has already been made that notwithstanding the higher normative value of a constitutional prescription, ordinary legislation might be more effective in protecting certain rights for the following reasons: the provisions of the Constitution dealing with discrimination only prohibit legislation which is directly discriminatory or in its effect, and to persons “acting by virtue of any written law or in the performance of the functions of any public office or authority.” On the other hand, legislation can be of general application, and it appears that this is the intention of the Disabilities Bill such that it would apply to both the government and private persons and concerns.

### *Language*

15.41 English is obviously the primary and perhaps the only language of The Bahamas, although this is not given any legal recognition either in the Constitution or in any other law. The Commission is of the opinion that it would be administratively unworkable to add language generally as a ground of non-discrimination. Nobody’s fundamental rights in The Bahamas could be said to be disadvantaged as a result of speaking a different language (or dialect). For example, there are specific legal requirements for the provision of translators in the legal system, which is the most important institution for protecting such rights. Where language is protected in a constitution, it is normally done so in a very limited and defined context. In South Africa, for example, several African languages spoken are proclaimed to be official languages of the republic, and it is those that are protected. In this connection, the Commission recommends that English should be declared as the national language in the founding provisions of the Constitution.



**Derogation of the non-discrimination clause: Article 26(4)**

15.42 Article 26(4), sometimes referred to as the derogation clause, dis-applies article 26(1)—which prohibits Parliament from making laws that are discriminatory either of itself or in its effects—in relation to laws that would otherwise be discriminatory by excepting certain classes of laws or activities.

***Gambling: Article 26 (4)(e) of the Constitution:***

15.43 Article 26 of the Constitution also prohibits the making of any law that discriminates against any person (or class of persons) on various specified grounds, including, as previously noted in another context, “place of origin”, a term which, properly construed, encompasses citizenship and nationality.

15.44 Amongst the several prescribed exceptions to this general principle, however, is Article 26(4)(e) which, in essence, says that no law is to be considered discriminatory simply because it permits gaming or lottery licences to be granted subject to conditions that impose “disabilities or restrictions” on “citizens of The Bahamas” that do not apply to non-citizens.

15.45 It should be observed at once that Article 26 (4) (e) attracts singular curiosity in that it is the only provision in the entire Constitution that explicitly (some might argue, bizarrely) countenances discrimination against the entire citizenry of The Bahamas

15.46 Nor is this a matter of theoretical interest. The gambling exception is no dead letter. On the contrary, the *Lotteries & Gaming Act* (of 1969) which pre-dates the Independence Constitution but is ostensibly saved by it, makes it unlawful, indeed makes it a criminal offence, for any person who is “ordinarily resident” in The Bahamas as well as work-permit holders, and the spouses of such persons, to engage in casino gambling (S. 50, *Lotteries & Gaming Act*, Ch. 387, Statute Laws).

Prosecutions under these provisions have been fairly numerous over the years, although it appears that they are becoming increasingly rare.

- 15.47 The restriction that prevents Bahamians and residents from taking part in licensed casino gambling (“the Gaming Restriction) is actually of considerable vintage, stretching back to 1939 when the licensing of casino gaming was first introduced in The Bahamas. In that year two licenses—technically, “certificates of exemption”—were issued, firstly, for a small seasonal casino at Cat Cay in the extreme Northern Bahamas (less than 50 miles from the Florida coast) and secondly for a casino at the old Bahamian Club just slightly west of the City of Nassau.
- 15.48 The Lotteries Prohibition Act of 1901 and the Lotteries and Gaming Act of 1905 having been successively repealed, the general prohibition against gaming was enshrined only in the Penal Code. However, by virtue of an amendment to the latter statute in 1939, the Governor-in-Council was empowered to issue a “certificate of exemption” exempting any “person, club or charity” from the general prohibition.
- 15.49 In what was arguably a precursor to the present carrying on of illegal “web-shop” gaming with only indifferent notice from the authorities, the Bahamian Club, by the time of its licensing in 1939, had already been openly operating as an illegal casino, albeit for a “very restricted clientele”, for at least 19 years without any official interference. Indeed as the Commission of Inquiry into Casino Gambling observed in 1967, the issuance of casino licences (certificates of exemption) for the first time in 1939 was “not to meet a growing public demand for the introduction of casino gambling into the Bahama Islands, nor as a result of a distinct change in governmental policy”. Rather it was prompted by the recent opening of the casino at Cat Cay and “the realization by those in government at that time that this venture (and the Bahamian Club operation in New Providence) were quite illegal”.<sup>71</sup>
- 15.50 Be that as it may, the two licences or certificates of exemption issued in 1939 effectively exempted visitors of the tourist type along with “winter-residents” and

foreign-born retirees from the Gaming Restriction. Such persons were therefore free to gamble at either of the two casinos. This result, however, was not explicitly stated. Rather it was deduced, by process of elimination, from the actual terms of the certificate of exemption which spoke not to the question of who was exempt but rather who was not. In this regard, each of the two certificates of exemption stipulated that the following persons were excluded from gambling in the casinos: (a) minors; (b) persons born in and ordinarily resident in The Bahamas; (c) persons gainfully employed in The Bahamas; and (d) officers and employees of The Government.

- 15.51 Later, in the early 1960s, following the closure of the casinos in Cuba, there was a dramatic shift in government policy, one that witnessed the introduction of large-scale casino gambling into the then emerging city of Freeport, followed not long after by the even more consequential licensing of casino gambling on Paradise Island. In each of these instances, the certificates of exemption included the Gaming Restriction.
- 15.52 The present iteration of the Gaming Restriction is, as noted above, to be found in the Lotteries & Gaming Act, albeit in terms that are even more exclusionary than the original version.
- 15.53 The exact reason for the Gaming Restriction remains unclear. Perhaps there was more than one. Indeed various, sometimes conflicting, explanations have been advanced over the years, perhaps the most cogent of them being that the exclusion of Bahamians from casino gambling was a compromise, a sop even, to the religious lobby; that while that lobby was adamantly opposed to gambling in all its forms, the next best thing to having no casino gambling at all would be to limit it to those who formed no part of local congregations. However cynical that might sound, such a compromise would at least allow The Bahamas to reap the riches from an extremely lucrative trade while at the same time “protecting” the local populace from the moral contamination of direct participation in the actual gaming. Bahamian history is littered with examples of such hypocrisies.

15.54 An alternative explanation, turning more on social policy than religion, suggests that the Gaming Restriction was born of a paternalistic concern on the part of the political directorate that Bahamians should be prevented from frittering away their money on pipedreams and foolish wagers (notwithstanding that they were allowed to participate fully, without let or hindrance, in racetrack betting at the Hobby Horse Hall).

15.55 Yet a third explanation has been mooted, namely that the Gaming Restriction was primarily aimed at keeping black Bahamians out of the casinos out of fear that their exuberance and boisterous ways might prove culturally offensive to white tourists who, in consequence, might stay away from the gaming tables to the ruination of the casino gambling business as a whole.

15.56 Whatever the reason or combination of reasons, it is noteworthy that the 1967 Commission of Inquiry, comprised, incidentally, of only white foreigners, was not impressed by any of it. Thus, in the very last paragraph of their report, they advised:

**“The Commission can find no compelling reason for excluding adult Bahamians or other residents of The Bahamas from the opportunity to play at the casinos and recommends that the current restrictions should be removed”.**

15.57 However, two years later when the new *Lotteries & Gaming Act* was enacted, the Commission of Inquiry’s recommendation on that particular point was roundly rejected. Instead the new Act not only continued the Gaming Restriction, it even enlarged upon it, as noted above.

15.58 It was clearly with a view to keeping the Gaming Restriction in place for the indefinite future that the framers of the 1973 Constitution thought it necessary to perpetuate the restrictions that had appeared in both the 1964 and 1969 Constitutions. They did so by immunizing the Gaming Restriction against constitutional nullification by providing, as indeed they did in Article 26 (4) (e), that no law

discriminating against Bahamian citizens in relation to gambling should be considered unconstitutional.

15.59 Finally, it needs to be noted that, strictly speaking, there is indeed no such law since the *Lotteries and Gaming Act* does not, in explicit terms, discriminate against citizens of The Bahamas at all; it only discriminates against residents of The Bahamas. Thus a Bahamian citizen living more or less permanently abroad who, on that account, is no longer “ordinarily resident in The Bahamas” would not be prohibited from gaming at a licensed casino in The Bahamas. The point, however, is essentially technical and not a particularly compelling one either for the simple reason that upwards of 95% of the citizenry of The Bahamas are indeed ordinarily resident here and thus are subject to the restrictions contained in the *Lotteries and Gaming Act*.

15.60 As previously noted, the idea that Parliament should be able, by legislation, to discriminate against the entire citizenry of The Bahamas on any matter seems rather a bizarre proposition. However, the Commission, again as previously noted, is not unmindful of the messages that were communicated by the electorate in the recent gambling referendum and feels, therefore, to remove Article 26 (4) (e) at this time would inevitably be perceived as a repudiation of the electorate and a backdoor ploy to re-open the door to unrestricted gaming by Bahamians.

15.61 In any case, it bears repeating that which was noted in the introductory part of this report, namely, that whether or not Article 26 (4) (e) stays in place or not is irrelevant to the question as whether Bahamians should be allowed to gamble in casinos. The Commission reiterates that this is not a matter that falls for constitutional address: Article 26 (4) (e) does not prohibit Bahamians from gambling in casinos. All it says is that if Parliament enacts such a law, it is protected by the Constitution from challenge. The bottom line is therefore this: if any government of The Bahamas should decide that it would wish Bahamians to be able to gamble in the casinos (or to take part in any other form of gambling for that matter), such a change could be achieved by simply deleting Section 50 from the *Lotteries and Gaming Act*. No

constitutional adjustments of any kind would be required in connection with any such amendment to the *Lotteries and Gaming Act*.

### *Recommendations*

15.62 Although there was no unanimity on the matter, the Commission does not recommend any alteration to Article 26(4)(e) which empowers Parliament to pass laws that discriminate against Bahamians in relation to casino gambling and lotteries.<sup>72</sup> It is clear that, in any case, if any government would wish to remove the current restrictions and thereby allow all adult residents of The Bahamas to gamble in the casinos, this would not require a constitutional amendment. It could be achieved instead by a simple amendment to Section 50 of the *Lotteries and Gaming Act*.

### *Restriction to guard against same-sex marriage*

15.63 Reverting to the issue of same-sex marriage, it is recommended that an additional subparagraph be added to 26(4) along the following lines:

**“Paragraph 1 of this Article shall not apply to any law so far as that law makes provisions –**

**(f) for prohibiting same-sex marriage or rendering the same void or unlawful.”**

The effect of this would be to preclude any constitutional challenges to such a law based on alleged discrimination on the grounds of “sex”, and makes the position clear that same-sex marriages are not permitted under our Constitution and current laws. The Commission would be remiss were it not to record in this regard the large number of recommendations it received, particularly from the religious community, to define marriage as a union between a man and a woman in the constitution. It should be noted, however, that the Commission was not unanimous in making the foregoing recommendation, as it was felt by several Commissioners that existing provisions in the Constitution (namely article 26(4)(c)) already give constitutional protection to laws prohibiting same-sex unions (e.g., *Matrimonial Causes Act*, s. 21(1)(c)) .

*Consequential amendments*

15.64 The Commission also observes that generally there will be the need to make several consequential changes to these provisions, based on the recommended changes to Article 26(3) and the changes proposed above, such as including “sex” in sub-paragraph 5, and adjusting sub-paragraphs (7) and (9) to take account of the suggested changes to 26(4)(e).

Article 27: Property Rights

15.65 With respect to property rights, there were several complaints about the lack of “prompt and adequate payment” in respect of the compulsory acquisition of land. There were also representations made about the purposes for which land is acquired, which sometimes seemed not to conform with the “public purposes” specified in paragraph 27(1) (a).

15.66 The Commission makes two brief observations in this regard. The problems that have arisen have come about not from any defect in the prescriptions of the constitution to guard against such possible abuses, but simply because of a combination of administrative factors and in some cases judicial inertia. So far as the ability to provide for “prompt and adequate” payment is within the hands of the executive to remedy, the Commission recommends that it takes all actions within its power to ensure that persons whose real property has been appropriated for public use are promptly and adequately compensated, so that the constitutional guarantees are not rendered ineffective.

Article 28

*Mechanisms for enforcement of rights*

15.67 Notwithstanding the broad ability of the Supreme Court to redress fundamental rights violations under art. 28, the Commission is of the opinion that there are certain institutional weaknesses in the judicial system that may diminish the ability of the court

to effectively declare fundamental rights. It is the Supreme Court that is given original (and unlimited) jurisdiction to hear and determine fundamental rights applications, and therefore the role of this court is paramount in declaring the ambit of the human rights provisions contained in the constitution.<sup>73</sup>The Commission is not in a position to produce any statistics to support the following postulate, but is comfortable in asserting that the overwhelming majority of cases which are appealed to the Judicial Committee of the Privy Council are cases involving issues of fundamental human rights.

### *Establishment of Constitutional Court*

15.68 In this regard, the Commission recommends the establishment of a ‘Constitutional Court’, on which the Chief Justice would be President, and which would consist of no fewer than one other justice and no more than two other justices. To be clear, what is being proposed is not a new court, but rather provisions empowering the Chief Justice to constitute such a Court within the existing framework of the Supreme Court. Indeed, the establishment of such a court is already presaged and provided for in Article 28 (5), where Parliament is empowered to make laws to enable the Supreme Court to more effectively carry out its jurisdiction for the hearing and determination of fundamental rights. Further, s. 5(3) of the *Supreme Court Act* already provides for the Rules Committee to make rules under section 76 “prescribing the jurisdiction, authority and powers of the court which shall be exercised by two or more judges sitting together.” (A recommendation with respect to the constitution of this Court has been made in the Section dealing with the Supremacy Clause.) It is odd, but perhaps not surprising in a system which has always emphasized the supremacy of Parliament, that our Constitution should attach greater significance to the determination of political and electoral disputes (by providing for an Election Court composed of several justices to hear and determine such matters) than fundamental rights matters.



*Referrals from Attorney-General*

15.69 In addition to being moved by an individual or by referral from another court, it is envisioned that the court would be empowered to review legislation (and bills) for constitutionality on referral from the Attorney General, or possibly even from citizens with a sufficient interest in the matter to give them *locus standi*. In the case of bills, this will present an advance judicial opportunity to seek the court's advice on the constitutionality of legislation where substantial questions of constitutional law arise, prior to it receiving the assent or entering into force. Importantly, it will bring clarity to an area of constitutional law that has not been elucidated by the case law—the ability of a citizen (or anyone for that matter) to seek anticipatory review of legislation, that is, prior to the bill actually entering into force.<sup>74</sup> It is clear that article 28 contemplates anticipatory review (i.e., anyone who alleges that his right is *likely* to be infringed). To wait until after a possibly unconstitutional act is passed, for example in a case where property rights are involved, would not be an adequate enforcement of the rights provisions.

**Article 29: Provision for emergencies**

15.70 The Commission approached the discussion of this matter, which exposed the struggle involved in balancing the rights of the individual with the right of the state to ensure collective security for the good of all. On the one hand, the Commission considered recommendations to reduce the powers of the Executive with respect to overriding fundamental rights in times of emergencies, and other recommendations to provide for greater flexibility in the executive to declare a state of emergency.

15.71 With regard to the first objective, the Commission looked in particular at whether the rights which can be derogated from during an emergency are not too expansive, and should not instead be limited without compromising the ability of the executive to maintain law and order. Article 21(1) allows derogation from the following articles: 20 (protection of the law), other than the paragraph protecting against retrospective

criminality; 21 (privacy of home and other property); 22 (freedom conscience and religion); 23 (freedom of expression); 24 (freedom of assembly and association); 25 (freedom of movement) and 26 (protection from discrimination on the grounds of race, etc.). Of course, any derogating laws must be “reasonably justifiable in the circumstances of any situation [arising] or existing during that period for the purpose of dealing with that situation.” (*sic*). (Incidentally, this is one of the few instances where there is a printing error in the Constitution, and the word “arising” should appear after situation, as in the case in similar formulations in other Constitution (e.g., s. 14(2), Bermuda).

15.72 While it is expected that rights such as those contained in articles 23-25 might reasonably have to be suspended during public emergencies, is there really a need to make encroachments on rights such as the protection of the right to a fair trial or the protection against discrimination? On the other hand, it bears noting that the Constitution does treat as non-derogable the most fundamental rights, such as the right to life, protection against inhuman treatment or punishment, and protection from arbitrary arrest and detention. Although the protection against arbitrary arrest is excluded, emergency regulations most often make it an offence to be found in certain areas, or in such areas after certain times.<sup>75</sup> In fact, the issue of detention is likely to be the most common kind of situation which arises for review under public emergencies.

15.73 It is notable that Constitutions such as that of Bermuda provide for an independent and impartial tribunal to review the cases of any person lawfully detained under emergency regulations. Ours, even though it came afterwards, does not provide for such a safeguard, and in the view of the Commission this is a serious omission—although it appears to be a deliberate one, since the identical provisions that appear in the Bermuda formulation were included in the 1969 Constitution (s. 15 (6), (7)).

15.74 The Commission would not wish to tie the hands of the Executive with respect to the ability of the Government to take certain necessary actions in the event of public emergency, the nature of which can be very unpredictable. The safeguard provided is

the scrutiny of Parliament, as emergency procedures only remain in force for a period of two weeks, unless extended by a resolution of Parliament (for a period of six months). But it does recommend, however, that there should be a procedure, in the form of a tribunal (as existed under the 1969 Constitution) which allows for persons who may be detained under emergency regulations to seek review of their detention.

*Territorial extent of public emergency*

15.75 The second recommendation was to consider whether, as drafted, the power to declare an emergency was one that could only be invoked for the entire Bahamas, or could be localized to certain areas. This obviously has important implications for a country such as The Bahamas, for two reasons: one, it is a multi-island state; and two, it is an important tourist destination. However, in all but the general cases such as ‘war’, which would affect the population at large, such emergencies are generally limited to particular areas, even if caused by riot or insurrection or criminality, or by a natural event (as is illustrated in the comparatively recent experience of the eruption of the Soufriere volcano in Montserrat).

15.76 In fact, many countries address this by other forms of legislation (such as an Internal Security Act) which may provide for certain areas to be designated as “security areas” and singled out for more stringent treatment.<sup>76</sup>In this regard, it is notable that in the 2006 *Disaster Preparedness and Response Act* (Chapter 34A), there are provisions (at 30(1)(d) and (e), which provide for the restriction of movement and forced evacuation of person in a variety of natural disaster situations, under an emergency order made by the Prime Minister. The Act tries to distinguish this situation from the Article 29 situation by providing that the Prime Minister may, notwithstanding the announcement of the emergency, declare that “the country is not in an emergency”.

15.77 Mention must also be made of *The Emergency Powers Act* (Ch. 34), which sets out the powers of the Governor General to make regulations pursuant to an emergency proclamation. Section 3 provides as follows:

**3. (1) Whenever a proclamation of emergency is in force the Governor-General may make such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of The Bahamas, the maintenance of public order and the suppression of mutiny, rebellion and riot and for maintaining supplies and services essential to the life and well-being of the community.**

What this illustrates is that the declaration of emergency triggers the power of the Governor General to make the regulations, and it is clear that the regulations can be limited to a specific geographical location. In other words, a state of emergency (as a state of war) relates to a legal state of affairs, and is not necessarily denotative of any physical state of activities.

15.78 However, concerns over the perception that might be created may be allayed by a slight amendment to art. 29 (1) (b), inserting the following: “[...] declaring that a state of public emergency exists [*in The Bahamas or some part thereof*] for the purposes of this section.] Additionally, consideration may be given to a modification along the lines of those made by Jamaica to its “emergency” provisions, which added a third limb to the emergency formula and specified the circumstances in which a proclamation should be made. (This amendment was obviously made to deal with the issue of a potential *coup-de-etat* or uprising.) It is noted also, that the Jamaica formulation takes some of the sting out of the procedure by referring to it as “a *period* of public emergency”, as opposed to a state of public emergency.

15.79 The Jamaican provision is reproduced below:

**“(4) In this Chapter “period of public emergency” means any period during which**

- a. Jamaica is engaged in any war; or**
- b. there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or**
- c. there is in force a resolution of each House supported by the votes of a majority of all the members of that House declaring that democratic institutions in Jamaica are threatened by subversion.**

**(5) A Proclamation made by the Governor-General shall not be effective for the purposes of subsection (4) of this section unless it is declared therein that the Governor-General is satisfied.**

**a. that a public emergency has arisen as a result of the imminence of a state of war between Jamaica and a foreign State or as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity whether similar to the foregoing or not; or**  
**b. that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life.”**

15.80 The Commission would propose a three-pronged approach: (i) a geographical limitation as indicated at 15.50; (ii) a provision specifying the circumstances justifying an emergency proclamation (as at 5 above); and (iii) specific provisions in the Emergency Powers Act providing for regulations to apply only to designated areas, etc.

#### Article 17 (2); 30: Savings Clauses

15.81 Although the articles providing for the savings of existing laws are contained within the fundamental rights chapter, because their effect is mainly realized in the interpretation of the Constitution, they are more conveniently addressed under the section dealing with “Interpretation”, although they are also mentioned in the discussion on the death penalty.

#### Article 31: Interpretation

15.82 The only change to this article was prompted by the observations of quite a few commentators as to the lack of any recognition accorded to the Royal Bahamas Defence Force in the Constitution. This omission is obviously explained by the fact that the RBDF is a post-independence creation, and is established under the *Defence Act 1979*. To remedy this, the Commission recommends the following amendment in the definition of a “disciplined force” at article 31:

“(a) a naval, military, or air force;  
(b) The Royal Bahamas Defence Force; (etc.)”

The Commission notes, however, that amendments such as the one proposed here are more properly in nature of revisions, rather than reforms. In any case, the matter

concerning the RBDF ought to have been addressed a long time ago. It should be attended to as soon as possible.

### **Other Categories of Rights?**

#### *Social and Economic Rights*

15.83 While it is clear that the Bahamian Constitution gives recognition to and entrenches the traditional civil and political rights (so-called first generation rights), it does not recognize social and economic rights (second-generation rights) or group or environment rights (so called third generation rights), a matter addressed separately below. The social and economic rights, which are most famously embodied in the International Covenant on Civil and Political Rights (ICESCR) includes rights such as food and water, shelter, clothing, health care, education, language and cultural rights, social security, etc. This came into force in 1976 (post-Constitution) and The Bahamas actually became a party to the ICESCR in 2009.

15.84 There were representations made to the Commission by several presenters that such rights should be included in the Constitution. The Commission has several reservations about this, for the reasons given below, but it is not totally averse to a reference to such rights in the Constitution, provided it is clear that they are not intended to be justiciable and enforceable in the same manner as the civil and political rights under Chapter III.

15.85 The main reasons for this have to do with the problems associated with the implementation and enforcement of the economic and social rights enshrined in the IESCR. The international instruments which create them acknowledge that they are to be enforceable depending on the resources of the state or are progressively achievable. For example, Article 2 of the IESCR provides that its rights may be realized by states parties depending on the availability of resources and also on international assistance and cooperation. Further, Art. 22 of the Universal Declaration of Human Rights acknowledges that economic, social and cultural rights are to be realized “in accordance

with the organization and resources of each State”. Thus, these rights are contingent on the availability of resources.

15.86 Secondly the inclusion of such rights is only likely create a large body of litigation over the enforceability of such rights, such as was waged over the right to work in the Constitutions of Guyana and Belize, although the approach is very different in these countries. The right to work forms part of a section of the Guyana constitution that deals with the Principles and Bases of the Political and Economic system, and are aspirational goals which are not meant to be justiciable. Article 39 (1) of the Guyana constitution simply urges that the various arms of the State, including the government, the parliament and the judiciary and all public agencies be “guided” by these principles.

15.87 On the other hand, article 15 of the Belize Constitution states: “No person shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or by engaging in a trade or business, or otherwise.” The case law from Belize on the interpretation of this seems to be that what is guaranteed is the opportunity to pursue a trade or profession without unlawful hindrance by legislative or administrative action.<sup>77</sup>

15.88 Thus, the Commission does not recommend that such rights be made enforceable. If they must be brought into the Constitution, they should be defined only by way of general aspirational principles or matters which the State has a moral and political (but not legal) obligation to help secure for its citizens. By way of rounding out this point, however, the Commission cannot fail to remark that several of these rights are already provided for and guaranteed at various levels by administrative (and legal provisions) in The Bahamas: education, health and social security.

### **The Death Penalty**

15.89 No issue dominated the agenda of the town meetings more than the Death Penalty and the question of the Privy Council with which, as previously observed herein, it was

frequently conflated. As has been mentioned in the executive summary, these two issues were indeed conjoined twins in the local discourse on constitutional reform, inspired no doubt by a widespread public perception that the inability to implement the death penalty in The Bahamas (as well as in other Caribbean countries) was largely as a result of the cases decided by the Privy Council. So pervasive was this view that it was difficult for the Commission to differentiate between those agitating for removal of the Privy Council as the final appellate court because they genuinely wanted to see a delinking from the PC on anti-colonialist grounds, as opposed to those who simply wanted to see capital punishment re-commenced and regarded the PC as an anti-hanging court.

15.90 In contrast, persons were generally far more likely to see local courts and the CCJ as upholding death sentences. The members of the Commission were at pains to explain that, in fact, the jurisprudence on the matter so far from the Caribbean Court of Justice (the regional trade and appellate Court for those CARICOM countries which have subscribed to it) is not likely to be very different from that of the PC. In fact, in one of the first decisions that came before it in its appellate jurisdiction, the CCJ upheld the challenge to the death penalty.<sup>78</sup> This is most ironic, given that the trigger or impetus for the call for a supreme regional court was the landmark 1993 case of *Pratt & Morgan v Attorney-General of Jamaica*, in which the PC held that to execute the condemned prisoners after a prolonged delay would be a violation of constitutional rights.

15.91 That was the first in a series of death-penalty cases, some of them decided on very technical and artificial grounds (see the section dealing with the savings clauses), which continued to circumscribe the circumstances in which states could lawfully impose or carry out the death penalty.<sup>79</sup> Two of the cases in this vein originate from The Bahamas itself. In *Bowe and another v The Queen* [2006] 1 WLR 1623, the PC ruled that the imposition of the mandatory death penalty was unconstitutional and violated the 1964 and 1969 constitutional orders and therefore was not imported under the 1973 Constitution, so as to possibly be saved by the savings clauses. Subsequently, in *Tido v The Queen* [2011] 1 WLR 115, with respect to the circumstances in which a discretionary death penalty could be imposed, the PC said that it would only be appropriate in cases



which were “the rarest of the rare” and the “worst of the worst”. The people may be forgiven, then, for thinking these cases have laid the groundwork for the eventual abolition of the death penalty in the Commonwealth Caribbean.

15.92 This is not to say that everyone was in favour of the death penalty. Several esteemed members of our society indicated that they were in favour of abolition, most notably a former Governor-General and founding father, the Hon. Arthur D. Hanna. Indeed, even the Commissioners themselves were divided on the issue (as is evident from the dissenting statement from Commissioner Mortimer (supported by Commissioners Stevenson and Saunders) at **Appendix IV**). However, having regard to the overwhelming support for the retention and the implementation of the death penalty, the Commission cannot in good faith recommend its abolition at this time.

*Getting around the Privy Council*

15.93 To ensure that the Executive is able to carry out the death penalty in a case which the courts have determined would warrant it, the Government may have to consider amending the Constitution (not ordinary legislation) to prevent challenges to the death penalty, as has been done by several Caribbean states: Barbados, and very recently Jamaica; also attempted by Trinidad and Tobago and St. Vincent and the Grenadines.

15.94 In 2002, Barbados amended its Constitution (Constitutional (Amendment) Act 2002) to provide that convicted prisoners who had been sentenced to a mandatory death penalty and who had been subject to delay in the execution of their sentences or held in inhuman or degrading prison conditions were debarred from challenging on the grounds that any of their constitutional rights had been violated. Trinidad attempted to make amendments in 2011 (*Trinidad Constitution (Amendment) Capital Offence Bill*) that would also have precluded constitutional challenge, but narrowly failed to attain the required majority to pass the Bill.

15.95 In St. Vincent and the Grenadines, an attempt was also made to accomplish a similar goal in the 2009 Draft Constitution (which failed at national referendum) with the following clause (29(3):

**“No objection shall be taken in or by any court to a sentence of capital punishment being carried out within one year after the exhaustion of all proceedings embarked upon and diligently pursued by the person thus sentenced....”**

15.96 But by far the most drastic response has been that of the Jamaica Government. Its 2011 Charter includes a clause to prevent challenge to laws authorizing the penalty for capital offences, in particular by retaining the partial savings clause (which saves punishments authorized by pre-existing laws) and also precludes challenges based on delay or physical conditions under which the condemned person is held. The provisions of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 are set out below:

**“(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (6) to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.**

**(8) The execution of a sentence of death imposed after the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, on any person for an offence against the law of Jamaica, shall not be held to be inconsistent with, or in contravention of, this section by reason of**

**(a) the length of time which elapses between the date on which the sentence is imposed and the date on which the sentence is executed; or**

**(b) the physical conditions or arrangements under which such person is detained pending the execution of the sentence by virtue of any law or practice in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.”**

15.97 The Commission recommends an amendment to the Constitution that would allow the death penalty to be carried out in appropriate cases. In this regard (see section on Savings Clause), it is also recommended that we retain the saving clause at 17(2), as in the Bowe case the PC left open the question of whether the *manner* of the imposition of the death penalty might be contrary to the protection from torture or to inhuman or degrading treatment of punishment. In fact, other courts have held this to be the case,

and therefore the only thing standing in its way would be the savings clause (if honoured).

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**Recommendation(s)**

21. The Commission recommends that the constitutional right to trial by jury when charged with an indictable offence be dis-entrenched, and trial without jury should be available under circumstances prescribed by law.
22. Consideration should be given to expanding Article 23 to expressly include a reference to freedom of the press and the media.
23. Article 24, which grants a right of “protection of freedom of assembly and association” should be expanded to constitutionalize the right to vote in general (and local) elections and referenda.
24. The Commission recommends that “sex” be included in the definition of “discriminatory” in Article 26(3) as one of the prohibited grounds of discrimination.
25. As a corollary to the recommendation at 24, the Commission also proposes that an amendment be made to Article 26(4) to provide that no law which makes provisions prohibiting same-sex marriage or which provides for such marriages to be unlawful or void shall be held to be inconsistent with the Constitution.
26. While it is essential for the protection of human dignity that all vulnerable groups be protected from discrimination, we do not think this necessarily requires expanding the list of grounds of discrimination in Article 26. Such protection could be accomplished effectively by providing for specific, limited protection under ordinary legislation (i.e., the *Employment Act, Disabilities (Bill)*).

- 27.** Social and economic rights should be acknowledged in the Constitution in a way that does not make them enforceable, but imposes a moral and political obligation on the state to pursue such goals for the general welfare.
- 28.** Article 29 of the Constitution dealing with declarations of emergency should be amended to amplify the circumstances in which a proclamation should be made and to provide for the geographical limitation of such a declaration. The Commission also recommends that there should be a procedure, such as that contained under the 1969 Constitution, for an impartial and independent tribunal established by law and presided over the Chief Justice to review emergency detentions.
- 29.** An amendment should be made to the Constitution to enable the implementation of the death penalty in appropriate cases, by precluding constitutional challenges based on criteria developed in the case law, mainly in jurisprudence from the Privy Council.

## Section 16:

### Environmental Protection

#### Environmental Protection

16.1 The Commission received several proposals from contributors advocating that provisions for the protection of the environment should be articulated in the constitutional text. The most elaborate of these was a presentation and paper from the Small Islands Sustainability Committee of the Small Islands Sustainability Programme at The College of The Bahamas<sup>80</sup>, which was endorsed by a representative from The Bahamas Environmental, Scientific and Technology Commission (BEST).

16.2 The provision proposed for inclusion is reproduced below:

- “1. All persons, including future generations of Bahamians, have a right to a healthy, biologically diverse, and ecologically balanced natural environment. The government shall not deny or abridge this right.**
- 2. Recognizing the intrinsic value of the natural environment, the government shall:**
  - (a) provide for the conservation of biological diversity, natural resources and cultural heritage resources, and the sustainable use of their components, on the basis of the precautionary principle, sustainable practices, indigenous and traditional knowledge, and best available scientific information;**
  - (b) provide for the protection of fauna and flora and natural resources in order to reduce risks to their ecological function, reduce the extinction of species, and reduce cruelty to animals, on the basis of the principle of sustainable development;**
  - (c) promote the protection of ecosystems, natural habitats and natural and cultural resources, and the maintenance of viable populations of species and healthy natural resources in natural surroundings;**
  - (d) recognize the vulnerability of natural and culture resources, including, but not limited to blue holes, fresh water lenses, and marine resources, and shall therefore recognize and protect them as the national patrimony and ecological heritage of the people of The Commonwealth of The Bahamas, to be preserved and held on trust for the long term benefit and public use of current and future generations of the people of The Commonwealth of The Bahamas;**
  - (e) provide sufficient, appropriate and timely information to the public regarding the environment and any substantial changes to it, and shall consult with the public and consider their views in relation to any decision which may have substantial effects on these resources; and**
  - (f) promote sustainable development.”**

*Regional approach to Constitutional protection of the environment*

- 16.3 Historically, Caribbean Constitutions have not expressly recognized a right to environmental protection, which belongs to the rights described in the international lexicon as ‘third-generation’ rights. While part of the rationale for this may have been the gradual progression of international law to a recognition of a rights-based approach to environmental issues, governments were naturally also wary of the possible litigation that might attend the inclusion of such rights.
- 16.4 On the contrary, such Constitutions have traditionally given pre-eminence to the protection of private property interests, as opposed to communal interests in the environment. These private interests may often require curtailment in order to achieve a balance between sustainable development and environmental concerns, which is sometimes not an easy balance to strike.<sup>81</sup> As described below, however, there is a growing trend in the region towards recognition of such rights, if only as general principles of the Constitution.
- 16.5 The notable historical exception in the Caribbean is the 1970 Constitution of Guyana, which at Article 36 states that: “In the interest of the present and future generations, the State will protect and make rational use of its land, mineral and water resources, as well as its fauna and flora, and will take all appropriate measures to conserve and improve the environment.” More oblique references may be found in the Preamble of the 1981 Constitution of Belize, which requires “policies of state...which protect the environment”, and in the Draft Constitution of Grenada, currently being circulated for public views in the lead-up to a referendum planned for 2015. Under the rubric of a “General Welfare Clause”, the Grenadian Draft (at section 28) imposes a moral and political obligation on the State to pursue social and economic rights, including the right to “a clean, health and ecologically balanced environment”, and section 29 imposes a fundamental duty on the citizen “to protect, preserve and improve the environment.”

- 16.6 More recently, in a 2011 Charter of Fundamental Rights and Freedoms, which introduced a new Bill of Rights in the Jamaican constitutional context, Jamaica included in the opening statement of the Bill of rights “the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage”.
- 16.7 The Commission endorses the objectives set out in the proposed provisions as laudable objectives to be pursued by the Government in the interest of protecting the environment, and the rationale advanced by the Sustainability Committee for including environmental protection in the Constitution—the need to protect biological diversity, and natural and cultural resources for current and future generations. The Commission would add to this analysis that The Bahamas also has the distinction of pioneering several of the largest marine protected parks in the world. Indeed The Bahamas enjoys an international reputation as a nature reserve and eco-tourist attraction. Accordingly, a case can certainly be made for special legal recognition to be given to environmental protection.

### *Recommendations*

- 16.8 However, the Commission is not of the view that detailed provisions such as those suggested by the Committee should be included in the Constitution, and it is very apparent that nothing approaching this level of detail appears in any other Caribbean constitution. It fully recommends, however, that some (or all) of these principles be given expression in some form of *Environmental Protection or Management Act*, and that suitable bodies be created to superintend and coordinate environmental protection.
- 16.9 What attracts more support from the Commission, and which it would recommend for inclusion in the Constitution, is a basic statement recognizing the importance of the environment for current and future generations and the duty of the state to protect it, along the line of what appears in the Constitution of India (“The State shall endeavour to protect and improve the environment”)<sup>82</sup> or some other formulation of a general principle.

This may be stated either as an article or part of the rubric of social and economic rights (as in the Grenadian example).

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**Recommendation(s)**

30. The Commission recommends that the Constitution should recognize a right to environmental protection in general terms, although more specific provisions for environmental protection should be left to primary and secondary legislation, such as an Environmental Protection or Management Act.
31. Further, the Commission is aware that there is a draft *Environmental Protection Act*, which apparently has been under consideration for several years, and which is specifically intended to address most of the environmental concerns articulated. The Government is urged to take the necessary steps to engage in public consultation on the Bill before introduction in Parliament for debate and eventual enactment, and to treat this as a matter of high priority.



## Section 17:

### Chapter IV of The Constitution: The Governor-General/Head of State

- 17.1 As a specific part of its mandate, the Commission was asked to “examine whether The Bahamas should evolve from a Constitutional monarchy into a republic within the Commonwealth of Nations.”
- 17.2 While it cannot be said that there was any ringing endorsement for this change during the public meetings, the majority of the written submissions to the Commission which addressed the matter supported the removal of the Queen as Head of State and replacing her with an indigenous non-executive or ceremonial President as Head of State under some form of parliamentary republic. At best, the views of the public were mixed. In many cases, there was general apathy or indifference, and the Commission was constrained, on many occasions, to prompt contributors for their views on the subject. In fact, there were pockets of persons (particularly the older generations and Family Island residents) who remained staunchly in favour of retaining the monarchy, including (surprisingly) at least one of the participants in the 1972 independence Constitutional Conferences.

#### *Reasons for changing: A question of sovereignty*

- 17.3 The traditional argument for the evolution to republican status is that it is a natural step towards completing the “circle of independence” and attaining full sovereignty, and that the retention of the British monarch is an historical anachronism, a hangover from the colonial era that formally ended in The Bahamas 40 years ago. The original case for republicanism was made by the 1976 Wooding Commission of Trinidad and Tobago, which said that “...independence must involve the creation of indigenous symbols of nationhood. Among young people in particular the British sovereign has no symbolic

meaning. The thrust since independence has been towards the discovery of a new identity, which involves leaving behind the colonial heritage of subjection, imitation and external dependence.” The Commission also noted the incongruity in the Governor-General’s oath, which required him to bear faithful and true allegiance to the queen, as opposed to the recommended oath to “faithfully serve the people of Trinidad and Tobago and to defend and uphold the Constitution.”

- 17.4 The argument was put, perhaps polemically, by one of the foremost supporters of republicanism and advocates of delinking from the Privy Council, the late Professor Simeon McIntosh, as follows:

**“...the continuing presence of the Crown and its Judicial Committee in the post-independence Commonwealth Caribbean political order represents a vestigial incongruity, a contradiction in the constitutional symbolism of a politically independent sovereign order.”<sup>83</sup>**

- 17.5 By and large, the main reasons given by Bahamians for advocating the removal of the monarchy were ideological, and did not go to any issues of governance. For example, one contributor indicated that:

**“As we approach 40 years of independence, it would seem appropriate that we no longer need to retain the British Monarch as our head of state. We should gradually move away from the formal vestiges of our colonial past [...]. Such a departure from this historical heritage need not be harsh or sudden. It can be used as a teaching tool for our citizens as we truly embrace our sovereignty or what’s left of it in a globalized, interconnected and interdependent world.”**

- 17.6 Another contributor, in recommending the retention of the constitutional monarchy, noted that the present form of government is still workable, and that comparisons of the Republican model in the United States and the Caribbean indicated that there were more negatives associated with the former, and that the latter tended to be more successful.

- 17.7 Ironically, the most passionate appeal to retain the monarchy came from a *young* Bahamian student overseas, who wrote an earnest letter to the Commission at the eleventh hour which included, among others, the following reasons for retaining the monarchy:

**“I believe keeping Her Majesty as the Queen of The Bahamas keeps intact some of the rich traditions, culture and customs our country. I fear these traditions are slowly fading away with my new and upcoming generation who are becoming more and more Americanised. Maintaining the Queen as Head of State helps to hold intact some of our rich culture and heritage. Some of this heritage was adopted from our colonial years, but has become inherently Bahamian over time. One such example is pomp and pageantry in ceremony, like the ceremonies involving the opening of Parliament, opening of the new legal year, inspection of guard during Independence Celebrations and many others. I fear if we lost the Queen and Governor General, many of our historical and traditional ceremonies will be also be lost.**

**Similarly, both the Royal Bahamas Police Force and the Royal Bahamas Defence Force enjoy the “Royal” prefix in front of their organizations, a prefix that I believe distinguishes these agencies from many of other regional law enforcement services. When people hear the “royal” title associated with the organization, many think of them as superior to similar regional organizations that lack such a prefix. [...]**

**Dissolving the Queen, as Head of State, would also mean abolishing our current national honours system, where we currently continue to award British honours. I acknowledge the attempts over the years to form our own honours system by renaming the current British levels of distinction to a similar Bahamian version, such as the Order of the British Empire (OBE) to the Order of The Commonwealth of The Bahamas I also acknowledge the idea of renaming the British levels of awards Commonwealth awards, i.e. Order of the British Commonwealth, as suggested by the current Governor General. In any event, if we were to abolish the Queen as Head of State, such awards would lack international recognition because they would lack the Crown’s seal. By removing the Queen we would lose the ability to have our national honours conferred by the Crown and would also remove the opportunity for outstanding and deserving Bahamians to be awarded knighthood and damehood, a highly revered recognition many of our founding fathers were most honourably presented with.”**

### *Republicanism in the Commonwealth Caribbean*

17.8 Of the 12 English-speaking countries in the Caribbean, nine remain constitutional monarchies with the British monarch as the head of State. Of the three exceptions post-independence modifications to the Constitution of Guyana in 1970 and Trinidad and Tobago in 1976 led to the establishment of constitutional republics. The 1978 Dominican constitution remains unique in the Caribbean as the only one to declare itself a republic when it achieved independence from the UK, with an indigenous president as Head of State. An important distinction is also to be made between the parliamentary republican system of Trinidad and Tobago which largely substitutes a ceremonial president for the Queen and Governor-General (and which has been largely successful), and mainly

executive President of Guyana, which hews more to the American presidential model (and which has experienced less success).

- 17.9 It is also of note that of the 54 countries remaining within the Commonwealth, 33 are republics, 16 have the Queen as Head of State (the “realms”) and 5 have their own monarch as Head of State.<sup>84</sup> Significantly, more than half of the “realms” are within the Caribbean.
- 17.10 The issue of removing the Queen as Head of State and taking steps to complete a transition to republican status has been discussed and indeed recommended by many of the recent Constitutional Commissions in the region: Jamaica (1991), St. Kitts and Nevis (1998), Barbados (1999), Antigua and Barbuda (2002), Bahamas (2006), Grenada (2009); and St. Vincent and the Grenadines (2009). The 1991 proposal to adopt a presidential model of government in Jamaica has received little political traction, however, and in Barbados a referendum to decide the issue has been deferred on several occasions.
- 17.11 Such diffidence may be well-placed, in light of the recent example of the 2009 referendum in St. Vincent and the Grenadines, where only 43.13 % of the electors voted in support of the proposal to replace the monarchy with a republic and abolish appeals to the Privy Council (a two-thirds majority is required). The 2009 Draft of the new Constitution for Grenada, which also provides for a non-executive President as head of State, is also still undergoing a further consultative process, with a referendum to be held in 2015. Ironically, Belize, which has the unique distinction in the Caribbean as perhaps the only state to have its independence Constitution enacted by its own Parliament yet opted to retain the British monarchy.
- 17.12 These contradictions, ambivalence and conflicted ideologies in respect of the retention of the monarchy may be somewhat attributable to what has been described by the Barbadian writer George Lamming as the “antagonistic weight of the past”—the long association and history with the Monarchy. But it seems to also be rooted in the apprehension and (understandable) fear of the future, with the operation of an unknown political system,

and one more susceptible to failings. As was put by one of the constitutional framers, “if we abolish the Monarchy, what will happen after that”, or words to that effect. This approach to the monarchy was rationalized by one commissioner as follows: “We are not quite happy where we are, but we are still somewhat afraid of the future.”

- 17.13 Indeed, it is noted that in the Trinidad experience, the public did not warm to the idea of republicanism until it was indicated that there would be no change in the political culture and that associations with the United Kingdom and the Commonwealth would remain. In fact, the people of Trinidad and Tobago, even while supporting a president for Head of State, elected to retain the Judicial Committee of the Privy Council as the final Court of Appeal.
- 17.14 The Commission endorses all of the ideological and symbolic reasons for a sovereign state such as The Bahamas to exercise full political and legal control over its Head of State, and thinks that the advent of a republic is inevitable in the continuing quest for a full realization of our independence and sovereignty. But the Commission does not pretend to make the case that seeking republican status is absolutely necessary at this time. In this view, the Commission is assured that it has honoured its terms of reference in which required it to look at the question of whether The Bahamas should “evolve”, and did not put the question of an abrupt metamorphosis to republican status. In any event, having regard for the requirement that such a proposal would have to pass both Houses (and obtain the special majority) and obtain public support in a referendum, support for this change has to come from the will of the Bahamian people.
- 17.15 Additionally, it should be borne in mind that changing from a constitutional monarchy to a republic is not merely ceremonial, and the transition would involve considerable financial and well as administrative, social and cultural costs. For example, in addition to any implications for the receipt of foreign UK financial aid and training assistance, it would involve (among others): changing of the royal insignia located on government buildings and post office boxes; re-branding the Royal Bahamas Defence and Police Forces and changes to their uniforms; and changing the honours systems.

***Recommendation***

- 17.16 At this time, the Commission does not recommend any change in the Office of the Governor General as the representative of the Queen as Head of State under a constitutional monarchy. It does recommend, however, that consideration should be given to planning for the eventual evolution to a parliamentary republican system, with a non-executive President as Head of State. The Commission is of the view that this is the inevitable terminus of constitutional evolution to full sovereignty and independence, and the only issue is timing. In fact, we cannot allow ourselves the delusional luxury of assuming that the Queen (or King) of England will forever be available to be Sovereign of The Bahamas, or any of the other ‘independent’ countries of which she is monarch. The monarchy will continue to wane either by a process of attrition, or possibly by constitutional changes from within the UK itself.
- 17.17 If (and when) The Bahamas transitions to republican status, the local Head of State would function in a role similar to that of the current Governor-General, although it is recommended that additional executive powers be conferred on this office. However, the position would remain largely ceremonial (that is non-executive), with executive powers continuing to be exercised by the Prime Minister and Cabinet. This variant of the British system of parliamentary democracy has been described by Barbadian Prime Minister Owen Arthur as a “Parliamentary Republic”, and by the 1998 Belize Political Reform Commission as a “Parliamentary Executive Model”.<sup>85</sup>
- 17.18 Another curious point about the appointment of the Governor-General is that there is no requirement for the holder of that office to be a citizen of The Bahamas. Because of the method of appointment of the Governor-General, it hardly seems logical that the person appointed to this office would ever be a non-Bahamian but the constitutional position still admits of the appointment of a non-Bahamian as Governor-General. To remove all doubt it should be declared that the Governor General (Head of State) shall be a Bahamian citizen.<sup>86</sup>

*Republican system but not 'Republic'*

17.19 Even if a republican system is adopted, the Commission does not recommend a change in name to a "Republic". There is nothing inconsistent about a President as Head of State in The Commonwealth of The Bahamas, as is the case in the Commonwealth of Dominica, which has a non-executive President similar to the Trinidadian system. Indeed, there would be nothing wrong with retaining a Governor General who would be head of State in his own right, with powers derived from the Constitution. There is nothing denotative in the term Governor-General; in the Cook Islands, he is simply called the "Queen's Representative".<sup>87</sup>

*Allegiance to Constitution*

17.20 As a small step towards this delinking process, however, the Commission recommends that the oath of allegiance of the Governor General, Prime Minister and Cabinet Ministers, Judges and other senior public officials be changed to swear allegiance to the Constitution and the people of the Commonwealth of The Bahamas, rather than to Her Majesty the Queen, her heirs and successors. It goes without saying that this oath should be changed to adopt one of the formulations used in either Trinidad or Jamaica. The Trinidadian oath requires the President "faithfully to serve the people of Trinidad and Tobago and to defend and uphold its Constitution." In October of 2001, the Jamaican Prime Minister and Cabinet Ministers for the first time swore an oath to be faithful to the Constitution of Jamaica and to be loyal in the discharge of their duties to the people of Jamaica.

*Greater powers for the Governor-General (Head of State)*

17.21 One of the recurrent themes during the constitutional debate was the need to devise a system which would operate as a check and balance on the enormous powers of the executive. This is dealt with in another part of the report, but it is thought that the Governor-General could be given additional powers that would assist in this process. For example, the Governor General could play a more active role in appointing a number of senators in his own right, so as to ensure a more representative balance in the upper house and to limit the ability of a government with the majority from “steam-rolling” its legislative agenda.<sup>88</sup> Other areas in which the Governor-General (Head of State) might be given additional powers relate to the appointment of senior members of the judiciary and the senior public officers of the state.

## §

**Recommendation(s)**

32. The Commission does not at this time recommend that there should be any change in the Queen as the Head of State and the Office of Governor-General as the representative of the Queen under a constitutional monarchy. However, the Government should embark on a process of public education to prepare the public for a possible change to a republican form of Government at some point in the future. Should such a change be made, it would require amendments to the Constitution providing for a non-executive national President, as Head-of-State, to discharge the functions formerly vested in the Governor General, with the Prime Minister and Cabinet continuing to exercise executive powers.
33. The provision of the Constitution which permits the Chief Justice and the President of the Senate to serve as acting Governor-General should be deleted to avoid potential conflicts of interest. Deputies should be appointed from among eminent citizens or retired parliamentarians to fill any vacancies in this office (as is already provided for in the Constitution).



- 34.** The Commission does not recommend the appointment of a standing Deputy Governor General, as there has been no indication that the appointment of deputies does not work well in practice. In any event, this would lead duplication of public officers, with the attendant increase in administrative costs and bureaucracy.
- 35.** The oath of the Governor-General and those of the Prime Minister and Cabinet Ministers, Judges and other senior officials should be changed to include a declaration of allegiance to the Constitution and people of the Commonwealth of The Bahamas
- 36.** To remove all doubt it should be declared that the Governor General (Head of State) shall be a Bahamian citizen.

## Section 18:

### Chapter V of The Constitution:

## Parliament

### Strengthening the political institutions

18.1 Our mandate also asked us to address a variety of questions, all directed to the functioning of our political system, aimed at strengthening the political institutions while curbing excessive concentrations of powers. In the course of its consultations, the Commission found that there was a widespread sense of disaffection with the functioning of the Legislature and the process by which its bodies are constituted and operated. As noted by one contributor:

**“It cannot be disputed, rationally, that the political and governance processes and institutions which we have inherited have failed us badly in many respects, and in particular, we argue, have led us into a political culture which has completely undermined our ability, as a community to mobilize and to arrange effectively, limited human and intellectual capital, critical to our development. Development ...not in the narrow economic sense which is often our primary focus, but in all dimensions of the human and national being.**

**At the heart of this political and cultural dysfunction, we think, are two features of our system for selecting those who govern us:**

- (a) The idea that it is necessary to disengage, during the duration of the mandate of a government essentially fifty percent of the pool from which the country selects its leaders, and the entire entourage of governance; and**
- (b) The de facto operation of our system of governance, which renders it near impossible for the populace to hold the government accountable, in the short term, if at all, with respect to the exercise of this vital responsibility.”**

### Senate

18.2 We begin our assessment of Parliament by looking at the Upper Chamber of our bicameral Parliament: the Senate.

*Views from the people*

18.3 There were widespread criticisms of the functions of the upper house, and many notable calls for that body to be abolished and consideration given to constituting a unicameral Parliament. In fact, some of the strongest calls for the abolition of what is called the Upper House came from persons who have spent much of their professional careers working closely with the institutions of Parliament. As one contributor noted:

**“The original thinking behind a second chamber was that it should be constituted by older and hopefully wiser men who would bring a different perspective, an apolitical, non-partisan approach when reviewing legislation. The Bahamian Senate, beginning with the introduction of political parties, moved away from these original principles. The Senate over the years has been used either as a platform for younger aspiring politicians or for candidates who lost an election but wanted to retain their public visibility.**

**So the question is: is the Senate relevant today in the political process or could it be remade to become relevant? I say no; not in today’s political reality. ...The second chamber of the Parliament has not served as an effective check on the executive; it has very seldom questioned, amended or rejected legislation passed by the elected House. To make matters worse, it meets infrequently and only to consider legislation passed by the elected House. One other fundamental tenet of bicameralism is that the legislative responsibility is shared between the two chambers. But although the Constitution has empowered the Senate to draft and initiate legislation, this has been done on very, very few occasions.”**

18.4 Most contributors, however, while prepared to describe the Senate as being “little more than a rubber stamp”, thought that it could be “remade”, and therefore should be retained. Various options for this reform included: (i) either enlarging and diversifying its composition; (ii) electing senators on their own mandate, or removing their appointment from the political process; (iii) changing its composition. It is notable that very many of the contributors from the Family Islands recommended the broadening of the senate to provide for the representation of the “islands”, based on some form of representative geographical allocation).

*Age qualifications*

- 18.5 In light of the specific question posed in its mandate as to “Whether eligibility for service in the Senate should be lowered from 30 to 21, the same age that applies to the House of Assembly”, the Commission looks briefly at the recommendations made in this area. There were some who felt that there should not be any difference in the age qualifications for the Senate and House of Assembly but the majority felt that the age should remain the same, perhaps to reflect the traditional Roman notions of the senate as a body of “wise” men. Indeed, one of the framers would have taken the concept even further and raised the threshold to 45, and lamented that “The understanding that the Upper House should be populated by mature and experienced persons has been abandoned by both political parties represented in parliament.”
- 18.6 The Commission records the greatest of respect for this view, but does not recommend any change in the age qualification for the Senate. Even though the framers might not have envisioned it at the time, the rapid advance of information technology and access to information would put the average thirty-year old in a position to be a “wise” man. The Commission eventually determined, by a narrow majority, that the current qualifying age of 30 should remain, although it was hard pressed to find a suitable justification for the difference between this age and that for the House of Assembly (21), other than one rooted in historical notions of the functions of these two bodies.

*Current composition of the Senate*

- 18.7 There are few (if any) countries in the Caribbean where the deck is so stacked in the favour of the Prime Minister to appoint senators as in The Bahamas. The Prime Minister effectively appoints 12 of the 16 senators (9 outright, and three in consultation with Leader of the Opposition). The appointment of the latter three (sometimes erroneously called “independent” senators, although it appears from the records of the independence conference that they were referred to as “floating senators”) subject to a formula that

appears nowhere else in any of the Commonwealth Caribbean. The purpose of the Prime Minister in appointing these three senators is to “secure that the political balance of the Senate reflects that of the House of Assembly at the time”. In fact, this appears to have been an attempt to impose a small form of proportional representation in the Senate, although it is rather imprecise and vague and can lead to interesting political questions (and creative mathematical calculations) when the balance in the House is rather close.<sup>91</sup>

18.8 The Commission recommends that the senate be expanded to include additional representatives (say, to 21), appointed as follows: 11 by the Government; 6 by the Opposition; and the remaining 4 by the Governor General (Head of State) in that person’s own right, after consulting with the Prime Minister and Leader of the Opposition. The four ‘independent’ senators should be chosen to represent religious, economic, social, *geographical* or such other interests as the Governor-General considers ought to be represented.<sup>92</sup> In this connection, it should also be noted that having regard to its demographics and geographical make-up, the present size of the Bahamian senate is comparatively small.<sup>93</sup> Antigua and Barbuda, with a population of approximately 81,800 (2011) has 17 senators (one more than The Bahamas).

18.9 The number 21 would also mean that the governing party would always have the majority to pass the Government’s legislative agenda, but would be shy of the majority required to change entrenched and specially entrenched provisions of the constitution. Such bills would require the support of several of the “independent” senators, and thereby introduce greater controls over the government’s legislative agenda. Such a balance would also guard against changing the fundamental complexion of the senate into a body that can create gridlock and paralyze government, as has been demonstrated in the recent decade in the United States, where both Houses are elected and might be subject to the control of different parties.

## **House of Assembly**

18.10 With respect to the lower House, the general tenor of the feedback from contributors raised as central concerns the following aspects: (i) the system by which the Members of Parliament (MPs) are elected; (ii) the quality of representation provided by MPs to their constituencies; and (iii) the system whereby political constituencies are demarcated, i.e., the Boundaries Commission.

### *Reform of the electoral system*

18.11 The first-past-the-post system (or more formally, plurality system), where the government is determined by the number of constituencies won rather than by the numbers of votes polled, often produces disproportionate results between the composition of Parliament and seat distributions. This is especially so in systems where political boundaries are engineered to achieve an equitable distribution of the population. When those boundaries are changed for political reasons (a process called gerrymandering), the results can be that the party which wins the majority of the seats, may have only a slim majority of the popular vote, and it is possible for the winning party to not have the popular support of the people. At the other end of the spectrum, it might totally eliminate the opposition. For example, the political scientist Selwyn Ryan records that there have been at least 13 post-independence elections in the Caribbean in which the first place party won all of the seats in Parliament.<sup>94</sup>

### *Popular vote v. Distribution of Seats*

18.12 In the 2002 general election, the opposition party (the Free National Movement) won seven out of 40 seats; the Governing Party (the Progressive Liberal Party) won 29 seats, and the independents four. Yet, the percentage of votes won by the FNM was 41.1 percent, which in statistical terms works out to a representative deficit (percentage of seats compared with percentage of votes) of 23.6 per cent. A comparative study of

national integrity systems conducted by consultants working under the auspices of Transparency International in conjunction with researchers from the University of the West Indies, indicates that this was the largest *representative deficit* of the eight Caribbean countries whose national systems were studied.<sup>95</sup>

- 18.13 The Wooding Commission had described the situation where the winning party might actually win all the seats by winning a bare majority in the constituencies and not poll 50% of the votes but are free to pass laws as “iniquitous”.<sup>96</sup> In fact, in light of the some of the recent constitutional experience of Trinidad and Tobago, that Commission might perhaps be thought clairvoyant. After the 2000 elections in Trinidad and Tobago, the then President A.N.R. Robinson refused to accept the recommendations to appoint a number of defeated electoral candidates recommended by the Prime Minister for appointment to the Senate and as junior ministers of government on the grounds that he found it “impossible to accept the principle, not expressed or demanded in the constitution, that persons who have been rejected by the electorate can constitute a substantial part of the Cabinet, even the majority, and consequently the effective executive in our democratic state.”<sup>97</sup>(Apparently this impasse lasted for some 55 days before the President capitulated.)
- 18.14 The system can also operate to deprive a political party, which polls a significant percentage of the popular vote, of representation, while an independent candidate with a far smaller percentage of the popular vote might win his constituency. Note the example from the 2011 elections where the Democratic National Alliance obtained 8.5% of the popular vote but did not win a single seat.
- 18.15 The dissatisfaction with this electoral system prompted several persons to advocate for a more representative and democratic election system, which would include some element of proportionality. One contributor recommended a mixed-member proportional voting system (MMP) as follows: Voters would be required in a secret ballot to “*mark two x’s*”, one for their constituency representative and one for the party of their choice. In addition to nominating representatives for the 38 constituencies, parties would nominate 16 other

persons (this was based on the idea of eliminating the Senate), who would be apportioned in descending order according to the percentage of party votes received. A threshold of 5% could be used as threshold to attain before a party could be eligible to participate in the sharing of seats.

18.16 Some form of proportional representation system pertains in several Commonwealth or CARICOM countries, including Guyana, where 53 out of the 65 seats in Parliament are determined by proportional representation.<sup>98</sup> The 51 members of the National Assembly in Suriname are elected by proportional representation by district. In fact, a proposal for a mixture of proportional representation and the first-past-the-post system was recommended by the 1974 Wooding Commission,<sup>99</sup> but was never implemented. More recently, in its 2009 Draft Constitution, Grenada proposed that in addition to the persons returned for each constituency, an additional number of persons should be chosen to serve in the National Assembly on the basis of the popular vote each political party receives in an election (as may be determined by laws passed by the National Assembly).

18.17 The Commission cannot gainsay that some form of proportional system would be perceived as a step that would deepen representative democracy. However, it is not prepared at this point in time to recommend such a system. The examples of the few Caribbean countries which have implemented such system do not suggest additional democratic dividends to be derived from a mixed system. Further the Commission is careful not to superimpose on the Westminster system, principles which may work well in large pluralistic systems, but are ill-at-ease in micro-states. There is a particular political synergy which develops between a constituency and its directly elected representatives which not only provides the elected person with legitimacy, but is sometimes also essential to the working of government policy and administration. As indicated below (on the section dealing with possible recall), it would also create a class of MPs that would be accountable only in theory to their own parties and not to the people they are meant to serve.



*Representation by members of Parliament*

18.18 This is one of those issues where the discussion was driven by the views of the people, many of whom felt that they were not receiving quality representation from their MP's. In this respect, there was a call for some kind of system for the recall of MPs who were absent from the House for long periods without good reason, and for the investigation and accountability of such persons through the oversight of a House or senate committee, which could be initiated at the behest of a petition signed by a requisite number of constituents. In other words, there was a clarion call for MPs to be more accountable to their constituents in the performance of their parliamentary duties.

*A matter of accountability*

18.19 However, the call for accountability went beyond the mere performance of parliamentary functions: many felt that MPs should also be accountable in matters of their conduct and for personal integrity. It remains an anomaly in our constitutional system that there is a clearly defined procedure for the removal of judges and heads of the permanent commissions for misconduct or reasons other than misconduct, but the removal of an MP or Minister for similar or far greater transgressions remains solely at the discretion of the Prime Minister. As remarked by one contributor, "members now serve out a parliamentary term with impunity." Thus, it was represented that there should be a non-partisan system for the investigation of the conduct of an MP, and a system of recall and impeachment.

18.20 Control over MPs and their conduct may be accomplished in several ways, and there were different recommendations in this regard. With respect to recall, it was suggested that this process could be triggered by a complaint by a constituent to the "Parliamentary Commissioner"<sup>100</sup> who would investigate and submit a report and recommendation to the Speaker or a Committee of the House. Depending on the recommendation, the House would debate a Resolution to impeach the Member and if supported by a majority, the

Speaker would advise the Governor-General to cause a poll or ballot to be held in the Constituency. If more than 2/3 vote in favour of recall, the Speaker would declare the seat vacant and initiate the process for a by-election to replace the Member. Another option was for the establishment of an Integrity Committee composed of representatives from both Houses, which would be responsible for the investigation of allegations of impropriety. Obviously, these two are complementary, as this Committee could be the investigatory committee envisioned in the model above.

- 18.21 The Commission understands the desire expressed by the public for a system of recall, including cases where members may have crossed the floor (see below). However, on balance, the Commission feels that such a mechanism could not be incorporated into the Westminster transplant model without attendant problems that could go to the root of the parliamentary system.

*Crossing the floor*

- 18.22 Notwithstanding the recommendation above, we think it important to note in passing that many persons were displeased with the practice of members who switched sides by crossing the floor and thought that this needed to be addressed. This can have significant political effects in a House with a narrow margin: note the example, during the last Government, of an MP crossing the floor to become ‘independent’ at a point when proceedings were before the court (the ‘Senate case’) challenging the composition of the Senate, which by article 40(3) is required to reflect “the political balance of the House.” This also has potentially invidious consequences for democratic representation in the Caribbean, where MPs are often elected based on a party platform rather than personal support. As was put by the then learned Chief Justice in the case referred to: “In the first-past-the-post system of elections to constituencies, despite the conventional wisdom of “safe” or “marginal” seats, the great unknown is whether a candidate was successful on his own merits or because he wore the label of a particular political party.” However, this is part and parcel of the risk inherent in the Westminster system and should remain subject to political rather than legal controls.

*Public Disclosure Commission*

18.23 The main object of this Commission is to “maintain probity in public life”.<sup>101</sup> Sections 4 and 5 require senators and members of parliament alike to make an annual declaration to the Commission, declaring assets, and income and liability of himself and his family. The Commission may investigate on its own motion or on a complaint by a person, and the Commission may send a report to the Prime Minister and Leader of the Opposition. That report may be forwarded to the House or Senate, or to the Commissioner or Attorney General if warranted. However, there are limitations on this body with respect to its investigative powers, and it certainly has no coercive powers. There can be no denying that there is a need for a body which would have the ability to ensure that Ministers, Parliamentarians, and other senior officials are accountable and exercise probity in their affairs. In recent times, however, under successive governments, the Public Disclosure Commission has become essentially a dead letter.

*Integrity Commission*

18.24 The Commission recommends that some form of Integrity in Public Life Act be enacted, which creates a watchdog agency to enforce the legislation. In this regard, the Organization of American States (OAS) secretariat for legal reforms has produced model drafts of Prevention of Corruption and Integrity in Public Life Acts, which make provisions for a monitoring agency. Furthermore, this would allow The Bahamas to transform the obligations under the Inter-American Convention Against Corruption into domestic law and give effect to the Convention.<sup>102</sup> As indicated, however, the Commission thinks that this can be effectively accomplished by the provisions of ordinary legislation, which could be readily amended as required in light of experience in operating the system.

*Privileges and Immunities of MPs*

18.25 The Commission needs no persuading that the privileges and immunities granted MPs for their conduct in the House (or its precincts) are vital to the effective conduct of the people's business.<sup>103</sup> Article 53(1) provides for Parliament by law determine the privileges, immunities and powers of the Senate and the House of Assembly and the members thereof. These have been set out in the *Privileges and Immunities (House of Assembly and Senate) Act*. However, given the susceptibility of this freedom to abuse, the question was whether or not some limitations should not be placed on this freedom, which carries with it absolute privilege, such as to insulate an offending parliamentarian from any legal action by an aggrieved person.

18.26 The Commission thinks that persons whose reputations are attacked under the cover of parliamentary privilege should be accorded a right to respond and defend themselves. However, this should be done in a way which does not in any way attenuate parliamentary privilege, nor erode the constitutional principle that the Courts will not trespass on the province of Parliament, and vice versa. The Commission thinks a balance can be struck by giving such persons a right to reply and defend themselves (perhaps by being afforded the opportunity to present a reply at the bar of the relevant House). In this regard, the words of the Privy Council in a case from this jurisdiction that the power given to Parliament to legislate is 'not to be construed' so as to encroach on entrenched rights are salutary (*A-G v Ryan (Bahamas)* [1980] AC 718).

*Electoral Machinery Reform: Parliamentary Commissioner and Boundaries Commission*

18.27 As has been mentioned in the introductory section, the process towards implementing independent machinery for the delimitation of political boundaries and supervision of elections was attempted as part of the 2002 constitutional referendum. Whatever the reasons for the failure of the referendum, it was clear that the public wanted to see reform

in these institutions. Before it makes any recommendations, however, the Commission thinks it appropriate to make a few observations about the proposals.

*Parliamentary Commissioner*

18.28 The Commission queries whether the term “Parliamentary Commissioner” is not a mis-description of what is meant to refer to an entirely different office in countries where the office exists.<sup>105</sup> In the United Kingdom, the Parliamentary Commissioner for Administration is the “ombudsman”, and this is the same use made of the term in St. Lucia. It is not the name applied to the person who is in fact the Chief Electoral Officer. (However, this is a matter going to form, not substance.) In light of the fact that the Commission is recommending the merging of the functions of this office with that the Boundaries Commissions, nothing more needs to be said about the attempt to provide security of tenure for this office

*An independent Boundaries Commission*

18.29 With respect to the Bill purporting to establish a boundaries commission, the Commission observes that other than attempting to effect a name-change, it did little to change the inherent weakness in the old system. If the principal intent was to reform the composition and appointment of that commission to make it more pluralistic, it is doubtful whether that would have been achieved. As prescribed by article 69 (1), the current Constituencies Commission consists of five persons appointed as follows: the Speaker of the House as automatic chairman, a Supreme Court justice appointed by the Chief Justice, and three members of parliament appointed by the Governor-General (two nominated by the Prime Minister, one by the Leader of the Opposition).

18.30 The new body would have replaced what was arguably a wider and more representative body (i.e., the Speaker who is elected by the House, and Justice nominated by the Chief Justice) with what was likely to be a partisan and politicized body, split 50:50 along party lines (with the exception of the standing member). Additionally, other than disqualifying

persons holding political and public offices, it did not define who could be eligible (or perhaps more to the point, ineligible) for such appointments. Further, the proposed reform would have left untouched the ability of the Prime Minister to make modifications to the report of the Boundaries Commission unilaterally.

*Composition of boundaries/electoral commission*

18.31 The Commission would propose merging the functions of elections management and boundaries review into a single Electoral and Boundaries Commission, which would be a constitutionally entrenched body whose members have security of tenure and constitutional autonomy and protection similar to standing service commissions. The person formerly occupying the office of Parliamentary Commissioner, would simply be a Chief Electoral Officer (by whatever nomenclature used) functioning under the aegis of that Commission. This is the procedure used in several Caribbean countries, including Barbados and Belize, and which was attempted in St. Vincent and the Grenadines, and which also exists in the draft Grenada Constitution. To ensure, however, that constituencies are delineated in a way that is equitable and that alteration of their numbers and boundaries is fair, the process must be controlled by a truly independent commission, even though ultimately subject to the oversight of Parliament.

18.32 The composition of such a Commission would be vitally important. One suggestion advocated the following lineup: a Judge nominated by the Chief Justice as chairman; Director of Lands and Surveys; The Director of the Department of Statistics; a legal adviser from the Attorney General's Office (nominated by Attorney General); and the Chief Electoral Officer *ex officio*. The Commission does not, however, think that this improves on the current Constitutional model, or that proposed in 2002, and submits that it is not necessary for any technical persons to be a part of the Commission since their services could be co-opted as required.

18.33 The approach to the appointment of the members of the Commission in the Grenada Draft Constitution is instructive. This would place the power of appointment of the 5-

member commission in the hands of the President, after consultation with the Prime Minister and Leader of the Opposition, and the members of the Commission would hold a five year tenure. Most importantly, it provides that the following persons would not be eligible for membership: (a) a Minister or a Parliamentary Secretary; (b) a member of, or a candidate for election to, the National Assembly; and (c) a public officer.

18.34 As far as the composition of the Boundaries and Electoral Commission goes, it should not be as currently exists (composed of one Judge and four parliamentarians.) The Commission would recommend a hybrid of the Grenadian model and the current model, under which the Governor-General is allowed to appoint the Chairman and the other members are appointed by the Prime Minister and the Leader of the Opposition along with the Chief Electoral Officer *ex officio*. Parliamentarians should be ineligible for membership of such a commission.

18.35 The Commission emphasizes that there should not be the participation of any member of the judiciary, as it feels that allocating this function to a judge is violative of the separation-of-powers principle. The Commission is of the opinion that the function of judges is to judge and declare what the law is, and they should not be allocated any “executive” functions under the Constitution. In fact, the Commission has heard from judges who have publicly expressed their distaste for having to perform this function which inevitably places them in a tug-of-war between the contending political parties with the attendant risk of being accused of showing political favoritism or bias.

18.36 Finally, any proposed alteration to the Commission’s report should be debated and made in the same manner that amendments to bills are made in the House.

*Time period for submission of Boundaries Commission Report*

18.37 One of the recommendations made was that there should be a time period within which the Boundaries Commission should be required to undertake its review and report, so as not to take place within 6 months preceding general elections. The Commission agrees

with this recommendation and thinks that this would reduce the temptation and ability to influence boundary changes. Such a study could be done within 2½ years after a general election. Barring some catastrophic natural occurrence which decimates or forces the mass resettling of a particular constituency, the demographics of a particular area should not change so significantly within 2½ years as to create any unfairness with respect to constituency boundaries.

### *Regulation of Political Parties*

18.38 The Commission also received recommendations for an independent Electoral Commission, as described above, to be responsible for enforcing rules relating to political broadcasts and radio and television broadcasts during elections, and laws governing the financing of elections. If ever a case needed to be made for this, it was made in the findings of a 2004 Transparency International Report on National Integrity Systems (referred to above) on the way political parties are regulated in the region, including The Bahamas.<sup>106</sup> The Report made the following comment, which is so apposite as to bear setting out at some length:

**“In no state is there any regulatory framework for political parties. Despite their critical public function in the system of democratic governance, these institutions remain in effect little more than private clubs. Hence there is no requirement for registration of parties or any standards of internal democracy, which parties have to meet. There is moreover, no obligation except in the case of Antigua-Barbuda to disclose sources of party funding, either to the membership, public or any constituted authority. There are no limits on contributions to parties or candidates. Similarly there is a complete absence of restrictions on the level of expenditure by parties in an out of election. Moreover, no system of public funding, in cash or kind, exists for political parties. These gaps combined with the absence of transparency in party financers combine with escalating costs of election campaigns across the region to produce a formula for political corruption. Not surprisingly therefore in all Caribbean states, there are strong popular perceptions that political parties are engaged in political corruption even in the absence of documented evidence.”**

18.39 Thus, the Commission recommends that electoral laws should provide for matters such as how political parties are to be regulated and funded, and for the control of broadcast and television advertising. The Commission is aware that several of these regulatory functions are reposed in the *Utilities Regulation and Communications Authority (URCA)*



*Act*, but it questions whether that Act does not make encroachments on freedom of expression in contravention of the Constitution.

*Dissolution of Parliament*

18.40 Many persons also made representations to the Commission that the power of the Prime Minister to dissolve the House within the five-year period prescribed by the Constitution but at the time most calculated to be favourable to his party cannot be part of a system of fair elections. The ability to call ‘snap’ elections and catch the opposition party (or parties) unprepared seems to have evolved as a part of the Westminster transplant system. The Commission is not of the view, however, that we need to go as far as the American position—which says that the terms of the President and Vice-President shall expire on the 20<sup>th</sup> day of January<sup>107</sup> (i.e., at the end of the term of office). However, the Commission is of the view that the Prime Minister should be constitutionally required to give at least nine months’ notice of his intention to call general elections. This would address the problem of unfairness in calling ‘snap’ elections.

*Prime Minister’s powers to call for dissolution at anytime*

18.41 The ability of the Prime Minister to call for the dissolution of Parliament at any time can only be part of the inheritance of a political system which has elevated the doctrine of Parliamentary sovereignty. The Commission thinks that this is another of the powers of the Prime Minister that needs to be curtailed, and recommends that the power of the Prime Minister to call for a dissolution of the House be limited to specific situations (as indicated) and the normal end-of-term dissolution.

18.42 Curiously enough, the way this particular provision is worded in the Constitution is that the Governor-General *may* (not shall) dissolve Parliament. This has led some Constitutional scholars to suggest that the Governor-General may be able to refuse to dissolve Parliament if there are not sufficient reasons for the Prime Minister so

recommending.<sup>108</sup> However, considering that the Prime Minister appoints and may remove the Governor-General, such a refusal is hardly likely.

*Appointment of Prime Minister/Leader of the Opposition*

- 18.43 There were several representations to the Commission dealing with how these matters are provided for in the Constitution. The first has to do with the way in which the Prime Minister is appointed. Under article 73(1), the person appointed Prime Minister is the leader of the *party* which commands the support of the majority of members in the House of Assembly (although the default position is the person who commands the support of the majority simpliciter, which is the more common formulae). Curiously, the reference in article 73 appears to be the only mention of party in the Constitution. Several young persons thought that this severely limited the number of persons who might succeed to leadership of the country, considering the miniscule number of persons who rise to the top levels of party leadership.
- 18.44 The next point, which was raised by one observer familiar with the workings of Parliament, is that the method of appointment of the Prime Minister was different from that of the Leader of the Opposition who under 82 (2) is simply the person who commands the majority of the support of the members in opposition to the Government. There is no mention of the party in this latter context. The recommendation was that this disparity should be removed, although it was not indicated whether this should be done by reform to article 73(1) to bring it in line with the common formula, or changing art. 82 (1) to impose a party requirement.
- 18.45 At the end of the day, the Commission is not of the opinion that the difference in formula produced very much of a difference, for the leader of the majority party in the House will almost always command the support of the majority. However, the possibly absurd result this might produce has been illustrated in Bahamian politics in recent times, where the Leader of the opposition party failed to be elected, and another person served as Leader of the Opposition. Had this been in respect of the majority party, it would have meant

that Article 73(1) (a) would have been displaced, and the default position would have operated. If the leader of the Party was not in the House of Assembly, upon whom could the Governor General call to form the government without violating the very clear requirements of Article 73 (1)?

18.46 The more interesting question which arises from this is how the determination is to be made by the Governor-General that a party does not have an undisputed majority or no party commands the support of the majority? This trespasses into a discussion of the role of constitutional conventions in the Constitution, which have often not been happily transplanted in the overseas Westminster models. There have been several cases in the Commonwealth Caribbean where a constitutional crisis has resulted from the requirement of the local head of state or Queen's representative to properly decide on a new leader in such circumstances, and what evidence could properly be taken into consideration.<sup>109</sup>

18.47 In light one of two historical examples, there have been calls to perhaps codify this convention and specify the procedure by which the Governor-General is to determine which member of Parliament commands the majority of support of the members of the majority in the House. Some writers have suggested that this could be done within Parliament, by a motion which calls for a tally of votes, signified under the hand of the Speaker. However, the Commission thinks this is one of the matters that should be left to convention. Further, the nature of Caribbean politics is such that there is very rarely any difficulty in determining who that person should be.

*Office of Clerk to House of Assembly and Parliament*

18.48 The Commission is also of the opinion that constitutional recognition should be given to the office of the Clerk of the House of the Assembly and the Deputy Clerk of the Senate. At the moment, this office is clearly set out in the Rules of the House, made under the Constitution, and there is an oblique reference in the *Powers and Privileges of the House of Assembly and Senate Act*. It is submitted, however, that these should be established as public offices under the constitution.<sup>110</sup> Their appointment should be by the Governor-

General on the recommendation of the Public Service Commission, after consultation with the Prime Minister and Leader of the Opposition.

*Office of Chief Parliamentary Counsel*

18.49 Another part of the Parliamentary apparatus should be the office of the Parliamentary counsel and staff. It is the opinion of the Commission that the drafting of legislation, which is currently done by the staff of the Office of the Attorney General, should be a ‘parliamentary’ service. For example, the Constitution provides for any member of the House (or Senate) to introduce a bill, and implicit in this is that such members ought to have access to public drafting facilities. The Commission recommends that this office be established as a public office, with the responsibility for preparing draft legislation and advising Parliament on its law-making powers and other legal issues relating to enactments.

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**Recommendation(s)**

37. The Commission does not recommend the abolition of the Senate, as was called for by a number of contributors. On the contrary, the Commission recommends the enlargement of the composition of the Senate and the manner in which senators are appointed to make it a more representative body, while ensuring the Government always maintains the majority necessary to achieve its legislative agenda.
38. The number of senators should be increased to allow for representation based on geographical considerations and other interests.
39. With respect to changing the age requirement for the Senate, the Commission recommends that the present minimum qualifying age limit of 30 be retained, based on a vote of the majority of the members.

40. The Commission does not recommend the change of the electoral system to a mixed system of first-past-the post and proportional representation, as the experience of other countries does not indicate any huge democratic dividends over the first-past-the-post system.
41. The Commission does not recommend that any limitations be placed on the privileges and immunities of members of the House of Assembly and Senate. However, citizens who are the subject of any unwarranted personal attacks should have the right to respond from the Bar of the relevant House.
42. The Constitution should be amended to create a truly independent Electoral and Boundaries Commission, with constitutional autonomy and protection similar to the other service Commissions, which would replace the Constituencies Commission and assume responsibility for the conduct and regulation of elections. Judges, parliamentarians and public officers should be ineligible for service.
43. The office currently styled Parliamentary Commissioner should be transformed into a Chief Electoral Officer, who should be *ex officio* a member of the Commission.
44. The Commission recommends that Parliament make laws for the establishment, regulation, and funding of political parties, to ensure transparency and accountability, which should also come under the superintendence of the Electoral and Boundaries Commission.
45. The Commission recommends the establishment of a mechanism for Members of Parliament to be accountable to their constituents for the performance of their duties, and accountable to Parliament with respect to their conduct and personal integrity (the latter extending to senior public servants). There should be agencies (such as an Integrity Commission) to investigate and take actions against parliamentarians who clearly fail to perform their duties, or violate the trust and ethics of their office.

- 46.** The power of the Prime Minister to effectively dissolve Parliament at any time in the run-up to general elections should be modified by a procedure which requires that the Prime Minister give at least nine months' notice before calling a general election.
- 47.** The Commission does not recommend that the procedure for determining the member who commands the support of the majority of a party in the House (or the majority of those in opposition to the Government) should be codified. This is a matter that should continue to operate as a constitutional convention.
- 48.** The office of Clerk to Parliament and Deputy Clerk, with responsibility for the Senate, should be established by the Constitution as public offices, independent of the Executive. The Commission also recommends the establishment of the Office of Chief Parliamentary Counsel, responsible for drafting of legislation and advising the Speaker of the House on the rules regarding the enactment of legislation.

## Section 19:

### Chapter VI of The Constitution: Executive Powers

19.1 In reviewing the Executive Powers of the State, the key concerns related to the concentration of powers in the hands of the Prime Minister and the potential for abuse or autocratic government. Some of these matters, although they arise strictly speaking under this Chapter, are more logically addressed elsewhere (for example, the powers of the Prime Minister in respect to dissolution of Parliament are in the Section dealing with Parliament). Concerns were also raised as to the lack of political accountability of the Government (the Cabinet) because of the deepening fusion of the Executive and legislature that can be produced in small countries like The Bahamas Thirdly, there was the issue of role of the Attorney General as a political member of Government continuing to exercise the prosecutorial functions of the state. On the latter point, there was almost universal agreement that those powers should be transferred to a constitutionally appointed independent Director of Public Prosecutions.

#### *Cabinet*

19.2 As has been explained, although all the executive power of the state is symbolically reposed in Her Majesty as Head of State, it is the Cabinet of The Bahamas, headed by the Prime Minister, which is the effective executive. Article 72(1) provides that the Cabinet of The Bahamas is charged with the direction and control of the Government of The Bahamas and is “collectively responsible and answerable to Parliament”. This is a constitutional codification of one of the very important conventions of Westminster Government, much honoured in its historical context,<sup>111</sup> but which has been unhappily transplanted in overseas models, particularly in micro-states within the Caribbean. Thus, just slightly more than a decade after operating the independence Constitution of

Trinidad & Tobago, the Wooding Commission was able to report that the executive powers in the Westminster system, especially in small states, have “a propensity to become transformed into dictatorship when transplanted in societies without political cultures which support its operative conventions.”<sup>112</sup>

- 19.3 In The Bahamas, where there is the real possibility that Cabinet may be composed of all the Ministers of Government, and where the majority of the Members of Parliament may be affiliated with the Government in some way or another—either as Ministers, junior ministers, parliamentary secretaries, or chairman of the various statutory corporations—the fundamental Westminster concept of collective responsibility may be completely subverted. In a sense, as was remarked by one contributor, it may be that Parliament is accountable to Government. There is no real scope on the part of the fiercely loyal party caucus in the House to exercise any independence in these matters, as they often look to their colleagues in Government for parliamentary or other appointments. This is a situation that has been described by a distinguished English Judge (Lord Hailsham) as an “elective dictatorship”.
- 19.4 Representations were also made that there should be limits on the number of MPs that might be appointed as Parliamentary Secretaries and junior ministers. With this, the Commission agrees. The tendency to inflate the Cabinet with a large number of Ministers—which has added to the Bahamian political vernacular the term “Gussimae cabinet”—was also criticized as an abuse and a practice which undermined accountability (as the Commission has hinted above). Indeed, it was one of the framers who recommended that “the Constitution should set a maximum number of ministers. I propose a cabinet no larger than 30% of the members of the House. This could result in enhancing the role and value of the back-bencher in our parliamentary system and thereby serve as a further check, in addition to the opposition, to the abuse of power by the Executive.”
- 19.5 In this regard, it is notable that the Constitution provides for a minimum of 8 Ministers (in addition to the Prime Minister), but does not prescribe a maximum. Indeed, it has



been drawn to the attention of the Commission that this provision has invariably been interpreted to mean that all of the Ministers, including junior ministers, comprise Cabinet. However, while it does not impose an upper level, it is fairly clear that a Cabinet of the Prime Minister plus 8 other Ministers (including the Attorney-General) would be a constitutional cabinet for The Bahamas.

- 19.6 The Commission notes that some of the attempts at constitutional reform have proposed limits to the size of Cabinet. For example, the 2009 Constitution Bill of St. Vincent and the Grenadines attempts to limit the size of the Cabinet to 12 members plus the Prime Minister. Incidentally, this number works out to the roughly 30% proposed by the contributor in the Bahamian context. The Commission agrees that the size of Cabinet should be limited, and thinks that it should not exceed 15 Ministers.

#### *Parliamentary Secretaries*

- 19.7 The Commission is of the view that careful consideration needs to be given to this position to ensure that it is used not simply to reward the party faithful not selected for a Cabinet appointment, and limits should be placed on the number of Parliamentary Secretaries who could be appointed from House of Assembly or the Senate. Incidentally, despite the use of term “junior minister”, there does not appear to be any mention of it in the Constitution, and the position must be synonymous with a parliamentary secretary, whose function is “to assist Ministers in the performance of their duties”. The Commission takes note in this regard of the proliferation of Ministers of State (“junior ministers”) under successive governments in recent times.

#### *Use of Parliamentary Committees to improve accountability*

- 19.8 It was recommended to the Commission that one of the ways in which the Executive could be made more accountable was through the use of the committee system, which operates well in the context of the United Kingdom and the United States, and the Commission accepts this recommendation. These committees should be drawn from the

House and the Senate, their membership should as far as practicable, be non-partisan, and they should be given real powers. The use of these parliamentary bodies, which should be fully empowered with the regular powers of House committees, can be a very valuable tool in the democratic process if used effectively and if their proceedings are televised so as to bring them under the scrutiny of the public.

### **Reduction of Powers of the Prime Minister**

19.9 In the booklet “Options for Change”, the first Commission had set out in some detail the plenitude of powers possessed by the Prime Minister, ranging from the ability to effectively appoint (and therefore remove) the Governor General; and the appointment of many important constitutional figures, including senior judicial officers (Court of Appeal, Chief Justice), chairmen of most of the permanent commissions, foreign representatives, Permanent Secretaries, Commissioner and Deputy Commissioner of Police, etc.

19.10 When it is considered that these persons in combination with the cabinet have the virtual run of the country, the pervasive influence of the Prime Minister is realized, and lends justification to descriptions of the Westminster transplant as “Prime Ministerial” as opposed to “Cabinet Government”. Furthermore, the Governor General, who is responsible for making other appointments, is himself a creature of the Prime Minister. This can conceivably operate as a force-multiplier for the appointments over which the PM has influence. There was a nearly unanimous call for the curtailment of some of the Prime Minister’s powers of appointment.

#### *Appointment powers (judicial appointments)*

19.11 According to the International Bar Association Code of Minimum Standards of Judicial Independence, the participation of members of the executive in judicial appointments and promotions is not inconsistent with judicial independence, provided that appointment and promotion are vested in a judicial body in which members of the judiciary and legal profession form the majority.<sup>113</sup> However, it is a rather strange logic that vests the

appointment of judges in such an independent body (the Judicial and Legal Services Commission) while allowing the Prime Minister the determining role in the appointment of the Chief Justice and Justices of Appeal.<sup>114</sup>

- 19.12 In the context of the re-structured Judiciary recommended below, the Commission would propose that the Judicial and Legal Services Commission be responsible for advising the appointment of all the members of the judiciary (other than the Chief Justice, who would continue to be appointed by the Governor-General on the advice of the Prime Minister (after consultation with the Leader of the Opposition).

*Appointments of diplomatic representatives and other senior officials*

- 19.13 With respect to the appointment of other functionaries, it is thought by some that the Prime Minister's nomination should be subject to ratification by an appropriate House or Senate Committee (e.g., foreign representatives subject to approval of Foreign Relations Committee; Commissioner and Deputy Commissioner subject to National Security Committee; and public service officers subject to Public Service Committee.) The Commission, however, saw no great mischief in the present system under which, in common with the traditions of most countries, ambassadors and high commissioners are within the customary patronage-appointments of the political directorate.

**Limiting the tenure of Prime Minister**

- 19.14 A lot of the discourse in the consultations also focused on limiting the terms which a Prime Minister may serve, as part of the prospect of generally limiting the power of the Prime Minister. In fact, there was considerable support for restricting the tenure of a Prime Minister to two consecutive terms. The Commission does not support this recommendation, however, and will deal with the point shortly. The answer given by the Wooding Commission to this issue in 1974 remains apposite today:

**“Essentially at any general election, voters choose the party which they wish to form the government. It seems to us unthinkable to impose any restrictions on the**

**number of consecutive terms which a party could win. Once this is conceded, it would seem to be wrong in principle to place a restriction on the party's choice of leadership. This could have a significant effect on their chances of winning the elections. Compelling them to change their leader may, in effect, reduce their chances of success."**

19.15 There are also other developments in Caribbean politics which makes this limitation unnecessary. Firstly, we have progressed beyond the larger-than-life, Father-of-the-Nation type Prime Ministers of the early independence years who could command the stage and dominate the political landscape for an inordinate length of time. Secondly, there seems to be developing patterns in The Bahamas, if not in the region, where the electors are wont to change parties virtually every election cycle thereby handing prime ministers a much shorter term-limit than any constitutional prescription is ever likely to do.

#### **Establishment of Constitutional Office of DPP**

19.16 The position of a political Attorney General as the person ultimately responsible for criminal prosecutions is an anachronism in a democratic system and a contradiction of the separation of powers doctrine. The Constitution's attempt to make the Attorney General "not subject to the direction and control of any other person or authority" in the performance of his quasi-judicial functions is not something likely to engender public confidence in the independence and impartiality of the Attorney-General, no matter how scrupulous and well-intentioned any individual holder of that office may be. It is noted that at least one Caribbean constitution provides for the Attorney General to be *either* a political officer (i.e., a minister and legal adviser to cabinet) or a public officer.<sup>115</sup> In cases where the Attorney-General may be a public official, he is given security of tenure akin to that of a judge.

19.17 The need to remove the prosecutorial powers of the State from a political Attorney General and transfer them to a constitutionally appointed Director of Public Prosecutions has also been recognized in The Bahamas, and the Constitutional Amendment Bills which attempted to accomplish this are described in the introductory section.

Interestingly, neither Article 78 nor Article 92, which are the articles affected by this proposed change, are entrenched, and therefore could have been amended by simple majority.<sup>116</sup> Notwithstanding that, neither piece of legislation has ever been given an appointed day, and neither is in force. This may be just as well, as the legislation raises other constitutional issues (apart from the technical law-making requirements) that might need to be further examined.<sup>117</sup>

- 19.18 The Commission was also pleased to hear from the Hon. Attorney General on this point. She indicated her support for the transference of criminal functions to an independent Director of Public Prosecutions (DPP). She attached a caveat, however, that this should be carefully phased in, so as to permit the proper reforms currently underway to the legal and judicial system to take root. However, the Commission sees no conflict between the transference of these functions to the DPP and the continued exercise of administrative functions by the Attorney General. In any event, any concerns in this regard could be met by a provision which specifically grants the Attorney-General responsibility for the administration of legal affairs (as was included in the 2002 Draft Constitutional Amendment Bill).<sup>118</sup>

#### *Entrenchment of DPP*

- 19.19 It is unclear why the framers of the Constitution did not entrench Articles 78 and 92. Be that as it may, any new provisions establishing an independent Director of Public Prosecutions and vesting in such person the powers of prosecution presently vested in the Attorney General should certainly be entrenched. It would be futile to create the constitutional office of a DPP, who could only be removed from office by a process similar to that for the removal of the Chairman of the Commissions, but whose office could be abolished by a simple majority vote in both Houses and the requisite enacting formulae.

*The Office of Public Defender*

19.20 There were also recommendations by members of the public, and emanating from senior members of the legal fraternity, for legal aid or some kind of public defender's office. Although several Caribbean countries have established legal aid schemes, none has gone so far as to appoint a public defender, which is a familiar part of the American legal landscape. However, with respect to serious cases, such as those involving capital offences, the State is obliged to appoint defending counsel, and this is done by way of assigning briefs to practicing counsel at the bar. This practice alone should raise some concerns, as there are no legal guidelines regulating this process. The Commission recommends that the post of Public Defender be instituted, with the statutory function of ensuring that persons charged with certain types of offences are afforded legal assistance where they cannot afford it. This would ensure that balance and fairness are maintained in the judicial process, and that all accused get a fair chance at a proper defence, not only those who can afford to hire high-powered defence counsel.

*Legal Aid*

19.21 A corollary to the recommendations for public defenders is the need for a legal aid system.<sup>119</sup> This point was also raised by several senior persons in the legal fraternity, and the Commission was assured by the Hon. Attorney General that the Government is currently looking at putting in such a system although the modalities are still being worked. In any case, this matter can be addressed by ordinary legislation, and does not require any constitutional changes.

**Local government**

19.22 Although the Government of The Bahamas remains a unitary one, the archipelagic nature of the country has made some degree of decentralization and local governance a necessity. The system of local government is purely statutory, and is established by the 1992 *Local Government Act*. This creates a system of District Councils and Town

Committees filled by locally elected officials to take care of basic administrative duties (e.g., sanitation, public health, some road works, and some revenue collection). Many persons from the Family Islands voiced concerns about the effectiveness of this system. Particular criticisms focused on the lack of power relative to the central government, lack of financial independence and control over taxes raised, and the overlap of functions and possibility of political partisanship and control, particularly with respect to the construction or repair of public infrastructure.

19.23 It was also pointed out that since the system of local government is a post-independence development, it is not included in the Constitution. However, since the control of the government is vested in the Cabinet of The Bahamas, the powers of the local government authorities, though set out in statute, can only be a form of delegated power from the executive. The Commission is of the opinion that the basic source of local government powers should be the Constitution, with the additional powers contained in legislation. On this footing, the existence of the system of local government, its administrative system, the elections of officials and the distribution and regulation of powers and duties would be expressed in the Constitution.

19.24 In advancing this recommendation, the Commission has noted that the inclusion of provisions for local government in the Constitution is an ordinary feature of constitutions in countries where there is a developed system of local government.<sup>120</sup> Provisions in respect of local government appear in several Caribbean constitutions (Guyana, Grenada, and Antigua and Barbuda). Since one of the functions of a constitution is to set out the powers of government, which extends to central government as well as to intermediate levels of government, the Constitution should, in the Commission's view, make provision for local government.

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### **Recommendation(s)**

49. The Commission recommends that there should be a limit on the size of Cabinet, and would suggest that the upper limit should be 15. It also makes the point that it does not seem to be the intention of Article 72(2) that every minister should be a member of the

Cabinet although the historical practice in The Bahamas has always been to treat ministers as automatic members of the cabinet.

50. The Commission recommends the establishment of a number of standing parliamentary committees empowered to have oversight of various aspects of government affairs and to act as a check on the powers of the Executive.
51. The Commission recommends that the powers of appointment of the Prime Minister be reduced by transferring some of those powers to the Governor-General in his or her own right, or to other permanent commissions whose independence and security of tenure members are already secured by the Constitution.
52. Limits should be placed on the number of MPs and Senators who could be appointed as Parliamentary Secretaries (pursuant to Article 81 of the Constitution) and Ministers of State. The potentially overlapping functions of Parliamentary Secretaries and junior ministers should also be clarified. As it stands, there is no constitutional provision which speaks to the appointment of Ministers of State.
53. The Commission does not recommend placing any term limits on the tenure of the Prime Minister.
54. The Commission supports the recommendation to remove the responsibility for criminal prosecutions from a political Attorney General and transfer it to a Director of Public Prosecutions (DPP) with constitutional autonomy and independence. Further, the proposed amendment creating the office of the DPP should be entrenched.
55. The Commission recommends the creation of the Office of Public Defender. This should be complemented with a suitable legal aid system. Both of these initiatives, however, could be accomplished by ordinary legislation.



- 56.** The Commission recommends that local government be given constitutional recognition. A specific part of the Chapter on the Executive should set out the system of local government, assign the responsibilities between central and local government, and grant a greater degree of autonomy to local government authorities within their prescribed areas of operation.

## Section 20:

### Chapter VII of The Constitution:

## The Judicature

### Restructuring the court system

- 20.1 There were several calls, mainly from among the higher echelons of the Judiciary for structural reforms to the existing Courts, in particular to remove the misnomer of a ‘Supreme’ Court (which is not the court at the apex of our court system) and to correct the anomalous position of the Chief Justice in the judicial hierarchy. This would mainly include restructuring the two superior courts under an umbrella Supreme Court of Judicature, made up of the High Court (formerly Supreme Court) and the Court of Appeal. The Chief Justice would be the administrative head of this new Supreme Court of Judicature.
- 20.2 The Commission agrees that the necessary steps should be taken to correct these incongruities and anomalies, which have been described by one of the contributors as a “constitutional oxymoron”.

### Judges

#### *Extension of retirement age*

- 20.3 The question of extending the service lives of judges was one of the issues taken up by the constitutional referendum of 2002. Although aborted, provision was made in *The Bahamas Constitution (Amendment) (No. 9) Act, 2002*, to extend the ages of Supreme Court justices from 65-68, with an extension to 72, and of appeal justices from 70-72, with a possible extension to 75. This was also largely supported by the many of the persons, including the legal fraternity, who appeared before the Commission.

20.4 The Commission supports the extension of the service of judges in principle, but questions the logic behind providing for an extendable period beyond the mandatory retirement age. A mandatory retirement age should be just that: a mandatory cut-off point. Thus, it would make more sense to simply adjust the mandatory retirement age upward to the extendable period in both cases (although the Commission does not agree with the upwards limits which were proposed). The Commission would recommend the more flexible approach of retaining the current prescribed age for retirement for both classes of judges (65 for Supreme Court Judges and 68 for Court of Appeal Judges), but would make that optional with mandatory retirement at 70 and 72 respectively. Then, the only reason for extending a judge's tenure would be to allow him or her to complete outstanding judgments, a period which should not, however, extend beyond six months so as to avoid the utilization of this mechanism as an artifice for extending judicial service.

#### *Extension of tenure*

20.5 The suggestion of removing the possibility of the extension also goes to the root of maintaining judicial independence. Although the Constitution provides for the Prime Minister to appoint the senior judges, it attempts to shield them from interference by granting them security of tenure. However, the ability of the Prime Minister to extend the tenure of judges, simply by consultation with the Leader of the Opposition (which at least one Bahamian case has held need not be strictly followed)<sup>121</sup> opens the door for the executive to wield some influence over the judiciary. It is one thing for a judge to know with certainty that he is required to retire at a certain age; it is quite another thing to be required to retire (or not) depending on the whim and fancy of the Prime Minister.

#### *Composition of Courts*

20.6 Another point that has been raised with respect to the judiciary is whether there should be a requirement for a certain proportion of the positions on the Supreme Court and Court of Appeal to be filled by persons who are Bahamian, or indeed whether should be full

Bahamianization. There were advocates for both options. (Incidentally, as the Commission drafts its report, there is a case in the legal system (at the Court of Appeal) in which a leading practitioner has approached this issue in a round-about way by claiming that foreign justices are ineligible for appointment to the Supreme Court and Court of Appeal as they cannot “effectually” swear the oath of allegiance.<sup>122</sup>)

- 20.7 The Commission is certainly of the opinion that the position of Chief Justice should be filled by a Bahamian, as indeed should be the case for the President of the Court of Appeal (as is currently the case). However, the Commission does not think that this is a matter that ought to be governed by constitutional edict, but rather by policy and practice.

#### *Constitutional Court*

- 20.8 The matter of a Constitutional Court (or more correctly, a Constitutional Division of the Supreme or High Court) has already been addressed in the chapter dealing with fundamental rights, but it needs to be mentioned here also. As has been intimated, the jurisdiction of this court would encompass not only alleged breaches of fundamental rights, but extend to questions of whether some Act or a Bill is inconsistent with the Constitution.

#### *Tenure of magistrates*

- 20.9 The reason that magistrates are not given constitutional protection of tenure is believed to be historical, in that magistrates courts were in earlier times presided over by a Jurat (medieval official of city or town), who was considered part of the executive. Whatever its historical origin, it cannot be denied today that a stipendiary and circuit magistrate is a part of the judiciary and that a magistrates court is a court or tribunal within the meaning of the Constitution, so as to be caught by the “fair and impartial” tribunal of law requirement mentioned in the Constitution.<sup>123</sup>

20.10 The appointment of stipendiary and circuit magistrates in The Bahamas is vested in an independent Judicial and Legal Services Commission (JLSC), which implies that their position has constitutional standing.<sup>124</sup> However, they have no security of tenure and hold office “during pleasure” (s. 13 of *Magistrate’s Act*).

20.11 The Commission thinks that it is a most unsatisfactory arrangement for magistrates, who are really at the fount of justice in this country, and who hear the majority of disputes that eventually reach the courts, to be without some institutional protection. The same imperatives which demand insulation for superior court judges against improper influence, also operate in the case of inferior judges, magistrates, chairman of tribunals and the like. We recommend, therefore, that the Magistracy be placed squarely under the judiciary within the Chapter on the Judicature and removed from the Public Service. They should enjoy the tenure of office similar (but not the same) to that of Judges of the High Court. For example, they should hold office during good behavior for such period as may be specified in their instrument of appointment, and should only be removed for the same reasons as a judge, after investigation by a tribunal appointed by the Chief Justice, appointed on the advice of the JLSC.<sup>125</sup> The tribunal could consist of a Chairman and not less than two other members, selected from among persons who hold or have held office as a judge of a court of unlimited jurisdiction in civil and criminal matters in the Commonwealth Caribbean or Commonwealth.

#### *Removal of responsibility for prosecutions from Police*

20.12 For many years, police prosecutors have been relied on to prosecute summary trials and conduct preliminary inquiries in many Caribbean countries. No doubt this was meant to compensate for the shortage of public prosecutors available to the national prosecuting authority, whether it was the Attorney-General or a Director of Public Prosecutions. The Commission is of the view that this system should be phased out, and that all prosecutions in the magistrates’ courts should be conducted by the office of the DPP and subordinate officers.

**Privy Council v. Caribbean Court of Justice?**

20.13 The Commission has dealt obliquely with this matter in the section on the death penalty and does not propose to delve into the merits or demerits of retaining the Privy Council. The Privy Council has served most of the Caribbean countries well with a generally consistently high quality of judgments. Those who would skew the debate on the Privy Council based on that body's apparent philosophical opposition to the death penalty are missing the larger picture. The Privy Council has been at the forefront of constitutional interpretation and the enforcement of fundamental rights and freedoms in the Caribbean generally, and has historically gone where local courts have usually been reluctant to take the lead.

20.14 The major arguments that have traditionally been advanced in favour of abolishing the court are as follows: (1) that Privy Council ("PC") is a foreign court that is far away; (2) that the members have no knowledge of West Indian or Caribbean societies; (3) that PC has been an obstructionist court with respect to enforcing the death penalty; and (4) that several of the Court's decisions have introduced uncertainty in the West Indian jurisprudence. Some of these raise legitimate concerns, but they must also be viewed in their proper context. In reality, London is not much further away from Nassau than Port-of-Spain; the English judges on the PC are replaced by judges on the CCJ who are also "foreign" and not necessarily fully knowledgeable about Bahamian society; that West Indian societies are not homogenous; and there is a very real possibility that a Caribbean court may take a similar approach to death penalty cases. It is a prudent decision of the Government to shadow the Court by supporting it financially, and hence keep a foot in the door. But the 'transition' time would also allow for this court to become established and for the many birthing pangs to be sorted out. In any event, the Commission is of the view that to replace the Privy Council with the CCJ is a decision that ultimately lies in the hands of the Bahamian people, as this would require a referendum to take effect (although some legal scholars have suggested that transition to the CCJ could be done legislatively-cum-administratively having regard to article 100 of the Constitution. The

Commission, however, does not subscribe to the view that it could be achieved in this fashion.<sup>126</sup>

### *Industrial Tribunal*

20.15 There were several representations, mainly from the representatives of the labour unions, to constitute the Industrial Tribunal as an equal division of the Supreme Court. The Commission does not support this recommendation. While it does acknowledge the importance of the work done by the Tribunal, the entire rationale for it was to enable there to be a tribunal of law and fact which could be accessed speedily, without the formalities of the Court process and without costs incurred by the parties. Of course, the anomaly in the procedure is that while its orders are only enforceable if registered in the Supreme Court, its decisions are appealable to the Court of Appeal. In fact, the Commission would recommend that the entire procedure created by the Industrial Tribunal, be the matter of further study, with a view to properly rationalizing this body within the judicature.

20.16 What the Commission would recommend, however, is that the Tribunal be removed from under the administrative control of the Ministry of Labour and placed under the Judicature, and that the President and members be given tenure similar to that being advocated for magistrates.

## §

### **Recommendations**

57. The Commission agrees that the necessary steps should be taken to correct the anomalies in the Court structure with regard to the re-branding of the Supreme Court as the High Court, which along with the Court of Appeal would come under a Supreme Court of Judicature presided over by the Chief Justice as head of the judiciary.

- 58.** The Commission recommends retaining the existing retirement age for Justices of the Supreme Court and Court of Appeal (respectively 65 and 68) but making these optional retirement ages, and raising the mandatory retirement age to 70 and 72 respectively, with no possibility for extension.
- 59.** The Commission recommends that both the Chief Justice and President of the Court of Appeal should always be Bahamians (as indeed they presently are).
- 60.** The Commission recommends that the provisions dealing with the appointment of magistrates should be dealt with in the Constitution under the Chapter on the Judicature. The magistracy should also be given a form of protection of tenure, not the same as superior court judges, but sufficient to achieve a constitutional guarantee of independence.
- 61.** The Commission does not recommend the abolition of appeals to the Judicial Committee of the Privy Council at this time. But it sees this as an inevitable event that must take place at some determined time in the future in the continuing journey towards full sovereignty. We must also be cognizant that the imperative for this change might be driven by changes emanating from within the United Kingdom.
- 62.** The Commission does not recommend the elevation of the Industrial Tribunal into a branch of the Supreme Court. However, administratively, it should be placed under the Judicature and removed from the Department of Labour, and some form of tenure given to the President and Members.



## Section 21:

### Chapter VIII of The Constitution:

### The Public Service

#### The Service Commissions

21.1 Many criticisms were leveled at the public service and the functioning of what might be considered the most important administrative governmental body: The Public Service Commission (“PSC”). In fact there was one contributor who called for the elimination of the PSC and the Public Service Board of Appeal (“PSBA”), on the grounds that they had outlived their usefulness and were emblematic of bureaucracy and red tape. Some of these broadsides have also come from the courts.<sup>128</sup>

21.2 The problems described were largely due to administrative and institutional weaknesses. However, the obvious problems, which were sought to be addressed in 2002, came about because of size, and the inability of the current PSC and the associated administrative apparatus to cater to appointment, discipline and removal of public servants.

#### *Teaching Service Commission*

21.3 It will be recalled that one of attempted constitutional amendments of 2002 was an act to create and entrench a Teaching Service Commission (*The Bahamas Constitution (Amendment) (No.5) Act, 2002*). That Commission would have had responsibility for the appointment, removal and discipline of teachers.

#### *An expanded Public Service Commission*

21.4 Notwithstanding the call for a separate Teaching Service Commission, the Commission is of the opinion that the way to best regulate the Public Service is not by the proliferation of service commissions, but by either expanding the existing PSC or effecting

administrative changes to promote efficiencies. Such a Commission could be empowered to form chambers or sections (Teaching Services Section) that could be responsible for dealing with different sectors of the public service (e.g., teachers, health workers, etc). The Commission is of the view that an umbrella PSC should make for a far more efficient and holistic use of public service resources, and that any increased fragmentation would make the system even less efficient than it already is. It would also ensure that there is uniformity of practice with respect to the public service and any ‘jurisprudence’ that emanates from the Public Service Board of Appeal.

- 21.5 The Commission notes, however, that the experiment with an omnibus PSC in Belize seems to have backfired, and the public service is now administered by three separate service commissions: the Public Services Commission, the Security Services Commission, and the Judicial and Legal Services Commission. Formerly, the PSC had consisted of 18 members, and included as ex officio members the Permanent Secretaries or heads of department of all the branches of government affected, including the Commissioner of Police and Commandant of the Belize Defence Force.<sup>129</sup>

*Protective/ Security Services Commission*

- 21.6 It is also recommended that the Police Service Commission should be re-constituted either as the Security Services Commission or Protective Services Commission, with responsibility for the Police (Fires Services), and the Prison Service. A similar Commission exists or has been proposed in several of the Caribbean models (Belize, Grenada). This would greatly reduce and simplify the work of the Public Service Commission. The reasons for excluding the The Royal Bahamas Defence Force (“RBDF”) from inclusion in this group are discussed below.

*Royal Bahamas Defence Force*

- 21.7 Several persons made representations that the RBDF should be provided for in the Constitution similar to the way that the RBPF has been provided for, including provisions

for appointment and removal. As already observed, the RBDF is a post-Constitutional creature. The only oblique, perhaps prophetic, reference is found in Article 31(1)(b), where a ‘disciplined force’ is defined to include a “naval, military or air force.” However, it is to be noted that “public service” is defined as “service of the Crown in a civil capacity”, which would exclude the RBDF.

- 21.8 The Commission is of the opinion that the *Defence Act* and *Regulations* create a thorough and comprehensive system with respect to the creation and regulation of the Defence Force, and its internal discipline. It is the only military organization in the country, capable of constituting court-martials (equivalent of Supreme Court trials, from which an appeal lies to the Court of Appeal), and therefore cannot be brought within the disciplinary system of any of the service commissions. As far as the Commission is aware, all of the other Caribbean countries (with the exception of Belize) have provided for their military forces by way of ordinary legislation. The Belize situation, which places the Belize Defence Force under the control of the Security Services Commission, along with the National Coast Guard and Belize Police Department, seems to be an anomaly.
- 21.9 Indeed, the Commission notes that in the United Kingdom, until very recently there was no standing army, and the army had to be legitimized by an annual Army Act (now done at five-yearly periods). The Commission is of the opinion that it is vital in a democratic country for the military to be subject to the control of the elected representatives of the people. It would not be prudent to unnecessarily complicate the procedure for the removal of the members of the Force by a complicated “civil service” process.
- 21.10 The Commission is also of the opinion that a separate study needs to be commissioned of the functioning of the Public Service Commission (and Public Service Board of Appeal) to determine whether this is the best way to regulate a “public service” in a modern and progressive country. There is no doubt that the old doctrine of the Crown’s ability to dismiss at pleasure has been abolished, and the requirements of fairness and natural justice have become firmly entrenched.<sup>130</sup> But the public service regime was never

intended to operate to make it nearly impossible for government to remove persons and to stagnate the progress of the civil service.

*Ombudsman*

21.11 The Commission was of two minds as to whether to recommend the establishment of an Ombudsman. Although this Scandinavian term for “complaints commissioner” was one of the recommendations of the Wooding Commission and has taken root in several Caribbean countries,<sup>131</sup> there is little evidence in the literature to suggest that this office has lived up to its billing. The concept of the ombudsman was introduced to provide citizens an additional forum at the expense of the state to redress their grievances with respect to mal-administration and administrative decisions. However, despite the constitutional entrenchment of this office, such a person normally does not possess coercive powers and is only able to undertake investigations and make recommendations. The Commission is of the view that the development of a proper legal aid scheme, combined with the facility for class or representative actions, and the strengthening of intra-departmental schemes for addressing complaints, might be preferable to creating another public functionary.

21.12 Notwithstanding these reservations, the Commission gives its support to the establishment of the Office. It does not necessarily think that this Office need be a constitutional position, as the experience of other countries does not indicate any greater efficacy in a constitutional as opposed to ordinary statutory context. The Commission would also support the creation of the position of Contractor General, with tenure similar to that of the Auditor General.

*Contractor General*

21.13 In contradistinction to the lukewarm reception given the above commissions, the Commission feels that there is a useful place for such an office in the constitutional scheme. This office could be constituted along similar lines as that of the Auditor

General, with the responsibility for overseeing the award and performance of government service contracts valued in excess of \$50,000.

§

**Recommendation(s)**

63. The Commission does not support the establishment of a separate Teaching Service Commission. It recommends instead the enlarging of the Public Service Commission and setting up divisions or sections to deal with specific sectors of the public service (e.g., Teaching Service Section). The specialist Commissions (Judicial and Legal Services Commission, Police Service Commission) should be retained, subject to the suggestion in respect of the Police Service Commission.
64. The Commission recommends that consideration be given to re-constituting the Police Service Commission into a Security Commission, which would be responsible for the Police (Fire Services) and the Prison Service. This would ease some of the burden on the Public Service Commission and allow it to devote additional resources to categories such as teachers.
65. The Commission recommends that the Royal Bahamas Defence Force, which is a military organization, continues to be governed by its Act and Regulations for the time being, and remain under the administrative control of the National Security Council.
66. The Commission recommends the establishment of the Office of Ombudsman, but it is not of the opinion that this Office needs to be a constitutional one and can be created by statute.
67. The Commission recommends the establishment of the office of Contractor General as a public office, with security of tenure, along the lines of the Auditor General. Such a person would be responsible for overseeing the award of Government contracts and ensuring that public funds are expended fairly and that value is received for money expended.

## Section 22:

### Chapter IX of The Constitution:

## Finance

### Control of public finances

- 22.1 The Commission approaches this area under the rubric of its general mandate for a comprehensive review, but realizing that it is also connected to the idea of increased political accountability, included within its mandate. However, the issues of control of public spending and management of the public debt were raised by several contributors, and engendered some debate among Commissioners themselves, even leading to one suggestion (not accepted by the majority) for a provision mandating a balanced budget (see below).
- 22.2 The current system for the control of public finances, erected by the Constitution and legislation, envisions a process that starts and ends with Parliament, which may be conveniently set out as follows: (i) Parliament debates and approves the annual budget; (ii) the Ministry of Finance and the Treasurer supervise disbursement of funds, along with the Central Tenders Board; (iii) the Auditor General receives financial statements from the Ministry of Finance and conducts his audits of various departments of government; and (iv) the Auditor General submits his reports to Parliament (via the Speaker) for the scrutiny of the Public Accounts Committee and debate in Parliament. It is clear that the Constitution, however, recognizes the Auditor General as the primary means of the control of public finances, and the mechanism by which any irregularities are brought to the attention of the House.

*Independence of the Office of the Auditor General*

- 22.3 The Constitution attempts to make the Auditor-General completely independent of the Legislature and the Executive by securing his terms of service and making him irremovable except in accordance with a judicial procedure. Article 136(5) provides that “in the exercise of his functions...the Auditor General shall not be subject to the direction or control of any other person or authority.” That may well be so as a matter of constitutional principle, but the reality of the existence of the Office of the Auditor General is rather different. For one, this office depends on the Ministry of Finance for an operating budget, and the Constitution leaves the audit of the Office of the Auditor General in the hands of the Minister of Finance. Both situations have significant implications for the degree of independence that the Auditor General is able to exercise.
- 22.4 The Commission recommends that the Office of the Auditor General be provided with its own budget, and the control for the appointment and disciplinary control of the staff of that Office be vested in the Auditor General. Further, the responsibility for the audit of the Auditor General’s office itself should be forthwith removed from the control of the Minister of Finance, and provisions made for this to be done by an independent firm of auditors selected after consultation between the Minister of Finance and Public Accounts Committee.<sup>132</sup> The Commission is also of the opinion that the system and transparency of the public finance system would be helped if the Auditor General had a closer working relationship with the Public Accounts Committee.

*Public Accounts Committee*

- 22.5 The next component in the system for the control of public accounts that needs strengthening is the Public Accounts Committee (PAC). This committee is a “sessional” committee of the House of Assembly (i.e., it functions for the life of Parliament) and is normally given powers to summon persons, papers and records in connection with its work. The Chairman of this committee is traditionally a member of the Opposition, which is thought to enhance its status as a controlling body. However, as a House

body, it is subject to the control of the House which creates its and can only exercise the powers delegated by the House.

- 22.6 Because of the importance of the PAC, the Commission recommends that the Public Accounts Committee should be enshrined in the Constitution as a special Parliamentary Body. This would ensure that the functions of this committee are ensured by the Constitutional document itself, not the rules of House of Assembly. For example, the Constitution of Antigua and Barbuda (s. 98) establishes the Public Accounts Committee and directs it to report to the House on “in the case of any excess or unauthorized expenditure of public funds, the reasons for such expenditure; and any measures it considers necessary to ensure that public funds are properly spent.” It is noted that the elevation of the Public Accounts committee to direct constitutional status is becoming more and more a commonplace feature of other Caribbean Constitutions.<sup>133</sup>

*Other administrative/legal changes*

- 22.7 While the Auditor General may sit at the apex of the control of public finances, the work of a single office can never produce the necessary transparency and accountability. In any event, it must be remembered that the work of the Auditor General is concerned mainly with post-expenditure control, and there should be systems to ensure that mechanisms are in place for current control. For example, the Auditor-General is required to submit yearly reports, which are inevitably delayed because of the timelines for the submission of other vital material.
- 22.8 Clearly there is a role for a Contractor General, mentioned earlier in the section dealing with the public sector, in the control of public finances. Indeed, such an office could as easily have been mentioned in this section. It is envisioned that this office could work in tandem with the Auditor General to ensure that there is transparency and accountability in the award of government contracts.



**A constitutional requirement to balance the budget?**

22.9 Among other recommendations to improve fiscal responsibility and governance was a novel suggestion from within the ranks of the Commission itself (namely from Commissioner Albury) for a constitutional mandate to maintain a balanced budget. However, the Commission sees this more as a matter of governance as opposed to legislation, and fears that such a provision would handicap the ability of a government to take urgent fiscal measures in the public interest. With the explosion of judicial review, it would also ultimately subject the executive discretion needed in this area to the control of the courts.

**§**

**Recommendation(s)**

68. The independence of the Office of the Auditor General should be strengthened by making provisions for the independent funding of that office out of the Consolidated Fund and for the appointment and control of the staff of the Auditor General's Office to be vested in the occupier of that office.
69. The Public Accounts Committee should be elevated to direct Constitutional standing by enshrining that body and its mandate in the Constitution. The Constitution should also declare the relationship of this body with the Auditor General.
70. Article 136(6) should be amended to provide for the accounts of the Auditor General's Department to be audited by an independent firm, appointed by the Minister in consultation with the Public Accounts Committee.
71. The Commission does not recommend including a clause in the Constitution requiring the Government to maintain a balanced budget.

## Section 23:

### Chapter X of The Constitution:

## Interpretation

### Interpretation of the Constitution

23.1 The requirement for the Constitution to be interpreted in accordance with “The Interpretation Act of The Bahamas and all amendments thereto as in force on 10<sup>th</sup> July 1973”, means that the Interpretation Act of 1967 applies to the Constitution. Any amendments to the Interpretation Act post 1973 do not apply. Although this provision is meant to be flexible (the 1967 Act applies with the necessary adaptations), it is one of the anachronisms of the Constitution that needs to be amended.

23.2 Indeed, such a prescription is contrary to the principle enunciated by the Privy Council that a constitutional document is “*sui generis*, calling for principles of interpretation of its own, suitable to its character...without the necessary acceptance of all the presumptions that are relevant to legislation and private law”.<sup>134</sup> In other words, depending on the circumstances, words and phrases may require a different meaning in the constitutional context than would pertain in an ordinary statute. In this regard, the Constitution should simply declare that in interpreting the Constitution, regard is to be had to the current *Interpretation and General Clauses Act*, as the context may require.

### Savings Laws Clauses

23.3 These are provisions of the Constitution which either protect pre-existing laws from constitutional challenge on fundamental rights grounds (general savings clause) or those which insulate particular laws or penalties from constitutional infirmity (special savings clause). An example of the first is Article 30(1) of The Bahamas Constitution; an

example of the latter is Article 17(2), which preserves from challenge forms of punishment lawful before 1973.

- 23.4 The major complaint with the savings clauses is that when strictly applied, they can have a regressive effect on constitutional interpretation, effectively locking the Constitution in time and prohibiting courts from giving full effect to fundamental rights. They have been described as “probably the most contradictory feature of Caribbean constitutions”<sup>135</sup> and as the “common law phenomenon in Commonwealth Caribbean constitutions.”<sup>136</sup>
- 23.5 These clauses have been a source of great irritation and hindrance to critics who question the constitutionality of the death penalty. Such clauses have also produced more confusion, judicial arbitrariness and contradictory jurisprudential outcomes than any other provision of the independence Constitutions. For example, in a series of recent cases, the Privy Council appeared to have embarked on a progressive and enlightened approach to these clauses. It held that savings clauses in the constitutions of St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago and Dominica were ineffective to shield the mandatory death penalty from review.<sup>137</sup> (See *Reyes v The Queen* [2002] 2 AC 235, *R v Hughes* [2002] 2 AC 284, *R v Fox* [2002] 2 AC 284, *Roodal v State of Trinidad and Tobago* [2004] 2 WLR 652.)
- 23.6 Not long after this, a trio of cases from Barbados, Trinidad and Tobago and Jamaica went to the Privy Council, all challenging the mandatory death penalty (respectively, *Boyce and another v The Queen* [2004] 3 WLR 787, *Matthew v State of Trinidad and Tobago* [2004] 3 WLR 812, *Watson v The Queen (Attorney General for Jamaica intervening)* [2004] 3 WLR 841). Apparently concerned that they may have tipped the scales too far in the direction of judicial law-making, their Lordships empanelled a Board comprised of nine Law Lords (one of the largest if not the largest Board ever to sit) to hear the three appeals.<sup>138</sup> In *Boyce* and *Matthew*, the Board held that the law imposing a mandatory death sentence was saved from being unconstitutional by the savings clause, notwithstanding the earlier findings that the death penalty is a cruel and usual punishment and therefore unconstitutional. A different result obtained, however, with respect to the

case from Jamaica. This was because Jamaica had amended its relevant laws in 1992, and the offending provisions, unlike the case in Barbados and Trinidad, were not therefore saved from constitutional infirmity.

23.7 Interestingly enough, the *Boyce* and *Matthew* decisions stand out more for the powerful dissenting opinion of Lords Bingham, Birkenhead, Steyn and Walker.<sup>139</sup> In their dissent, the minority held that the majority decision in effect elevated the savings clause over the bill of rights. Their trenchant criticism of the decision is contained at paragraph 78 of *Boyce*, where their Lordships said that the majority decision "...puts a narrow and over-literal construction on the words used, gives little or no weight to the principles which should guide the approach to interpretation of constitutional provisions, gives little or no weight to the human rights guarantees which the people of Barbados intended to embed in their Constitution and puts Barbados in flagrant breach of its international obligations."

23.8 Then, in the very recent Bahamian case of *Bowe and anor. v The Queen* (Privy Council Appeal No. 44 of 2005), the savings clause again reared its head. In a remarkable feat of judicial ingenuity, the Privy Council found that the general savings clause of the Bahamian Constitution (similar to that which prevailed in *Boyce* and *Matthew* from Barbados), saved the existing law authorizing the death penalty. Incredibly, however, what was saved was a law that provided for a *discretionary* rather than a *mandatory* death penalty because established principles and authorities prior to 1973 were against a mandatory penalty. The reasoning accepted by the Board can only be explicated by the series of propositions which were commended and accepted by them:

**"22. The appellants' submissions on the successive Orders and Constitutions referred to above involved a number of steps which may, it is hoped fairly, be summarized as follows:**

- (1) **These Orders and Constitutions guaranteed to the people of The Bahamas certain rights regarded as fundamental, including the right (although qualified) to life and the right (again qualified) not to be subjected to torture or to inhuman or degrading treatment or punishment.**
- (2) **While article 30(1) of the 1973 Constitution contained a general savings clause similar in effect to those held by the majority of the Board in *Boyce v The Queen* [2004] UKPC 32, [2005] 1 AC 400; *Matthew v State of Trinidad and Tobago* [2004] UKPC 33, [2005] 1 AC 433; and *Watson v***

*The Queen* [2004] UKPC 34, [2005] 1 AC 472 to be effective to preclude challenge to an existing law (if that law had not been amended after the relevant date) on grounds of inconsistency with the human rights guarantees of the Constitutions of Barbados, Trinidad and Jamaica, the 1963 and 1969 Constitutions of The Bahamas contained no such general savings clause.

- (3) Sections 4(1) of the 1963 and 1969 Orders imposed a mandatory duty to construe existing laws with such modifications, adaptations, qualifications and exceptions as might be necessary to bring them into conformity with the Constitution.
- (4). If, as the appellants contend, section 312 is inconsistent with sections 2 and 3 of the 1963 and 1969 Constitutions, it must be construed with such modification as may be necessary to bring it into conformity with the 1963 or 1969 Constitution, unless section 312 is saved by another provision of the respective Orders or Constitutions.
- (5.) The savings provision in section 3(2) of the 1963 and 1969 Constitutions relates to modes of punishment: it is effect to confer immunity on the death penalty but not on the mandatory requirement that the death penalty be imposed.
- (6) In pursuance of the duty imposed by section 4(1) of the 1963 and 1969 Orders, section 312 was to be construed before 10<sup>th</sup> July as prescribing a discretionary and not a mandatory sentence of death: thus the savings clause in article 30(1) of the 1973 Constitution applied to 312 so construed.”

23.9 The upshot of these decisions seems to be that the core content or meaning of the fundamental rights provisions depends not so much on normative principles but on technical drafting devices such as whether or not a “law is saved” by a particular legislative formulae. Small wonder then, that newer constitutions, such as the 1981 Constitution of Belize, lack a general savings clause,<sup>140</sup> and that many of the constitutional review commissions have called for its removal. For example, the Commission reproduces the following extract from the Barbadian Constitutional Review Commission:

“It has been drawn to the attention of the Commission that the absence of an ‘existing law clause’ in the Constitution of Belize, drafted in terms very similar to the Barbados Constitution, has posed no significant problems in that jurisdiction. The Commission has also taken note of the fact that Jamaica’s Joint Select Committee of the Houses of Parliament on Constitutional Reform in its May 1995 final report recommended the deletion of a similar clause in the Jamaican Constitution.”

23.10 The Commission thinks that the greatest proponent for the removal of the savings law clauses is the corpus of case law which the Privy Council has spawned, but the Commission is also guided by the experience and approach taken (or recommended) by the other countries, notably Belize, Jamaica, Barbados and Grenada. However, it realizes that the removal of Article 17(2) might render the death penalty (hanging) unconstitutional. Indeed the Privy Council left the door open for this in *Bowe*. It would be advisable, therefore, to retain the partial savings law clause at this point (see section on Death Penalty).

23.11 Commissioner Mortimer does not support the recommendations set out in this Section.

### **Recommendation(s)**

72. Article 137(13) should be amended to remove the application of the *Interpretation Act* of 1967 to the interpretation of the Constitution. Provision should be made simply for regard to be had to the current *Interpretation and General Clauses Act* and for the Constitution to be interpreted in its own right.

73. The general savings law clause at Article 30 should be deleted. However, the partial savings clause at Article 17(2) should be retained to head off any possible constitutional challenges to the manner of implementing the death penalty (by hanging).

## **PART VI:**

### **APPENDICES**

**Appendix I:** Prime Minister's Communication to Parliament Announcing Appointment of Commission

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**COMMUNICATION  
BY  
THE RT. HON. PRIME MINISTER  
AND MEMBER FOR CENTREVILLE**

RE : THE CONSTITUTIONAL COMMISSION

Dated : 1 August 2012

**MR. SPEAKER:**

I wish to inform this Honourable House and the general public that my government has appointed a new Constitutional Commission to conduct a comprehensive review of the Constitution of The Bahamas, and to recommend changes to the Constitution in advance of the 40<sup>th</sup> anniversary of Independence next year. These changes will require a national referendum to be held in due course so that the will of the people can be determined on the matter.

Former Attorney-General, **Sean McWeeney QC**, will be the Chairman of the Constitutional Commission. **Mr. Loren Klein**, Chief Counsel in the Chambers of the Attorney-General, will, in addition to being a member, serve as the technical co-ordinator of the Commission's Secretariat. The other members of the Commission will be former Attorney-General and former Minister of Education, **Mr. Carl Bethel**, **Mrs. Rubie Nottage**, **Mr. Mark Wilson**, **Mr. Lester Mortimer**, **Mrs. Tara Cooper-Burnside**, **Mr. Michael Stevenson**, **Dr. Olivia Saunders**, **Mr. Michael Albury**, **Ms. Chandra Sands**, **Ms. Brandace Duncanson** and **Mrs. Carla Brown Robert**.

The Commission has been given a broad mandate to build upon the impressive work that was done by the first Constitutional Commission appointed on 23<sup>rd</sup> December, 2002 but effectively disbanded after May, 2007.

It is anticipated that the new Commission will pay particular attention to the need to strengthen the fundamental rights and freedoms of the individual, including the need to end gender-based discrimination against women consistent with United Nations Conventions and more enlightened views that have developed globally since the attainment of our Independence. The Commission's inquiry into this particular matter will necessarily entail close examination not only of the anti-discrimination and fundamental rights provisions but the citizenship provisions of the Constitution as well. Indeed there are other difficult Citizenship-related questions that will no doubt exercise the Constitutional Commission as well.

Similarly, the Commission will bring under renewed scrutiny the provisions of the Constitution that regulate the relationship between centres of state power and the individual. This will be done with a view to affording greater individual protection against abuses of power while at the same time ensuring that the collective security needs of the citizenry as a whole are not unduly compromised by the pursuit of individual liberty in a democratic society. Complex questions relating to the retention and enforcement of capital punishment are expected to arise for consideration in this context as well.

The question of whether The Bahamas ought to remain a constitutional monarchy or evolve into a republic, albeit within the Commonwealth, is also expected to receive the close attention of the Commission.

Similarly, whether and, if so, to what extent, the Caribbean Court of Justice - or perhaps even a final court of our own - should replace the Judicial Committee of the Privy Council as the final court of appeal under our constitution will be a question that the Constitutional Commission will likely have to consider as well.

In addition, a broad and diverse range of questions relating to our political system will arise for constitutional review. These will include questions such as:

- Whether there ought to be constitutionally fixed dates for general elections;
- Whether there ought to be fixed term limits for Prime Ministers and MPs?
- Whether the electorate should be vested with limited rights to recall their MPs?
- Whether the Senate, being an appointed body, should be constituted differently to encapsulate a broader cross-section of national interests?



- Whether eligibility for service in the Senate should be lowered from 30 to 21, the same age that applies to the House of Assembly?
- Whether the Senate should even be retained at all?
- Whether the unqualified right to free speech enjoyed by legislators needs to be modified so as to give the individual citizen either a limited right to reply to defamatory attacks made against him in Parliament, or a right to seek redress against the offending legislator in a court of law?
- Whether the constitutional power and authority over criminal prosecutions now vested in the Attorney General should be transferred instead to a constitutionally independent Director of Public Prosecutions with security of tenure?

These and many other questions will receive the attention and study of the Constitutional Commission in the coming months.

More generally, as the Constitution of The Bahamas is now almost 40 years old, this is an appropriate juncture for us, as a nation, to take stock of where we are today in light of the constitutional experience of the past four decades, and to collectively decide, both in the legislature and in a national referendum, what reforms and adjustments, if any, should be introduced in order to secure the continuing relevance, vitality and resilience of the supreme law of the land.

The Commission is in the process of establishing and staffing a secretariat to facilitate the coordination of the Commission's work. It is also anticipated that a website will be launched to help keep the public informed of the Commission's work and to provide a channel for the exchange of views and ideas between the Commission and the general public on matters of constitutional reform. This will be supported by other opportunities for structured dialogue with the public.

The Commission is expected to report its recommendations to the government on or before March 31st, 2013.

**Appendix II: Prime Minister's Communication to Parliament Announcing Extension of Reporting Time for Commission**

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**February 13<sup>th</sup>, 2013**

COMMUNICATION  
TO THE HOUSE OF ASSEMBLY  
BY  
THE PRIME MINISTER  
& MINISTER OF FINANCE  
AND MEMBER FOR CENTREVILLE  
THE RT. HON. PERRY G. CHRISTIE

Mr. Speaker :

I have received a letter dated February 11<sup>th</sup>, 2013 from the Chairman of the Constitutional Commission, Mr. Sean McWeeney QC, requesting an extension of time for the Commission's report and also proposing that the timeline for the referendum on constitutional reform be adjusted accordingly.

The full text of the Chairman's letter to me is as follows:

**“Dear Prime Minister:**

“The Constitutional Commission – Request for Extension of Time

**“You will recall that when the Constitutional Commission was appointed in the latter part of last year, you set March 31<sup>st</sup>, 2013 as the deadline for submission of the Commission's report. This was done with a view to securing that (a) the necessary Cabinet conclusions, (b) the drafting, preparation and passage of the necessary bills through both Houses of Parliament, and (c) the required constitutional referendum, would all be concluded in advance of the 40<sup>th</sup> anniversary of Independence on July 10<sup>th</sup>, 2013.**

**“However, having regard to (a) the very considerable public interest in constitutional reform that continues to be manifested, (b) the attendant need to allow as much time as is reasonably practicable for public consultations throughout the Commonwealth, and (c) the need to ensure that adequate time will be made available for the electorate to properly consider and digest any recommended changes to the Constitution well in advance of voting in a referendum, it is the Commission's respectful submission that the timelines in this matter should be extended as follows:**

- 1. The March 31<sup>st</sup> deadline for the Commission's report should be extended to June 30<sup>th</sup>, 2013; and**
- 2. The constitutional referendum that was originally forecast for June of this year should be provisionally re-scheduled for late November, 2013.**

**“I shall await your determination in this matter.**

**“Yours sincerely,**

**“Sean McWeeney QC  
Chairman  
The Constitutional Commission”**

I am pleased to advise this Honourable House that I have acceded to the request of the Constitutional Commission. Accordingly, the deadline for the Commission's report has been extended to June 30<sup>th</sup>, 2013. Further, the constitutional referendum planned for this year, the 40<sup>th</sup> Anniversary of our Independence, has been provisionally re-scheduled for late November, 2013, on a date certain to be announced in due course.

These extensions will both encourage and facilitate the widest possible dialogue - and public education - on constitutional reform well in advance of any voting in a referendum.

It should be noted, Mr. Speaker, that this weekend past, the Commission launched its town hall-style public consultations with four separate meetings in Grand Bahama. These consultations will extend throughout the Family Islands and New Providence in the coming months. Concurrently with that, the Commission will be continuing to interview persons representing a broad cross-section of interests in our country.

It should also be noted, Mr. Speaker, that the Commission's website is now fully operational. As a result, members of the public can communicate directly with the Commission by e-mail, in addition to being able to access copies of the Constitution and a wide range of relevant constitutional materials that have been uploaded to the Commission's website. The address for the website is: [www.bahamas.gov.bs/constitutional\\_commission.com](http://www.bahamas.gov.bs/constitutional_commission.com)

I am pleased to further advise that the public can also communicate with the Commission at its office in the Fort Nassau Centre (which is in the British Colonial Hilton's commercial complex) or by

calling the Commission's office at 356-7050 or 356-7051; or by writing the Commission at P.O.Box N-1613.

Finally, Mr. Speaker, allow me to take this opportunity to publicly recognize the great work that has been performed to date by the Constitutional Commission, all of whose members are giving generously of their time without any remuneration. They are nonetheless doing so gladly, at great personal sacrifice, in a spirit of patriotic volunteerism that is worthy of emulation.

This is an extremely important undertaking, Mr. Speaker, one that is vital to the orderly growth and development of our constitutional democracy, and the rights and freedoms we hold so dear. Indeed, I would go further and suggest that the process of constitutional reform is vital to the growth and development of our civilization as a sovereign people.

I take great heart and encouragement from the excellent work that has been done already, and I have every confidence – as I am sure all honourable members do – that we are definitely on the right track with the process of constitutional reform that is now vigorously underway.

**Appendix III: List of Commissioners and Secretariat Staff**

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**Commissioners**

**Sean McWeeney, QC, Chairman**

Carl Bethel  
Rubie Nottage  
Lester Mortimer  
Loren Klein  
Tara Cooper Burnside  
Mark Wilson  
Michael Stevenson  
Olivia Saunders  
Chandra Sands  
Carla Brown Roker  
Michael Albury  
Brandace Duncanson

**Secretariat Staff**

Thelma Beneby, Secretary  
Darren Henfield, Assistant to Technical Co-ordinator  
Veronica Fraser, Office Manager  
Annie Lloyd, Personal Assistant III  
Antoinette Brown, Personal Assistant III  
Aretha Hinsey, Senior Executive Officer  
Sonobia Smith, Executive Secretary  
Rashad Flowers, Clerk  
William Morley, Head Messenger  
Pamela Woodside, Messenger

**Appendix IV: Dissenting Statement by Commissioner Mortimer: The Death Penalty**

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2nd July, 2013

**The Bahamas Constitutional Commission**  
Nassau, Bahamas

Dear Mr. Chairman and My Fellow Commissioners,

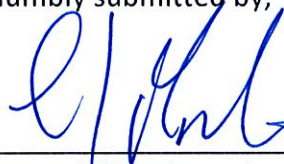
**Re: Report**

As you are aware I am one of those who do not believe that there is anything wrong with our Constitution. Where there are perceived deficiencies, I am of the view that they can be corrected by positive administrative action on the part of the various governmental agencies.

While I do not object to the proposal to put Bahamian women on an equal footing with Bahamian men as regards the right to pass on citizenship, I do object to those proposals that are non-justiciable and are merely aspirational and/or are declaratory. I object to the recommendation to put unnecessary verbiage in the Constitution, including the recommendation to have the national symbols schedule in the Constitution.

While I support the recommendation to reconstitute and expand the membership of the Judicial Commission, I object to the recommendation preventing practicing members of the Bahamas Bar from sitting on the Commission. I do believe that the practicing members of the Bar are likely to have more insight on a proposed nominee to the court having regard to their interaction in practice. I can recall several instances where the recommendations of the Bar were not accepted and there have been some regrets regarding some of those appointments.

Humbly submitted by,



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Lester J. Mortimer, Jr.  
Commissioner

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# LAW REPORTS OF THE COMMONWEALTH

## 1994

Volume 2

*General Editors*

**Professor James S Read, LLB**  
of Gray's Inn, Barrister

**Peter E Slinn, MA, PhD**  
Solicitor, England and Wales

*Cases Editor*

**James Neville, BCL**  
of King's Inns and of Lincoln's Inn, Barrister

London  
Butterworths



a be discussed under one rubric. This is because the right to dignity referred to in that provision is concerned with the preservation of dignity in the execution of a sentence. And it is my view that a person who has been subjected to a degrading treatment has also been deprived of his right to dignity.

I also wish to point out at the outset that a punishment may be either *inherently* cruel, inhuman and degrading or the *mode or manner of execution* of the punishment  
 b may be cruel, inhuman and degrading. That much was pointed out by the Court of Appeal of Botswana in *State v Petrus* [1985] LRC (Const) 699 and by the Supreme Court of Zimbabwe in *Ndhlovu v State* [1988] LRC (Const) 442. It is the case for the petitioners both that the death penalty is inherently a cruel, inhuman and degrading punishment and that its mode or manner of execution is also cruel, inhuman and degrading. And it is my finding that the term 'torture'  
 c used in our Constitution is the equivalent of the term 'cruel' that I will hereinafter use.

It will be important to remember that concepts such as 'cruel, inhuman, and degrading' are subject to evolving standards of decency. They are not immutable. That is what we learn from the US Supreme Court in *Trop v Dulles* 356 US 86 at 101 and *Estelle v Gamble* (1976) 429 US 97 at 102. Thus punishment or  
 d treatment incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the infliction of unnecessary suffering is repulsive. What might not have been regarded as inhuman decades ago may be revolting to the new sensitivities which emerge as civilisation advances.

The death penalty is *inherently* cruel, it was submitted on behalf of the two  
 e petitioners. It is said the process of execution by hanging is particularly gruesome. One leading doctor described the process as 'slow, dirty, horrible, brutal, uncivilised and unspeakably barbaric'. The prisoner is dropped through a trapdoor eight to eight and a half feet with a rope around his neck. The intention is to break his neck so that he dies quickly. The length of the drop is determined on the basis of such factors as body weight and muscularity or fatness of  
 f the prisoner's neck. If the hangman gets it wrong and the prisoner is dropped too far, the prisoner's head can be decapitated or his face can be torn away. If the drop is too short then the neck will not be broken but instead the prisoner will die of strangulation. There are many documented cases of botched hangings in various countries including Tanzania. There are a few cases in which hangings have been messed up and the prison guards have had to pull on the  
 g prisoners legs to speed up his death or use a hammer to hit his head. The shock to the system causes the prisoner to lose control over his bowels and he will soil himself.

In short the whole process is sordid and debasing. Not only is the process generally sordid and debasing, but also it is generally brutalising and thus defeats the very purpose it claims to be pursuing. The brutalising effect of executions has been amply documented: see Bowers and Pierce *Legal Homicide: Death as Punishment in America from 1864 to 1982* (2nd edn, 1984) pp 271–335 and 'The effect of Executions is Brutalisation, not Deterrence' by William J Bowers (1988).  
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It was argued for the petitioners that the state continues to perpetuate such cruelty under the protection of the law. This may legitimise the act in its legal  
 i sense, but certainly it does nothing to mitigate its barbarity. The act of killing



in itself is offensive: that it is done by the state does nothing to lessen its offensiveness. It is furthermore done in cold blood with utter cruelty. Now there are circumstances which lead up to the killing which are said to provoke it. But this is not provocation in the innate moral sense. When a private individual kills after having been provoked, this is regarded as mitigating because, at the time of the killing, the killer's blood is heated and human passions aroused. When the state kills, its blood is cold, its detachment inhuman. Legitimising state killings by law thus takes killing out of the arena of perverse human behaviour and elevates it into a principle. In other words rather than killing being deemed as heinous in itself – the result of perversity – it becomes something which is acceptable if done by the right people at the right time. The gates are then opened for people to determine whether they are the right people and whether the time is right. The heinous nature of murder becomes diluted in the public eye, the public becomes accustomed to brutality, brutality enters the prevailing moral ethos, becomes acceptable and regarded as an inevitable part of human society. A prominent American lawyer, Mr Clarence Darrow, in *Attorney for the Damned* (1957) states (at p 92):

‘We teach people to kill and the state is the one that teaches them. If the State wishes that its citizens respect human life, then the State should stop killing. The greater the sanctity that the State pays to life, the greater the feeling of sanctity the individual has for life.’

To dramatise it, consider its logical corollary. A woman is beaten and raped. The perpetrator is apprehended. A state rapist is then engaged to exact retribution on behalf of the society. He first beats the rapist in an identical manner to that in which the woman was beaten and then proceeds to rape the rapist in as identical a fashion as possible, once or however many counts are involved. The very analogy is distasteful. One may decide to create a raping machine operated by the state rapist to remove some of these distasteful aspects. It would none the less remain a punishment which should not be countenanced by society. The reason is clear. Rape in itself is brutal and abhorrent. It does not matter that it is done under the cloak of any law. To have an official state rapist is debasing and brutalising to society. It gives an official stamp of approval to degradation. Yet somehow, murder, which is worse, is carried out under the cloak of the law and is regarded as acceptable. Murder, like rape, is in itself brutal and must be condemned unequivocally for itself and not merely by reason of the fact that it was not done under the sanction of law. This is why state killing is debasing and brutalising. It seeks to legitimise brutality; which can never be anything other than brutality. That was part of the argument on behalf of the two petitioners.

Moreover, it was argued on behalf of the petitioners that the state by conduct admits that the death penalty is sordid and debasing. In the past hangings were done publicly. When capital punishment was a public spectacle it became linked in the minds of the public as part and parcel of the crime. It was as if the punishment was thought to equal, if not to exceed, in savagery the crime itself, to accustom the spectators to a ferocity from which one wished to divert them. At the end of the day the tortured criminal became an object of pity or admiration if not a hero by the spectators. The perception that the state was brutal had to be minimised. It was achieved by making the execution the most hidden part

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a of the penal process. The actual execution is carried out under a seal of secrecy and executions are bureaucratically concealed. The concealment minimises only and does not remove the debasement and brutalisation. The concealment, it was submitted, manifests *the state's guilty conscience*.

b It has also been argued that if the death penalty is to stay, then other better methods of killing than hanging have to be invoked or devised. There has been suggested the use of the electric chair or a lethal injection or gas chamber as used in the USA. Those methods are less cruel than hanging. The Supreme Court of Zimbabwe in *Chileya v State* (Criminal Appeal No 64/1990), unreported, was about to deliver a judgment to the effect that the death penalty by hanging was a cruel and debasing punishment, and so the state should devise a better method of killing. However, that court was pre-empted by the government which passed an amendment to the Constitution to the effect that 'hanging' was constitutional. But why use 'hanging' when there are other less cruel methods of killing?

c Then it is argued that the mode or manner of execution of the death penalty is objectionable on two grounds – firstly the long delay in carrying out the execution and secondly the horrible conditions under which the people on death row are kept.

d The first point is that the long delay in carrying out the execution, it is argued, causes untold mental anguish to the prisoners on death row. Capital punishment, it should be pointed out, is a euphemism for official killing by the state. However, unlike most murders, the process leading up to the killing is a long drawn out one. From the time the person is sentenced to death he is immediately installed on death row with a blue uniform. He is kept in virtual solitary confinement in an individual cell which is so small that he can touch both walls with his arms outstretched: see s 71 of the Prisons Act 1967 and also regs 21(2) and 33 of the Prisons (Prison Management) Regulations GN 19/1968. The only reading material allowed, if any, is the Bible or other religious tracts. Every night all his clothes are taken away and he is kept naked in his cell until the next morning. The light in his cell is never turned off and he is kept under surveillance from the guards. Some guards take delight in taunting the prisoners, constantly reminding them of their impending fate and telling them gruesome stories of executions which have gone wrong.

e From the time the High Court tells a murderer that he is to hang, in the Tanzanian context he will often wait in suspense for more than four years before he is finally taken to the gallows. I was referred to an article by Mr Robert Rweyemamu in the *Business Times* newspaper ('With a Legal Touch') of 2 April 1993 and Mr Rweyongeza said that it reveals aptly the long delays in carrying out executions in Tanzania. The long agonising wait before the final decision is taken and the shorter wait for the sentence to be carried out inevitably causes appreciable mental suffering. This pre-execution period has been referred to as a period in which the prisoner suffers *a living death* or *hell on earth*. He fearfully broods on his fate and suffers great anguish and uncertainty.

f This often leads to pronounced mental deterioration. Inordinate delay before execution thus constitutes a form of prolonged mental torture. For a detailed discussion of and reference to the literature on the mental effects upon prisoners on death row see the judgment of the Supreme Court of Zimbabwe in *Catholic Commission for Justice and Peace in Zimbabwe v A-G* [1993] 2 LRC 279 at 290–293, 1993 (4) SA 239 at 249–251.



Then there was the argument presented about the horrible conditions in the condemned sections of all prisons in Tanzania. I was, under ss 59 and 122 of the Evidence Act 1967, to take judicial notice of all the Prison Regulations GNs 13, 18 and 19/1968 and the reports of the Visiting Justices to prisons. For example, the amount of diet and the amount of exercise allotted to the prisoner on death row is at the discretion of the Principal Commissioner of Prisons and generally minimal: see reg 33 of GN 19/1968. It is common knowledge that the prisoners are kept in tiny cells without access to sunshine and open air and they cannot exercise effectively. Because of poor economic conditions the diet provided is extremely poor and the quantity small.

In short these prisoners on death row are treated as non-persons whose rights are subject to the whim of the supervising administration at the prison concerned. For similar conditions of prison in Zimbabwe, the Supreme Court there in *Conjwayo v Minister of Justice and Director of Prisons* 1991 (1) ZLR 105 held that these horrible conditions constituted cruel, inhuman and degrading punishment.

In concluding this part, it has been contended on behalf of the petitioners that the emerging consensus of values in the civilised international community, as evidenced by the UN human rights instruments, the decisions of other courts and the writings of leading academics, is that the death penalty is a cruel, inhuman and degrading punishment. It was pointed out that art 6(6) of the International Covenant on Civil and Political Rights (1966) (which Tanzania has ratified) states 'Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any state Party to the present Covenant', which indicates that the parties to the Covenant have agreed eventually to abolish the death penalty. And the UN Commission on Human Rights at its 1989 session in Geneva agreed by consensus that the death penalty was a cruel, inhuman and degrading punishment and agreed to forward to the UN General Assembly a draft Second Optional Protocol to the International Covenant on Civil and Political Rights aimed at abolishing the death penalty. Indeed the Second Optional Protocol to the International Covenant on Civil and Political Rights was passed by the UN General Assembly in 1989 and many member states have started ratifying it, and no doubt Tanzania, which has a great reputation of respecting human rights, will soon ratify it. Amnesty International, vide its Declaration of Stockholm (1977) by 200 delegates from Africa, Asia, Europe, the Middle East, North and South America and the Caribbean Region, declared that the death penalty was an inhuman, degrading and cruel punishment. The Nyalali Commission in its authoritative report (vol III, p 25), recognised that the death penalty is regarded as a barbaric form of punishment in democratic societies. Then we have the Council of Europe which in its Protocol 6 to the European Convention for the Protection of Human Rights and Freedoms (1950) abolished the death penalty in 1983 for all member countries of the Council of Europe because they had found it to be a cruel and inhuman punishment. And the European Court of Human Rights in *Soering* [1989] 11 EHR 439 held that the death penalty according to the evolving standards of Western Europe was a cruel and inhuman punishment. The following countries of the Commonwealth have abolished the death penalty: Namibia, The Gambia, Kiribati, New Zealand, Solomon Islands, Tuvalu and Vanuatu, Australia and South Africa (soon to become a Commonwealth member).

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## Methods of Execution

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### Hanging

Until the 1890s, hanging was the primary method of execution used in the United States. Hanging is still used in Delaware and Washington, although both have lethal injection as an alternative method of execution. The last hanging to take place was January 25, 1996 in Delaware.

For execution by this method, the inmate may be weighed the day before the execution, and a rehearsal is done using a sandbag of the same weight as the prisoner. This is to determine the length of 'drop' necessary to ensure a quick death. If the rope is too long, the inmate could be decapitated, and if it is too short, the strangulation could take as long as 45 minutes. The rope, which should be 3/4-inch to 1 1/4-inch in diameter, must be boiled and stretched to eliminate spring or coiling. The knot should be lubricated with wax or soap "to ensure a smooth sliding action," according to the 1969 U.S. Army manual. (The Corrections Professional, 1996 and Hillman, 1992)

Immediately before the execution, the prisoner's hands and legs are secured, he or she is blindfolded, and the noose is placed around the neck, with the knot behind the left ear. The execution takes place when a trap-door is opened and the prisoner falls through. The prisoner's weight should cause a rapid fracture-dislocation of the neck. However, instantaneous death rarely occurs. (Weisberg, 1991)

If the inmate has strong neck muscles, is very light, if the 'drop' is too short, or the noose has been wrongly positioned, the fracture-dislocation is not rapid and death results from slow asphyxiation. If this occurs the face becomes engorged, the tongue protrudes, the eyes pop, the body defecates, and violent movements of the limbs occur. (The Corrections Professional, 1996 and Weisberg, 1991)




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The rope should be  
3/4-inch to 1 1/4-inch  
in diameter

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### HANGING

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## Appendix V: Comment by Commissioner Stevenson: Article 28 *Locus Standi* & Principle of Equality

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### DISSENTING COMMENT BY COMMISSIONER STEVENSON REGARDING THE RECOMMENDATION BY COMMISSIONERS RELATING TO CONSTITUTIONAL STANDING

It is my opinion that the recommendations by my fellow Commissioners regarding *locus standi* under the Constitution do not go far enough. While I agree that there is a need to enable “citizens or a representative body to bring an action in the interests of their members or the public generally” in relation to infringed provisions outside of Chapter III of the Constitution, it is also pressing that the redress clause in Chapter III (A.28) be similarly liberalized in relation to the criteria of standing that it lays down. As my fellow commissioners note, the redress provision relating to the enforcement of fundamental rights is “very personalized in its approach to enforcement.”<sup>141</sup> What this means is that a person can only *stand* before the court and allege a contravention of a right if the allegation relates to the breach of a right of the person making the allegation. In other words, X will not have *standing* under A.28 to allege a breach of Y’s rights.

Those who argue in support of a more liberalized basis of standing to sue in matters relating to the enforcement of fundamental rights, claim that, in the interests of protecting the integrity of fundamental rights, constitutional courts need to be more concerned about the merits of an applicant’s argument than with the issue of the standing of the applicant. Thus, it is contended that associations (with the consent of its membership) should be allowed to sue on behalf their members in circumstances where it is unlikely that the members of such associations would be willing or able to personally bring a constitutional suit to vindicate their rights.<sup>142</sup> For example, why should not a responsible and dedicated association advocating on behalf of disabled persons be granted access to our constitutional courts to argue in support of the constitutional rights of disabled persons it felt were being infringed? Similarly, why should a citizen be barred from bringing a suit under the fundamental rights provisions of the Constitution in the interest of protecting a wider public interest?

The conventional rationale for the narrow approach to constitutional standing rests on the view that the narrow approach is necessary to ensure the proper economy of judicial resources; to filter out busybodies; and to safeguard that the court has before it a case crystallized into a legal controversy by an effective litigant. While each of these elements are worthy objectives, it may be helpful to consider that courts in jurisdictions that have adopted a more liberal view of standing take the view that judicial discretion with respect to each of these considerations can be exercised to determine whether citizen-standing or associational-standing should be granted in any particular case where the litigant has not been directly affected in some exclusive way by the breach of rights he or she may be alleging.

Accordingly, instead of excluding the associational- or public-interest litigant from the judicial review process, courts, adopting a more liberal approach to standing, have granted standing to such litigants if (1) the matter raised by such litigants can be considered of sufficient constitutional importance to warrant the use of judicial resources in attending to the matter; (2) the matter raised by such litigants is justiciable in terms of disclosing a legal controversy capable of judicial resolution; and (3) the litigants can be considered serious and effective litigants.<sup>143</sup>

Alas, my fellow Commissioners have not seen fit to recommend the liberalization of the *locus standi* requirements in relation to fundamental rights redress. In this regard, it should be noted that this unwillingness on the part of Commissioners is not in keeping with the Preliminary Report & Provisional Recommendations (2006) of the previous Bahamas Constitutional Review Commission, which provisionally recommended that “any person (whether aggrieved or not), with the leave of the Court may be given the right to challenge the validity of any law in the Court which may be *ultra vires* the Constitution and given such declaration and redress as may be appropriate”<sup>144</sup>. Furthermore, my fellow Commissioners’ thinking on this matter is not consistent with the trend in most progressive jurisdictions away from the narrow approach in relation to the enforcement of fundamental rights. Indeed, within our own jurisdiction, there has been a relaxation of the narrow approach to standing in relation to

judicial review based on administrative law.<sup>145</sup> And while progressive countries, like Canada, draw little distinction between ‘constitutional’ and ‘administrative’ standing, my fellow Commissioners persist in drawing such distinction.<sup>146</sup> Finally, I must object to my fellow Commissioners’ view that their recommendations regarding standing in relation to non-fundamental rights matters is consistent with the mandate given to the Commission to “strengthen the fundamental rights.” My fellow commissioners have explicitly stated that their recommendation regarding the enlargement of the constitutional enforcement provision, in order to allow for “universal review by the citizen,” does not extend to bill of rights matters.

#### COMMENT BY COMMISSIONER STEVENSON CONCERNING A GENERAL PRINCIPLE OF EQUALITY

It is in my opinion perplexing that in a country in which its entire history, arguably, can be summed up in terms of ongoing struggles over the meaning of equality in some way or the other, we shy away when it comes to acknowledging the value we place on equality and the struggles we have in the name of that value itself. I had hoped my fellow Commissioners, during this constitutional reform exercise, would have embraced the opportunity to recommend giving the principle of equality its deservedly proper place within our constitutional framework as a justiciable constitutional norm; thereby, allowing the courts of our country, through their development of our jurisprudence in matters calling for the courts’ interpretation of the meaning of equality, to fully engage in that struggle. Merely by making the recommendation, we would have suggested the dignity there is any attempt to advance the cause of equality. Alas, my fellow Commissioners have not embraced this opportunity for fear that, by embracing it, we would not have had a chance of securing the provisions we need in the Constitution to protect women against sexual discrimination and to remove the gender-bias that presently exists in our citizenship provisions.

My fellow Commissioners recommendations relating to equality, therefore, are a product of the struggle for equality, as are these lines that I jot down – a struggle we could have brought out of the shadows and raised up as an organizing principle of national development had we been bold enough to stand for a justiciable principle of equality. But there are different ways of struggling. Some take the pragmatic route, as I believe my fellow Commissioners have in this instance, of securing the little victories that can be secured today and progressing gradually.

**Appendix VI: List of Presentations to the Commission**

**LIST OF PRESENTERS – CONSTITUTIONAL COMMISSION**

<b>DATE</b>	<b>PRESENTERS</b>
<b>AUGUST 2012</b>	
4 <sup>th</sup>	Sir Michael Barnett Chief Justice
19 <sup>th</sup>	Mr. Branville McCartney Leader, DNA
<b>NOVEMBER 2012</b>	
23 <sup>rd</sup>	Dr. Hon. Hubert Minnis Leader, FNM
<b>JANUARY 2013</b>	
11 <sup>th</sup>	Sir Burton Hall Retired Chief Justice
	Umbrella Trade Unions
17 <sup>th</sup>	Dr. Myles Munroe Sr. Pastor, BFM
	Rev. Dr. Simeon Hall, President Emeritus New Covenant Baptist Church
	Pastor Rex Major Grace Community Church
18 <sup>th</sup>	Mr. Ernesto Williams President, COBUS
	Mr. Errol Bethel Retired Parliamentary Commissioner
<b>FEBRUARY 2013</b>	
1 <sup>st</sup>	Rt. Rev. Laish Boyd Archbishop of the Anglican Diocese
	Bishop Ros L. Davis, DD, MBA, OBE, JP New Apostolic Churches
	Elder Francis Carey, JP Bretheren Churches
	Pastor Sam Boodle Lutheran Church of Nassau
	Pastor Paul A. Scavella Bahamas Conference of Seventh Day



	Rev. Dr. Anthony Carroll Bahamas National Baptist Missionary & Educational Convention
	The Most Rev. Patrick Pinder, STD, CMG Archbishop of the Catholic Diocese

DATE	PRESENTERS
<b>FEBRUARY 2013</b>	
1 <sup>st</sup>	Bishop John N. Humes, National Overseer Church of God Bahamas, Turks & Caicos
	Rev. Dr. Emmet Weir, President Emeritus The Methodist Church in the Caribbean & the Americas (MCCA)
4 <sup>th</sup>	Mr. Vincent Cochetel UNHCR Representative
7 <sup>th</sup>	Hon. Anita Allen President, Court of Appeal
8 <sup>th</sup>	Mr. Maurice Ginton Attorney
	Mr. Harvey Tynes, QC Attorney
17 <sup>th</sup>	Mrs. Ruth Bowe-Darville President, Bar Council
	Mr. Maurice Tynes Clerk, House of Assembly
27 <sup>th</sup>	Mrs. Sheila Culmer President, Bahamas National Council for Disability
	Miss Erin Greene Human Rights Activist
<b>MARCH 2013</b>	
15 <sup>th</sup>	Mr. Lovy Jean Founder, UniVision
	Pastor Leonard Johnson President Caribbean Associations of Seventh Day Adventists
21 <sup>st</sup>	We the People Mr. Ed Fields & Mr. Philip Simon

	Civil Society
22 <sup>nd</sup>	Bishop Franklin M. Ferguson Pastor, Church of God of Prophecy
	Rev. Dr. Patrick Paul General Superintendent, Assemblies of God
	Rev. Antoine St. Louis Haitian Activist

DATE	PRESENTERS
<b>MAY 2013</b>	
3 <sup>rd</sup>	Priest Phillip Blyden Rastafarian Movement
	Mr. Godfrey V. Perpall President, Eugene Dupuch Students' Association
15 <sup>th</sup>	Dr. Myles Munroe (Closed Session) Senior Pastor, Bahamas Faith Ministries
29 <sup>th</sup>	Hon. Arthur D. Hanna Former Governor General & Original Framers of the Constitution
	Hon. George A. Smith Former Cabinet Minister & Original Framers of the Constitution
<b>JUNE 2013</b>	
4 <sup>TH</sup>	Mr. Barry Griffin Law Student
	Mr. Marvin Coleby Law Student
	The Environmentalists' Group
10 <sup>th</sup>	Sen. Hon. Allyson Maynard-Gibson Attorney General
17 <sup>th</sup>	His Excellency Sir Arthur A. Foulkes Governor General

**Appendix VII: List of Town Meetings in New Providence and Family Islands****LIST OF TOWN MEETINGS IN THE FAMILY ISLANDS - RESIDENTS' CONTRIBUTIONS**

DATE	ISLAND	VENUE	ATTENDANCE	NO. OF RESIDENTS WHO CONTRIBUTED
8 <sup>th</sup> February, 2013	GRAND BAHAMA			
	Freeport	Foster D. Pestaina Centre	155	14
	Eight Mile Rock	Eight Mile Rock High School	23	Did not mention names
	West End	St. Mary Magdalene Parish Hall	50	9
	High Rock	East End Primary	50	11
7 <sup>th</sup> March, 2013	ELEUTHERA			
	Rock Sound	Preston H. Albury School	100	12
	Governor's Harbour	St. Patrick's Anglican Church Parish Hall	50	12
	Harbour Island	St. John's Anglican Church Parish Hall	50	8
14 <sup>th</sup> & 15 <sup>th</sup> March, 2013	LONG ISLAND			
	North Long Island	Simms Primary School	55	7
	South Long Island	Community Centre Clarence Town	55	7
3 <sup>rd</sup> April, 2013	SPANISH WELLS			
	Spanish Wells	Spanish Wells Methodist Church Youth Hall	50	12
11 <sup>th</sup> April, 2013	CAT ISLAND			
	New Bight	New Bight Primary School	50	9
11 <sup>th</sup> April, 2013	BIMINI			
	Alice Town	Louise McDonald High School	40	10
25 <sup>th</sup> April, 2013	ABACO			
	Marsh Harbour	St. John The Baptist Parish Hall	60	*15 + (7 Pastors at pre-meeting)
	Cooper's Town	Faith Walk Church of God	40	6
	Moore's Island	Moore's Island All Age School	35	5
<b>Total</b>			<b>863</b>	<b>144</b>

## LIST OF TOWN MEETINGS IN THE FAMILY ISLANDS - RESIDENTS' CONTRIBUTIONS

DATE	ISLAND	VENUE	ATTENDANCE	NO. OF RESIDENTS WHO CONTRIBUTED
9 <sup>th</sup> May, 2013	ANDROS			
	North	North Andros High School	60	10
10 <sup>th</sup> May, 2013	Central	The Town Hall	54	15
	South	Marion Forbes' Community Centre	50	12
	Mangrove Cay	The Administrator' Complex	40	7
16 <sup>th</sup> May, 2013	SAN SALVADOR			
	Cockburn	Riding Rock Photo Lab	75	11
16 <sup>th</sup> May, 2013	EXUMA			
	George Town	The Resource Centre	60	10
	Black Point	Black Point All Age School	40	9
22 <sup>nd</sup> May, 2013	ACKLINS			
	Snug Corner	Snug Corner Primary School	75	8
22 <sup>nd</sup> May, 2013	CROOKED ISLAND			
	Cabbage Hill	Ezekiel Thompson Memorial Centre	45	8
22 <sup>nd</sup> May, 2013	INAGUA			
	Matthew Town	Inagua All Age School	50	8
4 <sup>th</sup> June, 2013	MAYAGUANA			
	Abraham's Bay	IDB Building	20	7
4 <sup>th</sup> June, 2013	RAGGED ISLAND			
	Duncan Town	Administrator's Office	50	5
14 <sup>th</sup> June, 2013	GRAND BAHAMA			
	Freeport Proper		70	*70 + (4) Local Gov't Reps
Total			739	184
Grand Total		27	1,563	328

**LIST OF TOWN MEETINGS IN NEW PROVIDENCE - RESIDENTS' CONTRIBUTIONS**

<b>DATE</b>	<b>ISLAND</b>	<b>VENUE</b>	<b>ATTENDANCE</b>	<b>NO. OF RESIDENTS WHO CONTRIBUTED</b>
2 <sup>nd</sup> April	NEW PROVIDENCE	The Diplomat Centre Bahamas Faith Ministries Carmichael Road	300	23
14 <sup>th</sup> May 2013		The Performing Arts Centre The College of The Bahamas Oakes Field	170	20
3 <sup>rd</sup> June 2013		Children's Chapel Church of God of Prophecy East Street Tabernacle	150	17
<b>TOTALS</b>		3	620	60

**Appendix VIII: List of Town Meetings conducted by Adderley-Tynes Commission**

DATE	VENUE	ATTENDANCE
<b>New Providence</b>		
21.11.03	B.C.P.O.U. (Farrington Road)	50 pp.
15.03.04	Diplomatic Centre (Bahamas Faith Ministries, Carmichael Road)	300 pp.
15.04.04	Abundant Life Church Hall (Abundant Life Road)	90 pp.
13.05.04	Queen's College (Village Road)	16 pp.
13.05.04	Sadie Curtis Primary School (C.W. Saunders Highway)	10 pp.
10.06.04	Garvin Tynes Primary School (Alexander Drive/Carmichael Road)	1 p.
10.06.04	E.P. Roberts Primary School (Lincoln Boulevard)	50 pp
28.06.04	New Testament Baptist Church (Dolphin Drive)	191 pp.
29.06.04	Epiphany Anglican Church Hall (Prince Charles Drive)	20 pp.
14.10.04	Grace Gospel Chapel Hall (Palmetto Village)	25 pp.
29.11.04	Choices Dining Hall (College of The Bahamas)	75 pp.
24.02.05	Sandilands Primary School (Fox Hill)	12 pp.
<b>Grand Bahama</b>		
26.11.03	Christ the King Church Hall (Freeport)	50 pp.
26.02.04	St. Stephen's Anglican Church Hall (Eight Mile Rock)	17 pp.
27.02.04	St. Mary's Anglican Church Hall (West End)	21 pp.

16.07.04	Sweeting's Cay School (Sweeting's Cay)	15 pp.
17.07.04	High Rock All Age School (High Rock)	18 pp.
<b>Bimini</b>		
31.03.04	Mount Zion School Hall (Bailey Town)	60 pp.
<b>Exuma</b>		
18.05.04	St. Andrew's Community Centre (George Town)	70 pp.
<b>Abaco</b>		
10.02.04	St. John the Baptist Anglican Hall (Marsh Harbour)	100 pp.
10.02.04	S.C. Boodle Secondary School (Coopers Town)	20 pp.
12.02.05	Moore's Island All Age School (Moore's Island)	30 pp.
09.04.05	Anglican Church Hall (Green Turtle Cay)	25 pp.
09.04.05	The Methodist Church (Hope Town)	8 pp.
09.04.05	The School House (Man-O-War Cay)	15 pp.
<b>Eleuthera</b>		
02.03.04	Rock Sound Primary School (Rock Sound)	102 pp.
02.03.04	Worker's House (Governor's Harbour)	100 pp.
22.4.04	Spanish Wells All Age School (Eleuthera)	10 pp.
22.04.04	Harbour Island All Age School (Harbour Island)	30 pp.
22.04.04	North Eleuthera High School (North Eleuthera)	33 pp.
<b>Cat Island</b>		

01.07.04	The Media Center (Knowles', Cat Island)	50 pp.
<b>Rum Cay &amp; San Salvador</b>		
23.07.04	Riding Rock Inn (Cockburn Town, San Salvador)	30 pp.
17.06.05	Rum Cay All Age School (Port Nelson)	40 pp.
<b>Andros</b>		
04.11.04	North Andros High School (North Andros)	40 pp.
11.11.04	Clarence A. Bain Town Hall (Fresh Creek)	51 pp.
18.11.04	South Andros Senior High School (Kemp's Bay)	40 pp.
19.11.04	Magistrate's Court (Mangrove Cay)	50 pp.
<b>Long Island</b>		
04.02.04	Simms Primary School (North Long Island)	40 pp.
04.02.04	Community Centre (Clarence Town)	31 pp.
<b>Mayaguana</b>		
04.03.05.	Abraham's Bay High School (Mayaguana)	20 pp.
<b>Inagua</b>		
05.03.05.	St. Philip's Parish Hall (Inagua)	30 pp.
<b>Acklins</b>		
25.06.05	The High School (Pompey Bay, Acklins)	
<b>Crooked Island</b>		
25.06.05	The High School (Colonel Hill, Crooked Island)	32 pp.
	<b>TOTALS</b>	<b>2,032 pp.</b>



## **Appendix IX: Political Recommendations for Constitutional Reform**

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### ***FMN Proposals for Constitutional Reform***

Among the matters the FNM proposed for consideration were the following:

- Changes in the composition, structure and appointment of the Senate.
- Limitation, with sanctions, on lengthy absences from Parliament by Members.
- The establishment of an Independent Constituencies Commission.
- A limit on the authority of Parliament to increase the number of seats in Parliament, except in accordance with clearly established criteria.
- The creation of an Independent Electoral Commission with responsibility for the registration of voters, the selection of returning and presiding officers and the conduct of all elections.
- The tenure of a Prime Minister.
- The entrenched bias of the Constitution against Bahamian women, which denies Bahamian women privileges and entitlements granted to Bahamian men with regard to the award of citizenship to children and foreign spouses.
- The establishment of the post of Public Defender, to ensure balance is maintained in the judicial process.
- The removal of responsibility for prosecutions in the Magistrates Courts from the Police, the requirements that all prosecutions by the State be conducted by trained lawyers.
- The removal from the Attorney General of responsibility for criminal prosecutions and the transfer of such authority to a Director of Public Prosecutions.
- The creation of the Posts of Chief Parliamentary Counsel and Director of Legal Affairs.

- The making of provisions for a Teachers Service Commission.
- The establishment of the office of Ombudsmen.
- A review of the age of retirement of Judges of the Supreme Court and the Court of Appeal.
- The appointment of the Chief Justice to head the Supreme Court and the Court of Appeal.

***PLP Proposals for Reform***

“1. Creation of a truly Independent Boundaries Commission with responsibility for ensuring the complete integrity of the electoral process—removing from the Prime Minister, control over the process.

2. The Constitution ought to provide that Parliament may prescribe by law for open and fairness in procedure for the funding of Parties at Elections both local and national. There ought to be prescribed national limits on Party political expenditure with approved penalties.

3. The Constitution ought to provide that General Elections are held on a fixed date at Five (5) year intervals but provisions ought also be made for accelerated General Elections in certain prescribed circumstances, including where the Prime Minister loses a Vote of No Confidence and does not resign his office within Three (3) days. Provision ought also to be made that no changes to constituency boundaries are to be entertained within the Six (6) month period preceding the constitutionally-fixed date for General Elections.

4. In order to ensure as far as possible an incorruptible, fully accountable system, replace the Public Disclosure Act by a constitutional provision to require members of the House of Assembly and Senate to disclose all business investments and shares in Companies held by them in which they have any beneficial interest.

5. In order to perpetuate democracy in a society dedicated to protecting human rights and the rule of law, not the rule of persons, there ought to be a constitutional amendment limiting the term of office of the Prime Minister to two terms.

6. In making our Government more responsive and more efficient to bring about more public debate and open Government the people ought to be given a legal “right to know” subject to security and personal privacy. There ought to be constitutional amendment providing for Parliament to prescribe a

Freedom of Information Act to break the culture of secrecy in Government decisions which leads to arrogance in governance and a loss of public confidence in Government.

7. Accountability in Government is absolutely necessary to preserve democracy and people expect and are entitled to greater access to information in which will give them protection from the all powerful State; to this end there ought to be established under the Constitution the office of Ombudsman to whom the people can for remedies, relief and protection from mistakes or deliberate acts on behalf of any public authority or person.

8. Any change in the existing powers of the Senate ought not to be considered; rate though the occasions are, the Senate ought to remain a body which can correct any mistakes made by the House. However, its composition ought to include representatives from the Church, Trade Unions, the Bar and any other non-political bodies to broaden the avenues for expression of national views beyond the purely political. Appointment of eight additional senators ought to be made by the Governor General after consultation with the Prime Minister and Leader of the Opposition.

9. Members of Parliament have the Parliamentary privilege of freedom of speech which can include any defamatory, abusive or inaccurate statements about a member of the public. Members sometimes abuse this privilege by making personal attacks on their political enemies who deserve the right to replay. The Human Rights provisions ought to be amended to allow the constitutional right of reply by providing that Responses in writing from such persons shall be published in *Hansard* which could include counter allegations and criticisms of their accusers.

10. The Human Rights provisions ought to be amended to incorporate as a protected right the right to vote and participate in free and fair elections coupled with the concept of Freedom of the Press which will enshrine the principles that the media shall be free from arbitrary intervention by the State and that equal access to television and radio be guaranteed during national elections.

11. Elimination of "extension of judicial service" provisions which presently obtain at both the Supreme Court and Court of Appeal level.

12. Creation of a new style of House of Assembly Committees which will hold public sessions before major pieces of legislation receive final passage."

## **Other Political Parties**

### *Coalition + Labour*

- Remove any provision which discriminates against either sex
- Make the Senate an elected body through a system of proportional representation
- Grant Bahamian citizenship to all persons born in The Bahamas who meet predetermined criteria
- Institutionalize the Office of the Auditor General within the Parliamentary Service and require the Auditor General to report directly to Parliament.
- Enshrine definitively in the fundamental rights of the Constitution the right to vote
- Express clearly the principle of freedom of the press.
- Recognize the realities of multiple parties in the House of Assembly
- Limit the powers of the Prime Minister e.g. to set the date of elections and to alter the Report of the Electoral and Boundaries Commission.

### ***Bahamian Democratic Movement (BDM)***

The BDM's suggestions for parliamentary and constitutional reform are as follows:

- Introduce a bi-monthly period of dialogue where the executive branch of government will answer questions posed by the media and the public.
- Introduce into the parliamentary system an established debriefing period affording members, especially from the opposition, the opportunity to present the concerns of their respective communities.

- Enact legislation that will empower the Speaker of the House to cut members' salaries for continued absences from the House and committee meetings without an acceptable or valid reason.
- Enact legislation to remove parliamentary staff from under the authority of the Public Service Commission placing them under the authority of a joint committee of the Senate and the House of Assembly.
- Introduce a system of full-time Members of Parliament, in order to better represent and articulate the views and concerns of their constituents.
- The rooting out of corruption and leading toward transparency and accountability, by enacting tough anti-corruption laws so that any politician involved in corruption will be subject to prosecution by an independent Prosecutor General.
- Remove all remaining constitutional and statutory forms of discrimination against women.
- Make fundamental change to the Constitution to implement a new constitutional order in The Bahamas by revising and reforming the existing one.

## **Appendix X: Acknowledgements**

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Many persons have contributed to the work of the Commission, and it is impossible to give recognition to them all. That said, it would be remiss of the Commission if it did not at least attempt to single out those individuals and bodies whose efforts have brought us to this point. The Commission also thanks the various Family Island Administrators and local government officials for their assistance with the logistical arrangements for those meetings.

Additionally, the Commission warmly thanks Mrs. Thelma Beneby, the Secretary to the Commission, and her staff, for the administrative and technical support rendered this Commission. The Commission also sincerely notes the support of the Cabinet Office, the Ministry of Finance, the Ministry of Grand Bahama, the Royal Bahamas Defence Force, the Royal Bahamas Police Force, Department of Information and Technology, the Broadcasting Corporation of The Bahamas, Cable Bahamas, Jones Communications Network, the Nassau Guardian Ltd., the Tribune and The Bahamas Information Services (BIS). Particular gratitude is extended to Mr. Fayne Thompson, Mr. Wendell Jones and Mr. Jeffery Lloyd for moderating live on-air broadcasts of the town meetings held in New Providence, and Mr. Elcott Coleby, for coordinating the services of BIS.

The Commission is thankful to Bahamas Faith Ministries, the Church of God of Prophecy, the Anglican Diocese of The Bahamas and the College of The Bahamas for providing venues to hold town meetings.

Finally, and most importantly, the Commission wishes to thank all Bahamians who participated in this review, through their attendance of the meetings, their written submissions or simply by reading the material posted on the Commission's website. This entire process was about you and your views, the Commission merely provided the setting for your participation.

## Appendix XI: Select Bibliography

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  - b. The Bahamas (S.I. No. 1080 of 1973), The Bahamas Independence Order 1973.
  - c. Belize, Belize Constitution Act (21<sup>st</sup> September 1981)
  - d. Federation of St. Kitts & Nevis (S.I. No. 881 of 1983), The St. Christopher and Nevis Constitution Order 1983.
  - e. Haiti, 1987 Constitution of Haiti
  - f. Jamaica
  - g. South Africa

- h. St. Vincent and the Grenadines (S.I. No. 916 of 1979), The Saint Vincent Constitution Order 1979
- i. St. Lucia (No. 1901 of 1978), The St. Lucia Constitution Order 1978.
- j. Trinidad & Tobago



## Appendix XII: Endnotes

<sup>1</sup>The Commission notes that in other countries similar Commissions have been appointed by Statutory Instruments pursuant to statutes such as the Commissions of Inquiry or Law Reform Acts, or special Constitutional provisions. For example, in Guyana, a Constitution Commission was established by a *Constitution Reform Act* (Act. No. 1 of 1999).

<sup>2</sup> For example, the “Wooding Commission” (one of the first review commissions in the Commonwealth Caribbean) was appointed in June 1971 and reported in January 1974; the recent Commission in Barbados (Sir Henry Forde) was appointed in 1996 and reported in 1998 (there was an earlier “Cox” Commission in 1979). Note, also, the timeline of some of the more recent constitutional review commissions within the Commonwealth: Antigua and Barbuda (1999-2002); Ghana (2010-2012), Kenya Review Commission (2000-2002); Zambia Constitutional Review Commission (2003-2005); St. Vincent and the Grenadines (2002-2005); Grenada (2003-2006); St. Lucia (2005-2013).

<sup>3</sup> This does not purport to be a complete list of constitutional review and reform initiatives undertaken within the Caribbean.

<sup>4</sup> These suggestions, as well as those from the other political parties, are presented as they appear in the source documents, with minor editing for grammatical and technical accuracy.

<sup>5</sup> See for example: *House of Assembly Revision of Boundaries and Re-distribution of Seats Order*, 2007 (S.I. 21/2007).

<sup>6</sup> Acts No. 8 (*Parliamentary Commissioner*) and 9 (*Teaching Service Commission*) of 2002, which appeared respectively as Articles 70A-C and Articles 121A to 121B. Technically, these two Acts did not require a referendum, but the Acts to entrench the amendments failed at referendum. Acts 12 and 13, which revised and re-enacted Article 78 (not entrenched) and which dealt with the position of the DPP also did not require a referendum, but no day was appointed for these acts to come into operation. They had appeared as Article 78 (amended) and Article 92A to 92C.

<sup>7</sup> See, for example, the note in the Corrigenda to the 31<sup>st</sup> December 2004, Updates to the Statute Laws of the Bahamas (Revised Edition of 2000).

<sup>8</sup> Professor Simeon McIntosh, in his book *Caribbean Constitutional Reform*, The Caribbean Law Publishing Co. Ltd., Kingston (2002), makes the case for patriation; cf. Dr. Oswald G. Harding, Q.C., “The Myth of Patriation” in the *West Indian Law Journal*, Vol. 28(1) pg. 37.

<sup>9</sup> A comprehensive account of the Canadian constitutional evolution is provided in Peter Hogg’s “Constitutional Law of Canada” (Thompson & Carswell), 2 Volumes.

<sup>10</sup> Sir Fred Philips, *Commonwealth Caribbean Constitutional Law* (Cavendish Publishing Co., 2002), p. 261.

<sup>11</sup> Sir William Dale, *The Modern Commonwealth*, London, Butterworths, 1983.

<sup>12</sup> Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London, Stevens & Sons, 1966).

<sup>13</sup> A classic example of a revolutionary constitution is that of the United States, where the people through revolutionary means threw off British rule and drafted a Constitution for themselves as a body politic. The preamble of that Constitution begins: “We the People of the United States...do ordain and establish this Constitution for the United States of America.” Several Commonwealth countries (India, for example), followed the “We the People” formula at independence to give a measure of autochthony to their Constitutions.

<sup>14</sup> See, *Buck v A-G* [1965] 1 All ER 882 (Sierra Leone), *British Coal Corporation v R.* [1935] AC 520, *Blackburn v Attorney General* [1971] 2 All ER 1380; note *Madzimbumoto v Lardner-Burke* [1969] 1 A.C. 645 with respect to those territories where only partial independence had been granted.

<sup>15</sup> Section 2 of the *Canada Act* 1982 provided as follows: “No Act of Parliament of the United Kingdom passed after the Constitution Act of 1982 comes into force shall extend to Canada as part of its Law.”

<sup>16</sup> Dr. Oswald Harding, *The Myth of Patriation*, *op. cit.*

<sup>17</sup> This recommendation is dealt with fully in the chapter dealing with fundamental rights.

<sup>18</sup> Professor R.W. James, “The Judiciary and the Emerging Principles of “interest and spirit” of the Constitution”, 2003 *Melanesian Law Journal* 1.

<sup>19</sup> See Article 54, (4)(b).

<sup>20</sup>The provisions could be changed by either a two-thirds majority of both Houses (38(2)), or three-fourths in the House of Representatives and two-thirds in the Senate (s. 38(3)).

<sup>21</sup>Section 73.

<sup>22</sup>See section on Death Penalty and the Privy Council.

<sup>23</sup>*Cal, Teul and Others v AG* (2007) WIR 110 (S.C., Belize), “Mayan Land case”.

<sup>24</sup>This Covenant, as well as the IESCR (dealt with below) entered into force for The Bahamas on 23 March 2009.

<sup>25</sup>See, for example, *Roberts & Ors. v. Minister of Foreign Affairs & Ors.* (The Bahamas) [2007] UKPC 56 (15 October 2007).

<sup>26</sup>See *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] Q.B. 529, per Lord Denning, MR.

<sup>27</sup>See *Higgs v Minister of National Security* [2000] 2 W.L.R 1368, PC.

<sup>28</sup>*The Ratification of Treaties Act 1989* (Ch. 364), Antigua and Barbuda.

<sup>29</sup>All of the provisions of the Independence Act are specially entrenched (A. 54 (3)(d); while several of the provisions of the Order are either entrenched or specially entrenched (para. 17 of The Independence Order).

<sup>30</sup>See, Francis Alexis, “*Changing Caribbean Constitutions*”, Carib. Research and Publications Inc., Bridgetown, Barbados, pg. 48.

<sup>31</sup>Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London, Stevens & Sons, 1966).

<sup>32</sup>*Jamaica Observer*, Wednesday, June 12, 2013 (Professor Rosemary Antoine).

<sup>33</sup>See s. 69 of the Constitution of Belize.

<sup>34</sup>See *Colleymore v A.G.* [1967] 12 WIR 5, in the context of the 1962 Constitution of Trinidad and Tobago, which did not contain a supremacy clause, and generally *Marbury v. Madison* (1803), which settled this point in US constitutional jurisprudence.

<sup>35</sup>See *Whitfield v. Attorney General* (1989) 44 WIR 1, *Gordon v. Minister of Finance* (1989) 12 W.I.R. 416, and *Re Alva Bain*, Suit No. 3260 of 1987 (H. Ct., T & T, unreported). On the other hand, in *Save Guana Cay Reef Association Ltd v The Queen & Ors. (Bahamas)* [2009] UKPC 44 (17 November 2009) and *R (on the application of Responsible Development for Abaco Ltd. and Matthew McCoy v. Rt. Hon. Hubert A. Ingraham and six Ors.* (SCCivApp No. 139 of 2010), the Bahamian Courts adopted a more liberal view of standing in judicial review applications.

<sup>37</sup>An ability to review legislation for constitutional conformity exists under the Canadian Charter, and under the 1996 South African Constitution the President may refer bills to a constitutional court whenever their constitutionality is in issue.

<sup>38</sup>This is the position that obtains under the ‘newer’ Caribbean Constitutions, such as those of the Associated States of St. Kitts/Nevis (A.96 (1)), St. Vincent and the Grenadines (A. 96(1)), Antigua and Barbuda (A.119 (1)), and St. Lucia (A. 105). Note, also, the inroads made by the Barbados *Administration of Justice Act*, c. 63, which gives a right of judicial review where “a person’s application is justifiable to the public interest in the circumstances of the case.”

<sup>39</sup>See, for example, A.1 (2) of the Belize Constitution; and A. 1(2) St. Kitts and Nevis.

<sup>40</sup>The territorial description in the *Independence Act* may have unwittingly created a difficulty in extending the territory of the Bahamas. The *Independence Act 1973* is entrenched at the highest level (specially entrenched) in the Constitution, requiring the  $\frac{3}{4}$  majority and referendum vote. Yet, the territorial boundaries of The Bahamas have been expanded post-independence by the *Archipelagic Waters and Maritime Jurisdiction (Maritime Boundaries) Order*, 2012, which gives legislative effect to the delimiting line established with the Republic of Cuba, made under the *Archipelagic Waters and Maritime Jurisdiction Act 1993*, Ch. 282. , w.e.f. 4 Jan. 1996). The provisions of this Act were partly to give effect to the increased maritime territorial limits that only became possible after the 1982 United Nations Law of the Sea Convention.

<sup>41</sup>*Archipelagic Waters and Maritime Jurisdiction (Archipelagic Baselines) Order*, 2008, which took effect on 8 December 2008, and was deposited with the UN Secretary General on 11 December 2008.

<sup>42</sup>Commissioner Mortimer disagrees with this recommendation.

<sup>43</sup>See the reference to this category of persons in *Godfrey and Jermaine Seymour v The Attorney-General and others* (Common Law Side No. 1330 of 1986 (June 25, 1987), Supreme Court, unreported.)

<sup>44</sup>As far as the Commission is aware, there has never been a case of revocation of Bahamian citizenship in the 40 years since Independence.

<sup>45</sup> See, *K (By her Next Friend, H, her father) and The Minister of Foreign Affairs et.al.* (2005/PUB/jrv/00005); and *Deveaux v. Attorney-General* (1998/LCE/gen/FP/112 (14 March 2006), Supreme Court, unreported). In this context, it is suggested that the word “parent” can only mean the biological parent of the child, not any legal construct used to denote the marital status of the parent. This view is supported by the use of the word *parent* in A.6, as distinct from *father* or *mother* used in other articles (and see *Minister of Home Affairs v. Fisher* [1980], where the Privy Council held that the word ‘child’ in the context of the Bermuda constitution had to be construed liberally to mean biological child). The underlying difficulties with the interpretation of this provision is the common law doctrine of *filius nullius*, and the definition of ‘father’ in the *Nationality Act* to exclude putative father. Although the *Status of Children’s Act* purports to grant equal status to children in respect to their father and mother irrespective of marital status, that provisions is specifically stated not to apply to citizenship (s. 3(3)).

<sup>46</sup> For example, such persons are Haitian citizens and are classified as such, which means that their legal status in The Bahamas is that of an alien. They are provided with travel documents (i.e. Certificate of Identity), but not all countries accept such identification as valid.

<sup>47</sup> *Unity Dow v. Attorney-General of Botswana* [1992] LRC (Const.) 623.

<sup>48</sup> The Bahamas is a party to this Convention, and has transformed many of its provisions into domestic legislation (i.e., the Child Protection Act.). However, the Bahamas made the following reservation upon signature and confirmed it on ratification: “The Government of the Bahamas upon signing the Convention reserves the right not to apply the provisions of article 2 of the said Convention insofar as those provisions relate to the conferment of citizenship upon a child having regard to the Provisions of the Constitution of the Commonwealth of The Bahamas.” Section 4 of the Child Protection, references this reservation thus: “A child shall have the right — (c) to exercise, in addition to all the rights stated in this Act, all the rights set out in the United Nations Convention on the Rights of the Child(the Convention) subject to any reservations that apply to The Bahamas and with appropriate modifications to suit the circumstances that exist in The Bahamas with due regard to its laws.”

<sup>49</sup> The vast majority of persons affected by this provision are persons born in the Bahamas to Haitian parents. The Haitian Constitution provides for persons to acquire nationality through descent, but only if either of their parents is native-born, and have never renounced their citizenship (A. 11, 1987 Constitution of Haiti). Thus, those persons born in The Bahamas to a native-born Haitian parent who has not renounced Haitian citizenship would be Haitian nationals during this period, but if their parents are not native-born or have renounced, they would effectively be stateless. Even where they are entitled to Haitian citizenship, most choose not to acquire Haitian passports, as in any event they would be required to renounce that citizenship at 18 to acquire Bahamian citizenship. The Haitian Constitution also forbids dual Haitian and foreign nationality (A. 15).

<sup>51</sup> Dr. Dawn Marshall, “*The Haitian Problem: Illegal Migration to the Bahamas*,” Institute of Social and Economic Research, University of the West Indies, Mona, Kingston, 1979.

<sup>52</sup> Section 13, *Immigration Act*.

<sup>53</sup> White Paper on “Independence for the Commonwealth of the Bahamas”, presented to Parliament by the Prime Minister on 18<sup>th</sup> October 1972.

<sup>54</sup> For example, the US system is almost entirely a judicial process, where the Immigration and Nationality Service investigates an application and makes recommendations and a federal judge in the District Court hears all sides and makes his decisions. The judge determines matters of citizenship entitlement, such as good moral character or attachment to the principles of the US Constitution. In Canada, a “citizenship judge” determines if the requirements are fulfilled, and the Minister or the applicant may appeal. A refusal on the grounds of security or public policy can only be made by the Governor in Council.

<sup>55</sup> In St. Kitts and Nevis, a person entitled to be registered as a citizen cannot be refused registration simply because he holds another citizenship nor can he be forced to renounce that other citizenship as a condition for being registered (A. 93(1)).

<sup>56</sup> See, for example, the Convention on Reduction of Cases of Multiple Nationality and Military Obligations.

<sup>57</sup> See, for example, the UK Nationality Act, 1981.

<sup>58</sup> These rights are as follows: the right to life (A.17); protection from slavery and forced labour (A.18); protection from arbitrary arrest and detention (A.19); protection of the law (A. 20); privacy of home and other property (A. 21); freedom of conscience (A. 22); freedom of expression (A. 23); freedom of assembly and association (A. 24); freedom of movement (A. 25); protection from discrimination (A. 26); protection from deprivation of property (A. 27).

<sup>59</sup> The Constitution of Bermuda (1968) seems to be the only other Commonwealth Caribbean Constitution that guarantees a right to trial by jury when charged on information or indictment in the Supreme Court (section 6(2)(g)).

<sup>60</sup> One citizen has made it a personal campaign, which has been litigated before the Supreme Court and Court of Appeal, for a fairer voting system by the use of untraceable ballots: see, *Rt. Hon. Hubert A. Ingraham et. al. (Prime Minister of the Commonwealth of the Bahamas)* [2002] BHS J. No. 26 (No. 24 of 2002).

<sup>61</sup> See, for example, *Smith v Kingsway Academy* [2001] BHS J. No. 10 (2000 NO. 1016, Bahamas Supreme Court, unreported).

<sup>62</sup> *Gregory Larrimore v The Commodore, Royal Bahamas Defence Force et al.* (2007/CLE/GEN/0849, Supreme Court, Bahamas, unreported).

<sup>63</sup> *Dow v. Attorney-General of Botswana* [1992] LRC (Const.) 623, *Nawaki v. Attorney-General of Zambia* [1993] 3 LRC 231.

<sup>64</sup> See in this regard the Equality Act 2010, Chapter 15, UK Statute Laws.

<sup>65</sup> See *Campbell-Rodrigues and Others v. Att-Gen of Jamaica* [2007] UKPC 65, *Societe United Docks and Others v. Govt. of Mauritius* [1985] 585. 605 (per Lord Templeman), *Matadeen and Pointu v Minister of Education and Science* [1991] 1 AC 98, and *Grape Bay Ltd. v. Att-Gen of Bermuda* [2000] 1 WLR 574.

<sup>66</sup> *Responsible Development for Abaco (RDA) Limited and another v. The Rt. Hon. Hubert Alexander Ingraham and ors.* (CivApp.No 64 of 2009, unreported).

<sup>67</sup> Protocol No. 12. The Convention is the 1954 Convention for the Protection of Human Rights and Fundamental Freedoms, which was one of the source documents for the bill of rights in the Caribbean constitutions.

<sup>68</sup> *Nadine Rodriguez v. Minister of Housing of the Government and anor.* [2009] UKPC 52.

<sup>69</sup> The St. Kitts and Nevis Constitution contains “birth out of wedlock” as one of the grounds on which discrimination is prohibited (A. 15(3)).

<sup>70</sup> Several cases from the ECHR have held this to be the case:

<sup>71</sup> *Report of the Commission of Inquiry into the Operation of the Business of Casinos in Freeport and in Nassau, London, Her Majesty’s Stationery Office, 1967* ( para. 4).

<sup>72</sup> Commissioners Saunders, Stevenson and Mortimer were of the view that Article 26(4)(e) should be deleted.

<sup>73</sup> The Court of Appeal may also deal with constitutional issues which arise there: Article 28(3); and see *Bowe v The Queen* [2006] 1 WLR 1623.

<sup>74</sup> This point was left unresolved by a trilogy of Privy Council cases: *A.G. for NSW v. Trethowan* (1931), *Rediffusion v AG for Hong Kong* (1970), and *The Bahamas District Church of the Methodist Church in the Caribbean and the Americas and Others v. The Hon. Vernon J. Symonett, MP, Speaker of the House and Assembly and Others* (Bahamas) [2000] UKPC 31 (26th July, 2000).

<sup>75</sup> *Commissioner of Police v. Cavanaugh* (Montserrat) [2005] UKPC 28 (06 July 2005).

<sup>76</sup> *Teh Cheng Poh alias Char Meh v. The Public Prosecutor of Malaysia* (P.C. Appeal No. 15 of 1978).

<sup>77</sup> *Belize Petroleum Haulers Association v Habet and Others* (Civil Appeal 20 of 1994, Belize Court of Appeal (unreported)).

<sup>78</sup> *Attorney General v. Joseph* (2006) 69 WIR 104.

<sup>79</sup> *Lewis v AG of Jamaica* [2003] 3 WLR 1785; *Reyes v The Queen* [2002] 2 AC 235; *R v Hughes* [2002] 2 AC 284; *Roodal v State of Trinidad and Tobago* [2004] 2 WLR 652; *Boyce and Joseph v The Queen* [2005] 3 WLR 787; *Matthew v State of Trinidad and Tobago* [2004] 2 AC 284; *Watson v The Queen (Attorney General for Jamaica intervening)* [2004] 3 WLR 841.

<sup>80</sup> This submission was supported by several environmental groups, as follows: Andros Conservancy and Trust, The Bahamas National Trust, The Bahamas Reef Environment Educational Foundation, The Bahamas Sports Fishing Conservation Association, The Cape Eleuthera Institute and The Islands School, The Coalition to Save Clifton Bay, EarthCare (Grand Bahama), Friends of the Environment (Abaco), The Grand Bahama Human Rights Association, The One Eleuthera Foundation, ReEarth and The Young Marine Explorers.

<sup>81</sup> See, for example, the two major judicial review actions challenging developments (one private, one governmental) on environmental grounds in this jurisdiction: ( i) *R v Wendell Major et. al. ex parte Save Guana Cay Reef Association et.al.*; and *R v. Rt. Hon. Hubert Ingraham et. al., ex parte Responsible Development for Abaco (RDA) Ltd. et. al.*



<sup>82</sup>See also, the Constitution of Greece, which provides as follows (Article 24(1): “The protection of the natural and cultural environment constitutes a duty of the State. The State is bound to adopt special preventive or repressive measure for the preservation of the environment.”

<sup>83</sup>McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity*: Kingston: The Caribbean Law Publishing Company, 2002, p. 264.

<sup>84</sup>Statistics taken from the Official website of the British Monarchy (<http://www.royal.gov.uk>).

<sup>85</sup> See address of Prime Minister, the Rt. Hon. Owen Arthur to the Nation on the Republic Issue, available at the official Barbados Government website (<http://www.barbados.gov>), accessed 9/29/2005; and Belize Political Reform Commission Report, paragraph 2.5, available at (<<http://www.belize.gov.bz>>).

<sup>86</sup> See A. 30 of the Belize Constitution: “There shall be a Governor-General of Belize who shall be a citizen of Belize....”.

<sup>87</sup> As one noted commentator points out, the Governor-General “does not govern, nor has ‘General’ any meaning here”. William Dale, “The Making and Remaking of Commonwealth Constitutions”, *International and Comparative Law Quarterly*, Vol. 42, pg. 67, at pg. 81.

<sup>88</sup> For example, note the position in Trinidad and Tobago, where 9 out of 31 senators are appointed by the President, and in Barbados, where 7 out of 21 senators are appointed by the Governor-General.

<sup>91</sup> *Perry G. Christie (in his capacity as Leader of the Opposition) v. Hubert Alexander Ingraham et. al.* (No. 00034 of 2007/No. 00012 of 2008 (SC, Bahamas, unreported).

<sup>92</sup> The reference to “religious, economic or social or such other interests” is adapted from the Barbados formulation, with the addition of geographical to take account of the archipelagic nature of the Bahamas.

<sup>93</sup> For example, Antigua and Barbuda, with a population of approximately 81,800 (2011) has 17 senators (one more than the Bahamas). Barbados, on the other hand, with a roughly similar population, only has 11 senators, but it has to be remembered that Barbados is a single-island nation not much larger than Nassau.

<sup>94</sup> Ryan Selwyn. *Winner Takes All: The Westminster Experience in the Anglophone Caribbean*. The University of the West Indies: St. Augustine, Trinidad and Tobago, 1999.

<sup>95</sup> Transparency International Country Study Report, Caribbean Composite Study 2004, “National Integrity Systems”, pg. 37, Table 13. The Report is available at [http://www.transparency.org/activities/nat\\_integ\\_systems/country\\_studies.html](http://www.transparency.org/activities/nat_integ_systems/country_studies.html). The eight countries studied were Antigua & Barbuda, Bahamas, Barbados, Dominica, Grenada, St. Kitts-Nevis, St. Lucia and St. Vincent and the Grenadines.

<sup>96</sup>Wooding Report, para. 181.

<sup>97</sup> Selwyn Ryan, *Deadlock: Ethnicity and Competition in Trinidad and Tobago, 1995-2002*. St. Augustine: Sir Arthur Lewis Institute of Social and Economic Studies.

<sup>98</sup>The 51 members of the National Assembly in Suriname are elected by proportional representation by district. A proposal for mixed representation was also recommended by the Wooding Commission of 1974, but was not accepted.

<sup>99</sup>Wooding Report, para. 207.

<sup>100</sup> In this sense the Parliamentary Commissioner being referred to is not the person responsible for the conduct of elections, but the office of Parliamentary Commissioner as an officer of the Parliament, who receives and investigates complaints from the public made against parliamentarians alleging impropriety, conflict of interest or some other misconduct (i.e., ombudsman).

<sup>101</sup>See *Public Disclosure Commission v Isaacs* [1988] LRC (Const.) 866.

<sup>102</sup> The Bahamas signed this Convention on 06/02/98, and ratified it on the 03/09/00.

<sup>103</sup> Article 53(1) provides for Parliament to by law determine the privileges, immunities and power of the Senate and the House of Assembly and the members thereof. These have been set out in the *Privileges and Immunities (House of Assembly and Senate) Act*.

<sup>105</sup> This point was also raised by the current clerk to Parliament, Mr. Maurice Tynes.

<sup>106</sup>Transparency International Country Study Report, Caribbean Composite Study 2004, “National Integrity Systems”, pg. 37, Table 13 (*op. cit.*).

<sup>107</sup>XX Amendment to the U.S. Constitution.

<sup>108</sup> Several constitutional scholars believe that the correct view is that the Governor- General is entitled to refuse a request for dissolution if he or she can find an alternative Cabinet to carry on without a general election. S.A. de

Smith was also of the view that the Queen (Governor-General) may refuse a Prime Minister's request if an alternative government could be formed, or if an election at the time would be prejudicial to the national interest.

<sup>109</sup> See *Adegbenro v Akintola* [1963] A.C. 614.

<sup>110</sup> See, for example, A. 35 of St. Kitts and Nevis Constitution; and A. 47 of the Jamaica Constitution, which contains full provisions for the appointment of these officials, their security of tenure and removal.

<sup>111</sup> Note the example of Prime Minister Margaret Thatcher, whose government lost a vote of no-confidence primarily because of the support of back-benchers in the British Parliament.

<sup>112</sup> See pg. ...., para., Report of the 1974 Constitutional Commission of Trinidad and Tobago (the "Wooding Commission").

<sup>113</sup> International Bar Association Code of Minimum Standards of Judicial Independence.

<sup>114</sup> See the discussion of similar issues in the Scottish case of *Starrs and Another v. Procurator Fiscal (Linlithgow): Procurator Fiscal v. Starrs and Another* [2000] 1 LRC 718, although many commentators think that this decision may have overstated the requirements of judicial independence.

<sup>115</sup> St. Kitts and Nevis Constitution.

<sup>116</sup> See, for example, *A.G. of Trinidad v McLeod* [1984] 1 All ER 694.

<sup>117</sup> For example, there do not appear to be any transitional provisions providing for matters currently in train to not be affected by the relocation of the prosecutorial power.

<sup>118</sup> See, also, s. 42 of Belize. Note, also, article 77 of the Constitution, which allows the Governor-General, on the advice of the Prime Minister, to charge any Minister "with responsibility for any business of the Government, including the administration of any department of Government." The responsibility for legal affairs could include responsibility for the administration of the office of the DPP, and there would be nothing unconstitutional about this. A notable example in the case law comes from Fiji. There, the Governor General had assigned to the Attorney General (a minister) responsibility for the office of the DPP. The assignment was held to be unconstitutional by the Court of Appeal, but was upheld by the Privy Council, as the PC found that it did not interfere with the constitutionally vested powers of the DPP in respect of prosecutions. This also solves the most obvious problem with the DPP's office: how is it to be financed if not through some department of Government?

<sup>119</sup> In *Hinds v. Attorney General & Ors.* (Barbados) [2001] UKPC 56 (5 December 2001), [2002] 2 WLR 470, the Privy Council held that the right to legal aid in complex cases was part of the right to the protection of the law.

<sup>120</sup> See, for example, Chapter 7 of the South African Constitution.

<sup>121</sup> *Whitfield v Attorney General* [1990] 43 WIR 1.

<sup>122</sup> *Maurice O. Glington v The Registrar of The Bahamas Court of Appeal and the AG (2009/PUB/Con/No.00045)*. The Supreme Court dismissed the application at the first stage, but the applicant appealed and the matter remains pending before the Court of Appeal.

<sup>123</sup> Note the decision of Burton Hall, CJ, in *Davis v. Commissioner of Police* (1992) BHS J. No. 104 (Bahamas Supreme Court No. 102 of 1991, unreported.)

<sup>124</sup> See *Emmanuel v. Attorney General of Dominica* (1989) Suit No. 194 (unreported).

<sup>125</sup> See for example, s. 104 of the 2009 Draft Constitution of Grenada.

<sup>126</sup> Note the experience of Trinidad with the matter, where the Wooding Commission had recommended abolition of appeals to the Privy Council, but this was rejected when the matter was put to a referendum.

<sup>128</sup> Note observations on the functioning of the JLSC by Isaacs. J. in *Grant-Bethel v. Barnett* (Chairman of the Judicial and Legal Services Commission) et. al. (PUB/JRV/No.25 of 2010), Bahamas, Supreme Court, unreported.)

<sup>129</sup> A. 105, Belize Constitution. Interestingly, public service is defined to include "military service", which means that the Belize Defence Force is a full-fledged part of the public service and are subject to the PSC.

<sup>130</sup> Enunciated most famously in *Thomas v AG* (1981) 32 WIR 381.

<sup>131</sup> Countries in the region which have the institution of Ombudsman, created either by the Constitution or statute are: Guyana, Trinidad & Tobago, Saint Lucia, Antigua & Barbuda (constitutional); Jamaica, Barbados, Belize (statutory). Bermuda has a Human Rights Commission, established by the Human Rights Act 1981.

<sup>132</sup> There have been calls for strengthening the independence of national Supreme Audit Institutions (SAIs) by the International Organization of Supreme Audit Institutions (SAIs), and the principle is also supported by the United Nations General Assembly Resolution A/66/209.

<sup>133</sup> For example, s. 8 of Antigua and Barbuda; A. 119 Trinidad and Tobago.

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<sup>134</sup> *Minister of Home Affairs v Fisher* [1980] AC 319, per Wilberforce J.

<sup>135</sup> Tracy Robinson, “Inherent constitutional rights; recalibrating the common law constitution”, (unpublished) 2007.

<sup>136</sup> Derrick McCoy.

<sup>137</sup> *R v Reyes* is a Belize case which challenged a statute providing for mandatory death for all shooting murders, but since the Belize Constitution has no savings clause, the Board did not have the impediment of such a clause to prevent a finding that the statute was unconstitutional.

<sup>138</sup> Lord Bingham of Cornhill, Lord Nicolls of Birkenhead, Lord Steyn, Lord Hoffman, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, and Mr. Justice Edward Zacca.

<sup>139</sup> One should attach a caveat to the moral authority of any decision that features such a narrow split in opinion, especially involving senior members of the Board.

<sup>140</sup> The savings clause in the Belize Constitution appears in the chapter on the bill of rights as follows at section 21: “Nothing contained in any law in force immediately before Independence Day nor anything done under the authority of any such law shall, for a period of five years after Independence Day, be held to be inconsistent with or done in contravention of the provisions of this part.”

<sup>141</sup> The Report at Pg. 81.

<sup>142</sup> For a similar argument see *T&T Civil Rights Association v A-G TT* (2005) HC 98. See, also in support of this argument, *Maya Leaders Alliance V A-G of Belize* (unreported, 28/6/2010). For an important U.S case on point, see *Lujan v Defenders of Wildlife* (1992) 504 US 555.

<sup>143</sup> See other variations on the test in *Minister of Justice (Canada) v Borowski* [1981] 2 S.C.R. 575; and *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236.

<sup>144</sup> See The Bahamas Constitutional Review Commission’s Preliminary Report & Provisional Recommendations (March, 2006) at pg. 8.

<sup>145</sup> This point is conceded on pg. 81 of the Report.

<sup>143</sup> See *Finlay v. Canada (Minister of Finance)* [1993] 1 S.C.R. 1080.

