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DISCUSSION PAPER

PRESENTATION

BY

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# Challenges and Opportunities in the Process of Decolonization of the Non-Self-Governing Territories in the Caribbean Region

## The Cayman Experience

I am Sophia Harris from the Cayman Islands and I am grateful for the invitation to make this presentation today as an expert.

In the Cayman Islands, five diverse Non Governmental Organizations (NGO's) became involved in the constitutional reform under the Chamber of Commerce ("the NGO Working Group"). At that time I was President Elect of the Chamber of Commerce and became Co-Chair of the NGO Working Group.

Whilst I have made submissions in the past on behalf of the NGO Working Group it should be made clear that I am not speaking as a representative of the NGOs on this occasion.

The NGO's had been meeting together for over 10 years and collectively making submissions to the United Nations Special Committee on Decolonization. The crux of their reports and the common element to the diverse group has always been the need for proper and full education on the UN options in order to achieve the right and free exercise of self-determination as required by the UN and as sanctioned by the UK.

This would include a comprehensive education campaign on all of the necessary elements relating to the constitution as would be expected.

We are also aware that every year the UK makes submissions that the Cayman Islands should be removed from the list of Non-Self-Governing Territories ("NSGT"). We too have in the past made submissions to the

UN to clarify that this is by no means the case; our governance system is still that of an Administering Power to a Colony.

I trust that when the time comes, this presentation will serve like-wise to confirm to the UN that the Cayman Islands has not achieved self-determination, but at best, if the current 2009 draft 'constitution' is approved by the electorate in a Referendum that is scheduled for 20<sup>th</sup> of this month, all we will have is a revised administrative document between the UK and a Colony, as opposed to a constitutional document of the people and by the people.

There has been no education or discussion in the Cayman Islands on the options outlined by the UN for achieving self determination.

To date the only surveys conducted that vaguely address any of the options available, have focused on the question of independence, and include surveys such as the Chamber of Commerce survey both in 2001 and 2008 which confirmed that their members did not want independence.

Over the years the United Kingdom has made it clear to the Cayman Islands that constitutional modernization is necessary for all Overseas Territories, but what constitutes "***constitutional modernization***" and the "***right to self-determination***" has become increasingly murky waters for those of us who are required to go through the process.

What has however become very clear from the latest developments on the constitutional reform process is this: if indeed the ability should exist for every Overseas Territory to have the consequential powers to draft their own constitution reflecting the wishes and will of those persons of that jurisdiction:

- (i) a level playing field must be established and respected between the Overseas Territory and its Administrative Power for this purpose;

(ii) the constitutional revision process must be totally open and transparent; and

(iii) standards should be set as to the minimum level of education to be established in that jurisdiction pertaining to all governance systems *before* an act of self-determination by the electorate can be conclusively said to have occurred in that Overseas Territory.

It would seem that if, at the very least, these parameters are not set, then it will be difficult for the people of the Overseas Territory to have a free hand in drafting a constitution of their own making, (within reason).

By way of background as to the latest draft constitution:

- In December 2007, an announcement was made that a Referendum to the Islands' constitution would be held in May 2008. There was no announcement then as to what matters would be addressed in the Referendum and there was no draft constitution with the public at the time. Merely a surprising announcement that a Referendum would be held in May 2008.
- In January 2008, the Government's Summary of Proposals for Constitutional Amendments was released.
- In February 2008 an announcement was made that the Referendum that would be conducted in May 2008 would be a 'yes' or 'no' vote in support of the amendments in broad terms for the negotiation by the Government with the UK.
- In April 2008, the NGOs wrote to the Government to commend them for agreeing to a Referendum vote on the draft constitution but to implore them to reconsider the 4-month time frame and the haste within which the process was being conducted as there was little time to educate the electorate on the constitutional issues.

We also noted in our letter that our NGO Working Group met with the Director of the Constitutional Review Secretariat and asked how and when the public education was to be structured and implemented in order to then solicit the informed views of the electorate, and we were advised that the solicitation of the views and the education of the public would *have to be done simultaneously*. It is still not clear how this was to be achieved.

An editorial ran in the major news paper of the Islands agreeing with the position of the NGO's and concurring that the simultaneous education and soliciting of views of the public was "untenable"<sup>1</sup>. In a subsequent editorial entitled '**Peoples Proposals?**' their comments summarized the failure:

*"It's too bad that at a cost of \$2.3 million a more engaging public education and consultation programme couldn't have been implemented, one that would have left the country with less doubt about which way voters will sway on the issue next May."*<sup>2</sup>.

We also made our case that meaningful, unfiltered education on all issues of constitutional governance was crucial to the process, including those issues that the Government of the day may or may not subscribe to: *"to give the people of these Islands a fair opportunity to properly evaluate and understand those changes that are being proposed from any quarters, so as to meaningfully solicit the public views on what they want in their constitution, and it is the only fair and honest means of ensuring that it is a constitution of the people of these Islands"*.

- A series of what can best be described as public hearings which began towards the end of January 2008 and concluded in early May 2008 took place. Government pushed back the Referendum

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<sup>1</sup> Caymanian Compass 4<sup>th</sup> April 2008

<sup>2</sup> Caymanian Compass editorial 6<sup>th</sup> October 2008

date from May 2008 until the summer of that year. These plans were also then scuttled as there was apparently no clear consensus on several of the issues that were actually up for debate. The Government then decided to delay the Referendum until after the negotiations with the UK.

- The NGO Working Group did ask the Government for access to its records and information that would assist them in understanding how the Government came to make the decisions they made in drafting their proposals for the draft Constitution, including opinions provided by Professor Jeffrey Jowell, their constitutional advisor. To date we have never received a response.

The negotiations with the UK started in October 2008 and concluded in February 2009. The Government extended an invitation to the opposition to participate in the negotiation, as was a representative from the Chamber of Commerce, a representative from the association of the churches (the Cayman Islands Ministers Association hereinafter 'CIMA'), the Seventh-Day Adventist Church (as they are not members of CIMA) and a representative from the Human Rights Committee. The CIMA and the Chamber of Commerce are 2 of the 5 members of the NGO Working Group. The NGO Working Group however, were not invited to participate and nor were any submissions sought on their behalf.

From the beginning of the Constitutional review process in 1999 there were requests from the public for the talks to be held in the Cayman Islands and to be held in an open forum so that the people of the Islands were aware of and informed as to how their constitution took shape. In fact the call for all constitutional discussions to be in the Cayman Islands and open to the public goes back decades. This call for openness and participation in the respective OT's is also echoed in the UK's House of Commons, *Foreign Affairs Committee 2008 report on the Overseas Territories*.

It would seem however that as this 2009 Draft Cayman Islands Constitution is still in fact only a revised Administrative document first and foremost, the negotiations were not to be open to the public solely on the orders of the UK.

Ian Hendry, the head of the UK delegation to the negotiations said that holding them in public would have made them *“unlikely to produce any real results because of the political posturing and grandstanding that would have assuredly occurred”*. **“Political posturing”** became the impetus behind the exclusion of the people from the people’s constitution!

An editorial in the newspaper<sup>3</sup> commented on the press releases on the sticking point issues relating to the constitution during those secret talks. The Opposition stated that the FCO “rejected outright” some of the Government’s key proposals, whilst the Government blamed the Opposition for the major sticking points during the talks. The newspaper pointed out that it was difficult to know what actually happened as the public was kept in the dark on its own constitutional talks. But this also raised the question: *if those proposals had in fact been proposals of the people of the country, could they or should they be up for debate, negotiation or outright rejection by the UK?*

As an example, I understand that Professor Jowell’s advice to the Government and to the public at large was that it would be certain that the UK would reject outright a constitution that did not have the Bill of Rights enshrined in it. This notwithstanding that the UK itself has no written constitution, is in the process of its own education campaign as they look to having a written constitution for the first time and are themselves evaluating whether or not to have a Bill of Rights enshrined in their future written constitution. The entire process, they have speculated, will take some **10 to 20 years** to accomplish.

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<sup>3</sup> Caymanian Compass 6<sup>th</sup> October 2008

Whilst the UK itself to date does not have a BOR, it has a Human Rights Act, and it is now being debated whether or not it should adopt the British Bill of Rights and Responsibilities as a “step towards a fully written constitution.”<sup>4</sup>

Apparently we however do not have the benefit of a similar evaluation, the luxury of taking the time necessary to get it done right or even the option it seems to have the Bill of Rights separate to the Constitution (or so we were advised). As a result, there was never an opportunity for the public to weigh and measure the merits of the Cayman Islands having a separate Bill of Rights vs. being enshrined in a constitution.

There has been no discussion of the dangers or merits of having a Bill of Rights enshrined in the constitution. There has been no discussion as to the overall policies, laws or current international obligations of the Islands that will be affected by such a BOR and the possible impact, costs and potential liabilities resulting therefrom.

The consequences of possibly now having a BOR enshrined in a constitution that has been drafted ‘*on the run*’ as one observer who was present during the negotiations commented, (as amendments to the draft apparently took place during the negotiations with the UK) without the full benefit of a proper analysis can be only proven over time.

However, it is clear that if we have not got this right, this could prove to be the most costly experiment the Cayman Islands would have ever engaged in yet!

There were certain issues that were bound to be controversial including the rights of homosexuals and same sex marriages. The Churches and some NGO’s memberships were clear that they could not support a Bill of Rights that did not protect against same sex marriage. The final

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<sup>4</sup> Jack Straw’s address to George Washington University, Washington DC. 13 February 2008.



round of talks held in the UK seemed to have resulted in a battle of wills between the Church and the Government on one hand and the Human Rights Committee on the other.

This later spilled out into the public domain back in the Cayman Islands, to a public that was caught unaware and regrettably uninformed of the subtleties of the language in the draft constitution in dispute, until the debate raged into an outright war of words between the Church and the Government on one hand and the Human Rights Committee on the other!

The controversy for the most part relates to what is referred to as the 'Non-Discrimination' section of the draft Bill of Rights, which as it turns out might be discriminatory in some instances, including amongst others, to homosexuals.

Objecting to any perceived discrimination is what one would expect the Human Rights Committee to do in all fairness given their own mandate as a committee. The Church (with support from others in the negotiations) did as one would expect them to do and fought for the draft to remain as is with limits to the non-discrimination clause, particularly when it comes to same sex marriages. The result was that the Human Rights Committee itself made it clear that they would return to the Cayman Islands to campaign against the section they deemed offensive.

Until this point there was no real debate in the public on the issues that would be impacted by a Non-Discriminatory section in the Bill of Rights, how it should be drafted, who it should protect, who it would impact etc. This clearly started as a battle between those who were invited to participate in the negotiations. But for the dispute between the HRC and the Church and the Government, this particular aspect of the BOR would not have been publicly discussed in any real substantive manner.

The HRC did as promised and one of the most divisive battles on the constitution dragged out in a public forum.

The HRC launched a campaign for a free standing right of non-discrimination the equivalent of Protocol 12 of the European Convention on Human Rights. It is fair to say that this battle might well have been inevitable but the point remains that unfortunately, had there been an unbiased and objective education exercise from the outset, then by the time the debate began, the public would have been equipped to process the information that spilled out into the public domain from the fall out with the UK negotiations.

Of more importance they would have been fully equipped to make an informed decision in the coming Constitutional Referendum based on information that should have been provided in a holistic and objective manner and not just as provided from the partisan perspective of certain groups, including the perspective of the Government of the day.

Of greater concern for the Cayman Islands is that this episode demonstrated the potential for other problematic issues left unexamined and unexposed in the absence of a major and unbiased education campaign. All of this is contrary to many relevant UN resolutions on the Self-Determination process.

This situation lacks the full debate and information that a complete education campaign would bring in the open to truly enable a final constitutional product reflecting the wishes of the people.

I do NOT believe that this is the intention of the powers that be in the Cayman Islands and clearly all of the parties who participated in the negotiations do believe they are acting in good faith and in the best interests of the Islands or at least of their particular cause. Indeed there is little doubt that the parties that attended did make tremendous contribution to the drafting process, such as it is in that regard.

It is interesting to note that a member of the opposition party<sup>5</sup> declared his support for the draft constitution at a recent political debate forum. He stated that he believed it to be an advancement to the current form of constitution and it is the result of “a collaborative effort between the Government, Opposition and the NGO’s”, (a most unfortunate reference as the public are of the impression that our five member NGO Working Group was included in the constitutional talks with the UK but which were regrettably excluded from the negotiations).

However, the fiery conflict with the Government, the Church and the HRC that spilled out after the negotiations and the divisiveness that then ensued amongst the public who then became aware of the issue for the first time, seemed to display the lack of success of that process. The newspaper polls also do not seem to show this process to have been particularly successful. In March of this year a poll showed that<sup>6</sup>:

- Nearly 60% of the respondents to the poll felt they are either not very informed or not informed at all about the proposed Constitution,
- 18% said they were fairly informed about the provisions of the proposed constitution.
- Only 7.3% said they were very informed about the proposed constitution.
- 15.2% said they couldn’t care less about the constitution!

Another poll in April by another paper, showed the following outcome<sup>7</sup>:

- 33.5% indicated they would vote for the new constitution in the Referendum in May
- 48% indicated they would vote **against** the new constitution in May.

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<sup>5</sup> CaymanNewsService.com 28<sup>th</sup> April, 2009

<sup>6</sup> Caymanian Compass 12<sup>th</sup> March 2009

<sup>7</sup> Cayman Net News 8<sup>th</sup> April 2009

The war of words also led to some interesting terms of appeasement from the Government on the release of the draft bill which included the Leader of Government Business stating: *“half a loaf of bread is better than no bread at all”*, an apparent reference to the disgruntled HRC’s dissatisfaction with not having a free standing non-discrimination section in the BOR. One respondent to the polls was quoted in the papers as saying, *“I’m informed and I’m unhappy about not being offered a complete loaf, a full bill of rights now, not later”*.

The bitter divide that resulted from the controversy also seemed to help create an identification of the constitution with the Government of the day, which is not ideal when it comes to the Constitution.

The Government of the day might have much riding on this, as the Referendum vote is scheduled to take place on the same day as the general elections for the Islands, a week from now! One has to consider the possibility that voters might weigh their views of the Government of the day and reflect that on their constitution vote or visa versa!

As a result of this exercise in the Cayman Islands in respect of the controversial constitutional reform process, clearly the importance for this committee to set minimum criteria that address the process of constitutional advancement towards achieving the ultimate self-determination act has been demonstrated and which should go above and beyond the current criteria outlined by the United Nations, before a jurisdiction can rightfully be said that it has achieved self-determination.

It is hoped you might consider the following:-

(i) EDUCATION

There should be a minimum criteria set for the level of education to be conducted in an Overseas Territory before self-determination can be accomplished. In this instance only with a full and complete education campaign can the people of the Cayman Islands take full ownership and at some level be authors of their own constitution. This would be necessary before a Referendum

on the subject is conducted. With a full independent and unbiased education campaign, the lobbying and petitions of all other interested parties of the day would be welcomed as an informed public can then make an informed decision.

This is in keeping with the UN resolutions and the UK's own obligations to its OT's to provide education on the options available and the corresponding international obligations of the UK. In May 2003 the FCO representative Mr. Roy Osborne was asked at the UN Committee's meeting in Anguilla if the UK would meet its obligations to the Cayman Islands and assist with and promote the education required for self-determination, and we were given assurances in that public forum by him that they would. It is regrettable to say that the UK has to date reneged on those assurances!

(ii) REFERENDUM

At the end of a meaningful educational campaign, a Referendum remains the only fair and reasonable means of determining what the people of that jurisdiction mandate to be included or not in their constitution and the path they have outlined for themselves moving forward as an OT. In our instance it is clear that the Government of the day had intended to utilize a Referendum before the talks with the UK, but the unfortunate time scale scuttled that effort forcing them to resort to having a Referendum after their discussions with the UK.

It would be unfathomable that had a proper Referendum vote been secured prior to talks with the UK that its Administrative Power would or could dismiss outright any proposal that is truly and irrefutably determined to be a proposal of the people, as it relates to our constitution.

The importance of Constitutional Referenda is recognized worldwide and most Constitutional Referenda require the

affirmative vote of at least 66% of the votes cast. However, during the last few days before the Cayman Islands Legislative Assembly was disbanded, the Constitutional Referendum Law was then amended to require only a simple majority of affirmative votes cast on the Referendum.

(iii) FREEDOM TO ACHIEVE SELF DETERMINATION

For the purposes of the exercise of self-determination, it would seem that there must be some clear means of creating an appropriate forum that facilitates a more level playing field between the Administrative Power and the OT, as opposed to a forum that seems to reflect a more Colonial relationship.

In fact we were advised that the impetus behind the rushed timing of this revised form of constitution was the grave and imminent danger of a revised detrimental constitution being issued by decree from the UK.

There is little doubt that when it comes to 'administrative sections' of the process, it might be more challenging in certain more sensitive aspects such as National Security etc, but it is unacceptable that all elements of the peoples constitution should be enveloped in the same shroud of bargaining and negotiations, regardless of the demonstrable wishes of the people. This goes against the inalienable right of self-determination, the resolutions of the UN and the UK's own obligations.

To date the Government's own measure of success on the constitutional reform seems to some degree to have revolved around their negotiating success with the UK on those more administrative matters. The Leader of Government Business of Cayman remarked:

*"none of the groups involved in negotiating the draft constitution with the UK, including the government,*

*opposition party, two churches, the Chamber of Commerce and the HRC, got everything they wanted”.*

This brings home the necessity of a Referendum before the talks with an administrative power as surely what matters is what the Caymanian People want as opposed to only those invited to the negotiating table.

There were several aspects of the UK, House of Commons Foreign Affairs Committee's Review of the Overseas Territories Management 2008 Report to which we hope you might focus attention. Whilst much can be said about the mostly dysfunctional relationship that currently exists between the Administrative Power and the Cayman Islands, time does not allow us to address that or the report in any depth here.

Suffice it to say however that we continue to have faith that this Committee will be able to make progress in achieving the UN objectives and it is hoped the recommendations made herein might be considered. However time is of the essence and with the passage of more time it is increasingly discouraging and it appears less likely that this Committee might be able to achieve its own objective of assisting the Overseas Territories in accomplishing self-determination.

In this day and age, in this new century, it is ever increasingly clear that the people of the Overseas Territories must be provided with assistance to accomplish that right of self-determination which, if it is an inalienable right should, nay must, be attainable albeit ever increasingly elusive.