

Ian Paget-Brown
Chairman Law Reform Commission
January 16, 2013

I have been instructed by the Honourable Attorney General to address your Lordships on issues relating to the Legal Practitioners Bill in my capacity as Chairman of the Law Reform Commission.

Before I do I would like to give your Lordships a brief summary of the Commissions Projects for 2012.

Commission Projects for 2012

2012 was an active one as the Commission continues to deal with the many matters on its agenda.

Arbitration Law, 2012

On 4 January, 2012, the Commission submitted to the Attorney General the Final Report of the Commission on the “Review of the Arbitration Laws of the Cayman Islands for the modernisation of the Arbitration Law (2001 Revision)”. The Final Report of the Commission was accepted by Cabinet and subsequently the Arbitration Law, 2012 was enacted and came into force on July 2, 2012.

Administrator-General

The Commission prepared draft legislation and consulted on the establishment of the office of Administrator-General. Such an office is similar to that of a public trustee and there have been calls for several years for its establishment in the Cayman Islands. The Commission sees the Administrator-General office as an essential part of the legal system in protecting the more vulnerable in our society.

Strata Titles Bill, 2013

After lengthy consultations, and with the valuable assistance from Mr. David Ritch, the Commission was able to submit for public discussion the Strata Titles Bill, 2013

Matrimonial Causes Bill and Maintenance Bill

The Commission continued with its Family Law Project and submitted a Matrimonial Causes Bill and Maintenance Bill to Mr. David McGrath and Ms. Karin Thompson, two well-known practitioners in this area of the law, for their preliminary comments. The Commission is currently concluding the re-drafting of these Bills and draft legislation that will regulate the financial relationship of parties while in a marriage or common law union and upon divorce and

termination of such unions. It will cover in detail what happens with the family home, the division of other property as well as provide for agreements similar to the well-known pre-nuptial agreements.

Succession Law and the Wills Law

With the assistance of Dr. Simon Cooper, former lecturer of the Cayman Islands Law School, the Commission is continuing its research on the modernisation of the Succession Law and the Wills Law.

Duties of Company Directors

The Law Reform Commission has initiated independent research into whether legislation should be enacted to codify the duties of company directors. The research will examine, among other things, the fiduciary duties of directors under the general law, the persons to whom those duties are owed, the liability of directors for breaches of those duties, and the circumstances in which a company can ratify a breach of those duties.

Enforcement of Foreign Judgments

Work continues into the issues involving the enforcement of foreign judgments and the question of reciprocity. Additionally, the Commission is examining the basis for permitting interim orders in aid of foreign proceedings. To date, this research has resulted in the formulation of an issues paper on the Enforcement of Foreign Judgments and Interim Orders and two Bills dealing respectively with the issues, all of which have been the subject of stakeholder consultation.

Sexual Harassment Bill

The Commission is finalising draft legislation which deals with sexual harassment in the Cayman Islands. The Sexual Harassment Bill was prepared by the Commission and sent for public consultation in 2012. The Commission is also examining whether reforms in the law prohibiting stalking are necessary. The objective of this review is to ensure that adequate legislation is in place which makes it unlawful to engage in any form of stalking and seeks to provide protective remedies.

Conditional and Contingency Fee Agreements

Pursuant to the referral of the Attorney General in 2012, the legal staff of the Commission is also conducting research on conditional and contingency fee agreements.

Coroners Law

The Commission has started work on the reform of the out-dated Coroners Law.

Law of Contempt

Work continues on the review of the Law of Contempt that is being addressed under three heads (similar to the approach of other commissions such as the Law Commissions of Western Australia and Tasmania). Thus, the Commission is preparing papers on (a) contempt in the face of the court (b) contempt by publication and (c) contempt by disobedience to a court order. There will however be a single final report that encompasses the Law of Contempt as a whole. We have reached out to the Law Reform Commission in other countries who are also reviewing this subject.

This brings us to the next topic.

Role in Legal Practitioners Law

In 2007 the Commission was instructed to look into the issue of amending the Legal Practitioners Law to enable Practising Certificates to be issued to non-residents working in law firms abroad.

We were told that if the Law was not amended, Cayman firms would have to close their offices in foreign jurisdictions where they were employing people who did not hold Practising Certificates.

The Law Society and the Caymanian Bar Association, in their meetings with the Commission, represented that if we did not amend the Law to allow Overseas Practising Certificates the Island's financial industry would be severely impacted to its detriment.

Acting on these representations, the Commission prepared a report and submitted draft legislation to Cabinet. The view taken at that time was that if there were strict Rules of Professional Conduct that applied to both resident and non-resident attorneys the court should be able to regulate attorneys practicing overseas.

At a Cabinet meeting attended by representatives of the Commission, the Law Society and the Caymanian Bar Association, I was asked what impact I believed allowing non-residents to be admitted would have on the prospects of young Caymanians. I answered that they would be affected by any amendment to the Legal Practitioners Law that widened the class of people who could become Cayman attorneys because there would be less incentive for law firms to hire and train Caymanians to staff the foreign offices that would be needed to comply with the existing law.

The Law Society and the Cayman Bar Association did not like the Rules of Professional Responsibility that were drafted. As a consequence, the

amendments to the Law stalled and the issue of overseas practice by non-residents is still open.

Code of Conduct

While on the subject of Rules of Professional Conduct, your lordships will note that the draft rules circulated last month are based on the American Bar Association model rules. It was felt that the ABA Code is a good starting point for a fused profession. Where it can be improved, we welcome suggestions. The rules are up to date and reflect the challenges and opportunities of today's global legal environment. The latest edition was published in September 2012. The ABA Center for Professional Responsibility advances the public interest by promoting and encouraging high ethical conduct and professionalism by lawyers. Over 400,000 lawyers are bound by them, and there is a wealth of published material to teach and to enforce them.

Back to the role of the Commission

When the Commission made its recommendations in 2007 it was not aware of concerns expressed by cabinet that the draft legislation did not address the fundamental concerns expressed by Caymanian lawyers on equal employment, training and promotion opportunities within the profession. It appeared that there were concerns of discrimination against Caymanians that the LRC was not aware of because those affected were unwilling to come forward and express their views to the LRC for fear of losing their jobs or employment prospects. In May 20, 2011 Cabinet appointed three Caymanian lawyers - Theresa Pitcairn, Sherri Bodden and Sammy Jackson - (the "Government Team") to make submissions to cabinet on the issues of the advancement of Caymanians within the legal profession.

At that stage the Commission itself was not involved. However, in the spring of 2012, the Attorney General instructed me, as Chairman, to provide an advisory role to the Government Team, together with Cheryl Neblett and Jose Griffiths, the LRC secretariat.

To move matters along, we recommended that the draft Bill should be published as two options and on April 4, 2012 Option A and Option B were circulated for consultation purposes to the Law Society, the Caymanian Bar Association and individual lawyers.

Option A was the Bill without provisions permitting non-residents to be admitted. Option B had provisions permitting non-residents to be admitted.

The feedback showed that Option A was favoured by Caymanian lawyers but was not acceptable to the large firms. Based on representations made to the

Government Team by a number of the lawyers, the first draft of Option B was equally unacceptable to the smaller and some of the foreign-owned firms established in the Islands because the requirement that the majority control be in the Islands appeared to be slanted in favour of the only two large firms.

Recognising that it is impossible to draft regulations without knowing the structure of the firms to be regulated, on May 2, 2012, Theresa Pitcairn, acting for the Government Team wrote to the President of the Law Society and Cayman Bar Association and explained that she had been asked to present to the Premier and his Cabinet and the Attorney General a revised draft Legal Practitioners Law. She asked a number of questions such as the structure of the law firms, their overseas practices, and about opportunities for Caymanians.

She received no answer. However, Mr Jennings did write to its Council Members questioning the authority of the Government Team to ask the above questions.

To move matters along on June 25, 2012, Revised Option B was sent out for circulation to the Law Society and Caymanian Bar Association for comment together with a preliminary draft of the Qualified Firm Overseas Practice Regulations referred to therein. Revised Option B moved the overseas practising provisions out of the law itself and incorporated them into regulations to give the Bar Counsel flexibility when considering the grant of Overseas Practising Certificates.

Revised Option B was drafted in an attempt to find a middle ground to move forward with legislation that fairly regulates the legal profession while ensuring, through the Qualified Firm Overseas Practice Regulations, that the issue of Overseas Practising Certificates will take into account the best interests of the country in general and the future of Caymanian law students and attorneys. No comments were received on Revised Option B throughout the following six months.

Legal Landscape Change

The Law Society has written to the Government Team saying that the legal landscape in the Cayman Islands has changed substantially in the last ten years. In 2002 there were two firms advising on Cayman Islands laws from outside the Islands. Now there are at least fourteen such firms, with approximately 180 lawyers working for those firms outside of the Cayman Islands. It is for these 180 that they now need Practising Certificates - an increase from the 132 needed in 2007.

Another way of looking at the expansion referred to in the Law Society's statement is that twelve firms realised how easily the two firms referred to were able to circumvent, prior to and subsequent to 2002, Cayman Islands immigration laws and regulations by employing persons outside of the Islands who did not have Practising Certificates but were nevertheless held out as entitled to advise on issues of Cayman Islands law.

The twelve decided to join the two and have a go themselves to enhance their bottom line by increasing profits by using persons who were not Cayman lawyers to generate fees for them as though they were. The statistics the Law Society provides of 180 lawyers working outside the Islands as Cayman attorneys, assuming that none of them hold current Practising Certificates, are generating an estimated US\$108 million in fees annually (180 x average salary US\$200,000 x 3 salary being the expected billings) or a staggering US\$1.8 billion over 10 years.

At the beginning of January this year, The Law Society advised the Government Team that there is broad agreement within the legal profession in the Cayman Islands that new legislation is required to regulate the practise of Cayman Islands law outside the Cayman Islands and to create a framework for the training of Caymanian lawyers and the discipline of all lawyers practising Cayman Islands law.

Revised Option A and Revised Option B

What Revised Option A and Revised Option B have in Common is the appointment of a Bar Council to address the regulation of the profession by the establishment of an independent regulatory body.

The legal profession is to be subject to greater accountability than its members have been in the past. Council members will include the Chief Justice or his appointee as Chairman, the Honourable Attorney General or his appointee as Deputy Chairman, the Director of Public Prosecutions, three persons appointed by the Chief Justice, the Honourable Attorney General, and the Director of Public Prosecutions respectively, a Cabinet appointee and the Director of the Truman Bodden Law School or his appointee. Thus, there is discretion for the appointment of private sector attorneys and lay persons as Council members.

The Bar Council's functions and powers will include-

- Establishing a system of legal education and practical training;
- Ensuring that systems are in place for eligible persons to be afforded an opportunity to be admitted as articulated clerks;
- Regulating and upholding standards of professional conduct, discipline and etiquette within the legal profession;

The Law will establish who will be eligible to be admitted to practice Cayman Islands Law, which, subject to Cabinet's decision, may or may not include non-residents practising overseas. Finally, the Law will increase the existing criminal sanctions for unlawfully engaging in the practice of law.

Where Revised Option A and Revised Option B differ

The issue of non-residents practising Cayman Islands law overseas has grown exponentially over the past decade but without any legislative or regulatory framework or control. The practice has given rise to concerns of the lack of regulatory oversight. At present, we do not know how many persons overseas are holding themselves out as qualified to advise on Cayman law against how many of those actually hold Practising Certificates.

When lawyers practice Cayman law overseas without the need for work permits and without obtaining Practising Certificates, the employment opportunities of duly licensed Caymanian attorneys are correspondingly diminished. It follows that the lion's share of the very substantial revenues generated by those overseas lawyers does not flow through the local economy.

The evidence shows that ten firms with operations in Cayman also have a presence in offshore jurisdictions. They employ over 1,300 lawyers, approximately 25% of who are Cayman licensed attorneys. Only 24 individuals of those Cayman licensed attorneys work outside the Cayman Islands.

History of Legal profession

It seems to me that there is a perception among lawyers that they are the ones responsible for the success of the Cayman Islands. To that I can only say that it was Cayman that made the lawyers successful, not the other way around.

I was admitted in Cayman nearly forty-two years ago. At that time W.S. Walker had four lawyers, MacDonald & Maples four, Hunter & Hunter three, Bruce Campbell one, each providing legal services in Cayman together with the unsung heroes in the history of the Cayman legal profession, the Law Agents, Miss Annie Bodden and Mr Ormon Panton to name only two.

We all worked together with the Civil Service (Sir Vassal Johnson the Financial Secretary and Gerald Waddington the Attorney General), politicians, bankers, trust administrators and others to build a financial industry in the "Island that Time Forgot". Our loyalties were to Cayman first and the common good of the people of these Islands. We treated ourselves as guests and behaved accordingly; we felt honoured to be part of Cayman's success story.

Discrimination

But it appears that things have changed. It is evident that many in this community consider the social injustice experienced by some of their best and brightest compatriots even more troubling than the outsourcing issue. The Caymanian may well ask herself what is, or was, the point of devoting years to educating herself only to find that there are no real opportunities to pursue the career she has invested so much effort and made such personal sacrifice to prepare for? How can this situation be right when there are so many non-Caymanians practising Cayman Islands law without being admitted as Cayman Islands attorneys?

Thus, it follows that perhaps a very important objective of the new Law is to ensure that bright and ambitious Caymanians have legitimate opportunities to fully participate in the legal profession without having to compete with those practicing as Cayman lawyers illegally.

There is an urgent need for the profession to address law school scholarships, articles of clerkship, hiring opportunities, equitable distribution of billable work, marketing and networking exposure, attendance and contribution to conferences, being mentored, mentoring and training others, continuing legal education, work experience overseas, and preparation for and participation in leadership and ownership of offshore and local firms.

It is lamentable that the legal profession has made it necessary to consider some sort of affirmative action instead of creating reasonable opportunities for Caymanians to share in the prosperity that this jurisdiction has afforded so many expatriates over the last four decades.

I must admit I was deeply saddened when the Government Team shared allegations of discrimination within the legal profession last year. I was horrified to hear and read the evidence that had been gathered.

It is clear that we need some effective and enforceable rules of etiquette at the Cayman Bar to deal with such behaviour.

On December 7, 2012, the President of the Law Society appeared on Channel27 and was asked whether there was discrimination in the legal profession. He said that we had to draw a distinction between what happened ten or fifteen years ago and today. I took that to mean he was admitting discrimination in the legal profession ten or fifteen years ago but that there is none today. It appears to me he is right on the first point and wrong on the second.

There is a feeling among Caymanian lawyers that the major law firms:

- a. are in the hands of people who do not care about the islands or where

work is conducted;

- b. have no real interest in living or investing in these islands;
- c. prefer that the business of the offshore industry be conducted elsewhere to avoid the immigration/work permit regime;
- d. have established a glass ceiling, operating to the detriment of Caymanian professionals;
- e. give Caymanian professionals inadequate and unequal training; there are unequal opportunities for Caymanian advancement within the firms; and a system has developed over the years that is designed to ensure that Caymanians fail;
- f. have created an environment of fear and victimization preventing, many Caymanian professionals from speaking publicly and in opposition of the firms; being a 'team player' is synonymous to Caymanians having to "rat" on Caymanians who want to see the profession become fair, transparent and accountable.

Some contend that only foreign lawyers reap the economic benefits and successes from the offshore business and that when the firms get a chance, they outsource jobs suggesting that the firms have no loyalty to the islands.

The evidence shows that Caymanians are:

- deliberately being marginalised in the work place;
- denied fair opportunities to advance;
- have been instructed on occasions about how to vote at Caymanian Bar Association elections;
- told that to be a 'team player' they must allow the "status quo" to continue uninterrupted;
- used as pawns to secure status grants and permanent residence and once the Caymanian has outlived his or her usefulness in securing these grants they are unfairly or constructively dismissed;

There are allegations that firms may have been guilty of

- filing misleading affidavits; qualifications; residence; experience; character with the Court;
- misleading the Trade & Business Board as to Caymanian participation and efforts to secure it;

- failing to report Caymanian applicants;
- misleading the authorities as to the nature of experience and qualifications as to both expatriate and local applicants;
- publishing misleading advertisements so as to seek to avoid attracting qualified local applicants;
- giving misleading description of the positions held by Caymanians and Expatriates for regulatory advantage;
- concealing remuneration for regulatory advantage;
- failing to make applications for promotion/re-designation and disingenuous about the nature and extent of training;
- taking on articulated clerks but then not offering employment opportunities; and
- in house training programs that are not offered to Caymanian

Qualified Firm

The purpose of Revised Option B and the Qualified Firm Regulations was to put the past behind us and incorporate in the regulations criteria for the Bar Council to consider in the issue of the grant of Practising Certificates to non-residents by the adoption of “affirmative action” initiatives to assure the advancement of Caymanians and the public interest.

The draft Regulations provide that in considering whether to recognise a firm as a qualified firm, the Council shall take into account criteria that would be the basis of an affirmative action initiative for the education, training and advancement of Caymanian lawyers and the contribution of the applicant firm to the Cayman community.

At a meeting on January 7, 2013, between the Government Team and representatives of the Law Society, I thought we were making progress on Revised Option B and the Regulations and accepted the suggestions that we incorporate into the draft Regulations commitments that the law firms have said they are willing to make and tighten up the drafting of the criteria that would be taken into account.

Grandfathering In

At that meeting, the Law Society representative inquired whether there would be a grandfathering period. We advised that we did not contemplate there would be. All firms would have to start from scratch and that the Bar Council would exercise its discretion when reviewing all applications. People without a Practising Certificate would have to successfully meet the Bar Council’s requirements. The Government Team said that the request for the inclusion of grandfathering provisions in the Bill to enable firms who currently appear to be in breach of the Legal Practitioners Law to continue their overseas operations

under the new law by the automatic grant of practising certificates at their request was akin to treating Cayman Practising Certificates as a "Flag of Convenience" readily for sale to the highest bidder.

I recall saying that it was better to start with a clean slate and have each application considered by the Bar Council on its merits, as envisaged in the Bill.

No Progress

I really felt we were making progress, and all that was left was tidying up the drafts. On Friday last my optimism was shattered. Notwithstanding our discussions the previous Monday trying to reach agreement on the criteria for non-residents to be considered for the grant of Practising Certificates, the Government Team received the following:

LEGAL PRACTITIONERS BILL 2012

**Response of Appleby, Conyers Dill & Pearman, Maples and Calder, Mourant Ozannes, Ogier and Walkers
11 January 2012**

"This document is issued by Appleby, Conyers Dill & Pearman, Maples and Calder, Mourant Ozannes, Ogier and Walkers (together the "**Firms**"). It is issued in response to the consultation draft of the Legal Practitioners Bill, Qualified Firm Regulations and Code of Conduct released for consultation at the end of November 2012 (together the "**Consultation Documents**").

The Firms have had the opportunity to review the response of the Cayman Islands Law Society ("**CILS**") dated 10 January 2012 on the Consultation Documents and wish to note for the record that they endorse the contents of the CILS response."

"GRANDFATHERING" PROVISIONS - ADMISSION

2.1 We welcome the inclusion of "grandfathering" provisions to enable those lawyers who are currently based overseas to be admitted within a six-month period.

2.2 We note however that under current procedures each such lawyer will need to fly to the Cayman Islands to be presented to the Grand Court within a six month period from the law coming into effect.

2.3 We would request that consideration be given to establishing a process for any overseas lawyers to be admitted without the need to attend at the Grand Court.

**Appleby
Conyers Dill & Pearman
Maples and Calder**

**Mourant Ozannes
Ogier
Walkers"**

That response speaks volumes for the apparent contempt that those firms have for the professional qualification of being permitted to call oneself a Cayman Attorney. The grant of a Practising Certificate is a privilege not a right. It is licence to be part of an honourable profession. It is not a boarding pass that can be bought online to join the gravy train.

The response is evidence that those named firms appear to be focused on short-term gain instead of considering the opportunities in our profession for future generations of Caymanians.

I feel we have been wasting time in our attempt to negotiate a resolution on the issue of Practising Certificates to non-residents.

At the January 7th meeting with representatives of the Law Society, we were told that unless we permitted Overseas Practising Certificates to be granted we would lose financial business to our competitor jurisdictions. To which I responded that Law Society firms were the ones representing those "competitor jurisdictions".

For my part, I am not sure that we will lose business to our financial sector because we will have cracked down on the unlicensed practice of law in foreign jurisdictions. It is more likely to me that the risk is the other way around due to the reputational risks associated with people holding themselves out to be attorneys when they are not.

However, the threat to move business shows that we urgently need to have and enforced Rules of Professional responsibility because it is a disciplinary violation for a lawyer to put his/her own interests (to move the business to keep the fee) ahead of those of the client whose best interests are to be in Cayman as a respected financial centre.

Option A

Given the facts and opinions expressed, I believe that Revised Option A, and establishing a Bar Council and Rules of Conduct, is in the best interests of the country and we should proceed without delay to regulate the profession to guard against reputational risk caused by the unlicensed practice of law in foreign jurisdictions.