



**Formal Negotiations on a
New Cayman Islands Constitution**

Second Round

Between

The Cayman Islands Delegation

- and -

The United Kingdom Delegation

Tuesday, 13 January, 2009 – Friday, 16 January, 2009

Held at

The Westin, Grand Cayman

The United Kingdom's Delegation

Mr. Ian Hendry - The Chairman
Ms. Susan Dickson - Legal Counsellor, Foreign and Commonwealth Office
Mr. Michael Bradley - Constitutional Adviser, FCO Overseas Territories Directorate
Ms. Helen Nellthorp - Deputy Head, FCO Overseas Territories Directorate
Ms. Sarah Latham - Desk Officer, Cayman Islands FCO Overseas Territories

The Cayman Islands Delegation

His Excellency the Governor Mr. Stuart Jack
Hon. Samuel Bulgin, QC, Attorney General
Professor Jeffrey Jowell, QC – Consultant to the Cayman Islands Government to assist
in the Constitutional Modernisation Initiative

a National Negotiating Team comprising representatives of:

The Elected Government

Hon. D. Kurt Tibbetts, JP - Honourable Leader of Government Business, Minister of District
Administration, Planning, Agriculture & Housing
Hon. Alden M. McLaughlin, Jr. JP – Minister of Education, Training, Employment, Youth, Sports
& Culture
Hon. Anthony S. Eden, OBE, JP - Minister of Health & Human Services
Hon. Charles E. Clifford, JP - Minister of Tourism, Environment, Development & Commerce
Hon. V. Arden McLean, JP - Minister of Communications, Works & Infrastructure

The Government Backbench

Ms. Lucille D. Seymour, BEM
Mr. Osbourne V. Bodden
Mr. W. Alfonso Wright
Mr. Moses I. Kirkconnell, JP

The Official Opposition

Hon. W. McKeeva Bush, OBE, JP, Honourable Leader of the Opposition
Mr. Rolston M. Anglin
Capt. A. Eugene Ebanks, JP
Mr. Cline A. Glidden, Jr.
Ms. Juliana Y. O'Connor-Connolly, JP
Ms. Theresa Pitcairn-Lewis – UDP Legal Adviser

The Cayman Ministers' Association - Pastor Al Ebanks

The Cayman Islands Conference of Seventh Day Adventists - Pastor Shian O'Connor

The Chamber of Commerce

Mr. Will Pineau – CEO Chamber of Commerce
Mr. Eddie Thompson, President Elect Mr. Stuart Bostock, Vice President

The Human Rights Committee

Ms. Melanie McLaughlin, Chairperson HRC Constitutional Working Group
Mrs. Sara Collins, Partner and Head of Specialist Trust Disputes Group

List comprised from first round of negotiations. Other contributors may not be listed.

TUESDAY, 13 JANUARY, 2009
2008/9 CONSTITUTIONAL NEGOTIATIONS
HELD BETWEEN
CAYMAN ISLANDS DELEGATION AND
THE FOREIGN AND COMMONWEALTH OFFICE

OPENING REMARKS

THE CHAIRMAN: Good morning everybody. I'd like to start by inviting Pastor Eric Clarke to lead us in prayer.

PASTOR ERIC CLARKE: If I can have your attention, we just bow our heads as we pray:

Our Father in Heaven, we're so grateful that You have brought us together to deliberate, to discuss, to share, to negotiate, to plan for this important document that affects generations yet unborn. We thank You that You have given to us life, health, and the strength, that You have blessed us with the wisdom. We ask that You will guide us in the proceedings for this day and the remaining days. Be with those who lead out in it, and we ask, oh, God, that we will come to a resolution that will be in the best interest of the Cayman Islands. Bless each participant and continue to bless this nation that You have founded upon the seas. In Jesus' name we pray. Amen.

THE CHAIRMAN: Thank you, Pastor Clarke.

Governor; Leader of Government Business; Ministers; Leader of the Opposition; Members of the Legislative Assembly; Attorney General; Church and Chamber of Commerce representatives; members of the Human Rights Committee; Professor Jowell; and other members of the Cayman Islands delegation, it is our pleasure to be here again to resume discussion of a new constitution for the Cayman Islands.

I thought we made good progress at our first round of discussions last September, and I had anticipated that we would have pushed on in December but I understand fully the reasons for the postponement. I should like, on behalf of the United Kingdom delegation, to express our heartfelt sympathy to the people of the Cayman Islands, and especially to the people of the Sister Islands of Cayman Brac and Little Cayman for their suffering and loss resulting from the hurricane. I hope you're recovering well and knowing your great resilience I am confident that you will overcome that terrible setback.

In that regard, I should like to congratulate the Cayman Islands government and the Sister Islands MLAs Julianna O'Connor-Connolly and Moses Kirkonell, as well as the business representatives here today for their considerable efforts with the recovery work.

Turning to the business before us, we have a lot of work to do, and I hope we can use the next few days productively. We have as a basis for further work the draft of 24 October 2008 that I prepared in the light of our September discussions. That draft was intended to be a Working Document, and as stated in the note covering it, it was not intended for publication.

There are some outstanding issues noted in that draft and some other notes of explanation. There are also a few gaps where proposed language is awaited from the Cayman Islands delegation. There are some gaps in the preamble in section 70 on people-initiated referendums, and in section 116 on public debt. I hope we shall be able to fill those gaps without great difficulty and resolve as many issues as possible this week.

In my view, the best method of work will be simply to go through the draft of 24 October page by page starting from the beginning of the Draft Constitution on page 10. I think it's sensible to reserve until the end of our meetings the draft Order in Council on pages 2-5 because this contains largely technical legal material, and is to some extent dependent on the Constitution itself. So, I suggest that we begin with the preamble; then move on to the Bill of Rights, where I'm conscious that there are some areas that still require further consideration; and the succeeding parts of the Draft Constitution, in some of which there are tricky outstanding issues; and then conclude by looking at the draft covering order. It is my firm intention to complete this work by the end of Thursday.

On Friday morning we should meet again in public session to take stock of where we have reached and to discuss the way forward in the light of what we have achieved.

I am conscious that the Leader of Government Business formally requested that these talks should be held throughout in public. That request was given careful consideration by the responsible Foreign Commonwealth Minister Gillian Merren, who decided that the working meetings would be better held in private. Her reasons are the same I gave at the first round of talks in September. This is a difficult negotiation in which forbearance and compromise will be required, and a successful outcome is more likely if the substantive talks are held outside the glare of publicity.

Finally, I should like to assure you that the United Kingdom's commitment to a modern effective relationship with the Cayman Islands that takes our partnership into a bright future. Our delegation approaches these talks in a spirit of goodwill and cooperation, and I sincerely hope and expect that this will be reciprocated by the Cayman Islands team.

While recognising that there may be more than one point of view, I hope that the Caymans' side will seek a unified position amongst yourselves rather than, for example, using these talks to make party political points that do not move the discussions along in a constructive direction. I hope we can concentrate on seeking the best constitutional arrangements available for the Cayman Islands with which both sides can comfortably live. Working together - working together - I am confident that we can take important steps this week towards a successful conclusion that will be for the benefit of the people of these Islands.

Thank you very much.

And with that I'd like to invite the Leader of Government Business to make some opening remarks.

HON. D. KURT TIBBETTS: Thank you very much, Mr. Chair, and welcome to you and other members of your delegation.

Your Excellency; my Cabinet colleagues; the Honourable Leader of the Opposition; and my other colleagues in the Legislative Assembly; representatives from the Cayman Ministers' Association; those from the Cayman Islands Seventh Day Adventist Conference; and also from the Chamber of Commerce and the Human Rights Committee; other observers; ladies and gentlemen, it certainly gives me great pleasure, on behalf of the Cayman Islands Government, to welcome all the various stakeholders as we gather this morning for the start of the second round of formal negotiations with the United Kingdom on a new Cayman Islands Constitution.

Mr. Chair, considering that it is winter in the UK, I particularly wish to extend a warm Caymanian welcome to you and your delegation from the Foreign and Commonwealth Office. Even though it is a working visit, we certainly hope that your short stay in the sunshine provides you with a refreshing respite from the weather that you have to endure from whence you came.

As this meeting coincides with the start of a new year, I also wish to take this opportunity, on behalf of the Government, to extend best wishes to everyone for 2009. May you continue to enjoy the rich blessings of good health, happiness, prosperity and success in all of your endeavours during the year ahead.

As I glance around the table, I sense that everyone is refreshed and reinvigorated following the Christmas holidays and we're all rearing to go. Certainly, we on the Government side certainly are. We look forward to a productive round of negotiations and hope that the end product will be the much-anticipated first draft of the new Cayman Islands Constitution.

I wish to welcome the NGOs who are part of these important negotiations: the Chamber of Commerce, the Ministers' Association, the Cayman Islands Conference of Seventh Day Adventists, and the Human Rights Committee. And I want to acknowledge publicly that each of them

has continued to play a very constructive and important part in discussing the draft which you have sent to us, Mr. Chair, from the last round of talks.

I also welcome the Opposition representatives, the Leader and his team, and I am pleased that they are now in a position to give the Constitution their full attention.

If we proceed in the spirit of cooperation and compromise; if we focus on the bigger picture and put what is best for the Cayman Islands ahead of any of our own narrow individual interests, I have no doubt we can achieve a Draft Constitution which reflects the genuine needs and aspirations of the people of the Cayman Islands at this juncture in our history, and which is acceptable to the vast majority of our population by the time our deliberations end on Friday.

Indeed, if we are to have a realistic chance of meeting the tight timetable for a planned May referendum on the new Constitution, this round must – and I emphasise must – produce the first draft for subsequent fine-tuning.

As all of us are aware, this round of negotiations was originally scheduled to have taken place in early December, as you mentioned, Mr. Chair. However, in order to ensure that there would be full participation of the Opposition in the wake of the passage of Hurricane Paloma in November we know it had to be postponed, so we find ourselves now that time is of the essence.

Generally speaking, the Government came away satisfied with the outcome of the first round of negotiations in late September/early October. As the situation now stands, significant progress has been made on most issues, most notably the Bill of Rights. Therefore, we are beginning this second round of negotiations with a good foundation on which to build further consensus.

An agreement is possible and it's attainable. However, it's going to require everyone to accept that the nature of every negotiation is such that no one ever gets everything that he or she sets out to achieve. Every negotiation is characterised by a measure of give and take. You give way on some issues in order to make progress on others. Hence, whatever agreement eventually emerges reflects compromise amongst the participants. The Government has always approached these negotiations with this understanding.

Coming out of the first round, we now have before us a Working Document. It was distributed among stakeholders well in advance of this meeting so that everyone would have adequate time to study the contents and to prepare their positions.

The Working Document is not – and I want to repeat so that everyone including the general public can understand – it is not a draft of the new Constitution. It is merely the UK's team first attempt to produce a document which gives some indication of what the United Kingdom is willing to agree to, based on the submissions made by all

parties at the last talks. As such it will provide the basis for this second round of negotiations.

We are gratified that the UK seems to understand that our goal in these negotiations is not merely to accept the standard constitutional model imposed by the United Kingdom on its various overseas territories. Our goal is to achieve arrangements with the United Kingdom based on mutual support and respect, which recognise the special culture, traditions and values of the people of the Cayman Islands. So, we ask therefore for institutions and standards that are not off-the-peg but which are tailor made to enable our modern society to flourish.

Secondly, we are consciously seeking to achieve a society that is open and is transparent and accountable. We want these features to apply to our own Legislative Assembly and Cabinet and to all our internal institutions of government. However, we feel, too, that is right that they apply in equal measure to the decisions and actions of our Governors, now and in the future, and the decisions and actions of the United Kingdom government.

Thirdly, we wish for our new constitution to be accessible to all of our people. This is difficult for any legal document, which a constitution has to be. However, we wish for people to know and understand how government works and who is accountable for what deeds. And we want our children, now and in the future, easily to grasp from its content that this country embraces the values of freedom, the rule of law and democracy. It is for those reasons that this Government began its constitutional journey, and we trust that all will benefit from the fact that we have done so.

Since the first round of negotiations, Mr. Chair, the Government has continued to engage stakeholders on some key issues. As a result, we are immensely encouraged that agreement on a Bill of Rights appears within reach during this second round. This surely would be a major achievement considering that initially the Bill of Rights stood out as the major sticking point in public debate related to the constitutional modernisation process. It certainly is testimony of what is possible when various interests are willing to sit down, iron out their differences, and come to a common position in the national interest, in the true spirit of negotiations.

The Government wishes to laud the mature approach taken by the various NGO groups, specifically as I mentioned before those who are here: the Chamber of Commerce, the Human Rights Committee, the Cayman Islands Conference of Seventh Day Adventists, and the Cayman Islands Ministers' Association.

Additionally, having reviewed the Working Document, the Government is encouraged by the acknowledgement by the UK of the critical need to improve the constitutional arrangements relating to the key issues of the police administration and internal security as well as the judiciary.

Under the existing 1972 Constitution, His Excellency the Governor has sole responsibility for internal security. However, Mr. Chair, in today's world our people are demanding more accountability from the police and its elected government, especially in the wake of recent developments. The Government is also pleased to see from the Working Document that the UK appreciates the importance of a National Security Council as part of any new constitutional arrangement, although it is clear that further discussions are necessary before we can arrive at a satisfactory conclusion.

Equally, recent events have given rise to concerns regarding matters relating to the judiciary, and so the Government is also happy at the inclusion in the Working Document of a Judicial and Legal Services Commission which will manage appointments and discipline of judicial and key legal personnel.

We're also pleased that the United Kingdom has accepted our view that provision ought to be made for considering Cayman's interests, whenever the UK is entering international treaties that have implications for us here in the Cayman Islands. This is a most welcome development in the context of constitutional modernisation, given the increasingly international nature of our economy here in the Cayman Islands. There have been instances in the past, Mr. Chair, where Caymanian interests were placed at a tremendous disadvantage because of the United Kingdom's obligations under international treaties that it had entered into. These treaties had been negotiated without any consultation at all with us here in the Cayman Islands.

I certainly have not attempted to provide an exhaustive list of the areas of encouraging progress which the Government believes has already been made in our collective endeavour to achieve a good constitutional arrangement for our country. I have simply highlighted a number of the important provisions by way of the examples that I have used. These provide solid grounds for optimism today, as we begin our second round of discussions.

So if I may quickly summarise, these negotiations provide us with an historic opportunity to modernise our centuries-old constitutional relationship with the UK so that it works better for us and the UK in the future. The world has undergone fundamental change since 1972, when our present Constitution took effect, and this fundamental change has had some impact on our relationship with the United Kingdom as an overseas territory. Our needs as a people have also changed since 1972. Today I dare say we are more mature and more confident as a people, and certainly we would like to have a greater say in running our affairs in a continuing partnership with the UK.

A new constitution, therefore, in our view, is the only answer. A new constitution is possible. It is within our reach. Let us use these negotiations to grasp it. I believe that despite any posturing, there is broad agreement on most of the issues. If we have the will, we will

definitely find a way to reach consensus. It is possible. We owe it not so much to ourselves but more to our children, our grandchildren and future generations. We have the opportunity here and we can lay a strong foundation for securing their future by us being able to produce a new constitution.

So, may God guide our deliberations over the coming days and fill us with the wisdom to make the right decisions, and may He continue to bless all of us here in the Cayman Islands and also our beloved UK. Thank you, sir.

THE CHAIRMAN: Thank you very much.

Leader of the Opposition, would you like to make some opening remarks?

HON. W. MCKEEVA BUSH: Mr. Chairman; representatives of the Foreign and Commonwealth Office; His Excellency the Governor; Honourable Attorney General; Leader of Government Business; colleagues; NGOs; members of the press; other distinguished guests; ladies and gentlemen, thank you all for being here.

Mr. Chairman, we have a draft we consider one that we must deliberate upon. There are parts which we would support and have pushed for since 2002 and 2003, such as our involvement in treaties and other such matters that affect us. There are parts we will fight against.

Mr. Chairman, one thing I know is that the people of these Islands want less politics, not more. I believe what is put on paper will give us more politics, not less. I believe what is already on paper will give us more in fighting in these Islands, not less, and certainly will not give us enough representation.

Mr. Chairman, I would have finished there except that I must reply to the mention made by the Leader of Government Business that - I quote his pleas — **they are able to give the Constitution their full attention.** Well, let me reiterate we have always given it — that is the Constitution — our full, fair and equitable attention.

Perhaps, Mr. Chairman, we were not on the television as often as the Secretariat with the Government, nor on the radio as often as the Secretariat with the Government, nor in the papers as often as the Secretariat with the Government as perhaps an Opposition should have been given opportunity so to do. We simply did not have the funds, nor could we use the Government's Treasury as the Government did to get our information out. But we did go to the public. We talk to the public as we continued to do after the first discussions at the Ritz-Carlton, and we believe our position to be solid. Our position is less politics for the Islands and more representation.

Mr. Chairman, therefore, the people will have their say. I am confident they will. And it would be my express joy to help them more

fully understand whatever is derived out of our discussions here, my express joy and my responsibility, and that is what we intend to do.

May the good Lord bless these Islands. May He continue to bless the UK, and let us all hope for a more peaceful world in the new year, and let us be thankful for the mercies that He bestowed upon us.

Thank you, sir.

THE CHAIRMAN: Thank you very much.
Leader of Government Business.

HON. D. KURT TIBBETTS: Mr. Chair, just to quickly mention so we're not off on the wrong foot this morning. When I mentioned the Opposition being able to give full attention, I was simply referring to what had happened with Hurricane Paloma and it was not meant to suggest that the Opposition were not paying the attention they should to the Constitution, sir.

THE CHAIRMAN: Right. Thank you for that clarification.

[inaudible comment from the Leader of the Opposition]

THE CHAIRMAN: Okay. Now, I understand that one or two of the — perhaps all of the NGOs representatives would like to say something. Could we start with Mr. Thompson from the Chamber of Commerce?

MR. EDDIE THOMPSON: Thank you.

Mr. Ian Hendry, Chairman of the delegation from the Foreign and Commonwealth Office and members of his delegation; His Excellency the Governor, Mr. Stuart Jack; Hon. Edna Moyle, Speaker of the House of the Legislative Assembly; Hon. D. Kurt Tibbetts, Leader of Government Business and members of his delegation; Hon. W. McKeeva Bush, Leader of the Opposition and his delegation; Hon. Samuel Bulgin, Attorney General; Pastor Al Ebanks and representatives from the Cayman Ministers' Association; Pastor Eric Clarke and representatives from the Seventh Day Adventist Cayman Islands Conference; Mrs. Melanie McLaughlin and Mrs. Sara Collins, representatives from the Human Rights Committee; members of the media; and other guests and observers, the Cayman Islands Chamber of Commerce membership, council, staff and I thank you for inviting us to attend the second round of these negotiations.

Established in 1965, the Chamber of Commerce comprises 726 corporate and associate members. These businesses and industry associations employ more than 20,000 persons of the Cayman Islands. The mission of the Chamber is to support, promote and protect business and community success so it is appropriate for our organisation to be represented at these talks.

The Chamber's public position on the original constitutional proposal is posted on our website, caymanchamber.ky. Our position is based on the findings of a membership survey conducted in September 2008 and previous surveys dating back to the 1970s.

I want to assure the public once again that our members were given the opportunity to comment on the proposals presented by the Peoples Progressive Movement and the United Democratic Party prior to the start of the talks.

Our survey found that majority of our members support constitutional modernisation which would ultimately lead to increased local control and accountability over our own affairs.

The positions that I will be sharing during these discussions are not my own, although I agree with many, but are based on the Chamber survey results.

While reserving our final assessment until after the talks conclude, I am pleased to say that after our initial review of the discussion draft as developed by Mr. Ian Hendry of the Foreign and Commonwealth Office delegation, it appears that good progress has been made since the talks in September. We regard this second draft to be moving in the right direction in keeping with the findings of our membership survey. The working draft includes several of the provisions that the Chamber membership supports which include:

- Maintaining our ties with the United Kingdom and no move towards independence;
- Incorporating a suitable preamble to the Constitution that reflects the beliefs, culture and aspirations of our people;
- Upgrading the Cabinet;
- Introducing more checks and balances on executive power;
- Modernising the role of the Governor;
- Establishing a Judicial and Legal Services Commission, Human Rights Commission, a Commission for the Standards of Public Life and National Security Council;
- Limiting the role of the Attorney General and outlining the responsibilities of the Auditor General; and
- Harmonising the representatives of various oversight bodies.

As with all negotiations, there will be some issues that remain unresolved that will require further discussion. These include:

- Confirming the functions and responsibilities of the Governor to allow the sharing of power with the Executive branch of Government;
- Confirming the composition of the Legislative Assembly and whether or not to introduce single-member constituencies;
- Confirming the composition of the Cabinet and whether or not the Attorney General and the Financial Secretary should serve as *ex-officio* rather than voting members;

- Confirming the provisions of the proposed Bill of Rights, Freedoms and Responsibilities and its application;
- Confirming term limits for members of the Legislative Assembly.

With a membership as diverse as ours, however, it is challenging in the best of times to reach consensus on any issue, particularly on topics as complex as the Bill of Rights, Human Rights and constitutional modernisation. As we embark on this second round of negotiations, it is likely that there will continue to be differences of opinion on key issues. It is our hope, however, that these issues can be resolved amicably and that these discussions will produce a modern constitution for the Cayman Islands.

We challenge our elected representatives to set aside political differences and to develop a new constitution that protects our unique way of life; provides for a more open, transparent and accountable government and contributes to fair and equitable exercise of power and delivery of public service. The only way that this can be achieved is through compromise and negotiation. It would be a tremendous national tragedy if the constitutional modernisation process fails to reach a satisfactory conclusion.

I wish to raise two final points which we consider important.

It is regrettable that we were not allowed to distribute the Working Document of the Draft Constitution to our membership prior to these talks. This prevented us from entering into open dialogue and discussing key issues that would have assisted us with these deliberations. We would therefore request that we are permitted to share the details of the next working draft with our membership. In this way, we will be practicing the openness and transparency that we are aiming to achieve in the new constitution and will allow more people to become involved in the development of the highest law of the land.

Secondly, we repeat the appeal that was made during the first round of discussions that the new constitution is written in plain English. The second draft makes no attempt to simplify the language of the original constitution and represents more of a cut-and-paste exercise, incorporating the legal language that appears in many of the other Overseas Territories and Crown Dependencies that is intended to be read by legislators and attorneys.

Many agencies of the United Kingdom government have produced hundreds of documents that have received the Crystal Mark from the Plain English Campaign which has been fighting for crystal clear communication since 1979. The Crystal Mark has now become firmly established in the UK as the standard that all government organisations aim for when they produce public information. The mark also appears on documents in other countries including the United States, Australia and South Africa.

The Constitution is the highest law of the land in the Cayman Islands. Let us make the document easier to read and interpret so that everyone, no matter your age or learning ability, can understand how the government works and your rights, freedoms and responsibilities as Caymanian citizens.

Thank you very much for your attention. Look forward to the talks.

THE CHAIRMAN: Thank you very much.

Pastor Clarke, would you like to say a few words?

PASTOR ERIC CLARKE: Mr. Chairman, may I request permission to dispense with my protocol list in the interest of brevity.

I say good morning and Happy New Year to everyone.

The Seventh Day Adventist Church joins the rest of the parties in these talks welcoming you, Mr. Chairman, and your delegation back to our fair shores. We have every reason to believe that this round of negotiations will also prove successful in spite of the points of fundamental differences that remain to be addressed.

While we seek to ensure unanimity among us, we remain focused on our mission at these talks, and there are two points to this mission: one is to represent the concerns of our members; and two, to protect and preserve the social, moral, spiritual values of these Islands that we call home.

Mr. Chairman, we wish to thank you and your staff for the obviously hard work exhibited in producing a Working Document, a working Draft Constitution within the short space of time since we concluded the first round. In our view, it is a fair representation.

There remains one residual point of concern in the proposed Bill of Rights that is fundamental in nature to us. As a church we cannot and will not support any constitutional provision that in our view will have the effect of undermining the strong moral, social and spiritual value of this country. While we seek unanimity, it cannot be at the price of moral compromise.

Consequently, with regards and respect to the nondiscrimination provision in Section 16(2) of the Bill of Rights, the Seventh Day Adventist church cannot support it as it stands. While we're aware that this a model of the European Union Constitution, we strongly recommend that it be modified to reflect a provision with a closed end.

We freely, willingly and unreservedly join the CMA in this respect and all who share this view that prevention is better than cure.

It is our conclusion that we must seek the benefit of globalisation without the attending ills. We can globalise without being secularised, and for those who think we can't we say to them yes we can.

So, we trust that we can arrive at a document that will reflect the will of the people of this country and preserve our rich, spiritual and moral values that have sustained our nation over the years of our

existence, and by so doing we preserve a legacy for our children and their children's children.

I thank you, sir.

THE CHAIRMAN: Thank you, Pastor Clarke.
Pastor Al Ebanks.

PASTOR AL EBANKS: Good morning, Mr. Chairman. I too would like to ask to be excused from the courtesies and protocol that has already been established and welcome you back to the Cayman Islands and thank you for the privilege to be here and be part of these meetings today.

I will just highlight a few points from our document that we have prepared for this morning. We are once again grateful for the opportunity and privilege offered to us by the Cayman Islands government and the UK to be a part of these important discussions.

I want to once again reiterate that we have approached these discussions with the mindset and understanding that the stated objectives of Her Majesty's government and its official representatives regarding the Bill of Rights and the new constitution for the Overseas Territories were well intentioned and clearly spelled out, the need for partnership and mutual respect.

That was particularly spelled out in the "Partnership for Progress" document of 1999, and in which that document expressed that they wanted to reflect the aspirations of the people of the various Territories. Baroness Scotland herself in a later speech talked about the diverse — the differences of the culture, religious observance and societal values that exist in the various Overseas Territories and also between those territories and the UK itself.

In more recent times The Right Honourable Jack Straw MP, has made the following statements: In 2007 he said the **"Human rights are our birthright as human beings: they are not the gift of governments but part of our common humanity."** He further stated in 2008: **"In the United Kingdom we have remained faithful to the principle of Parliamentary sovereignty - whereby no power is preminent to Parliament, where any law can be made and unmade."** He then makes a quote from The Swiss constitutionalist, Mr. de Lolme, and he described this in practice. **"Parliament [Mr. de Lolme said] can do anything but change men into women and women into men"** he quipped.

We believe these are extremely important points that echo many of our concerns, and we aspire for the people of the Cayman Islands to enjoy no less an achievement in our own journey towards constitutional modernisation in partnership with HMG.

The Ministers' Association considers that its position on the Bill of Rights, Freedoms and Responsibilities is fully in accord with these stated

principles emanating from the UK, and we hope to hold the current negotiations to this position.

While we gratefully acknowledge important progress in the first round of negotiations, we also are acutely aware that the UK October 2008 Draft has in some very important and critical respects outlined in this response moved away from this position.

I'd like to restate three of the points enunciated in my opening statement at round one that really form a part of the nonnegotiable framework of our association.

1. While the Legislative Assembly is not the source of the rights of people, it is clearly the most representative voice of the people, and therefore best placed to protect and uphold these rights and the dignity of our people.

2. We recognise the need to balance individual rights with corresponding societal responsibilities, and in particular we support the traditional ideal of marriage and the family. These positions have been stated very clearly by our Government. It has been stated very clearly by the Opposition, and in particular the Seventh Day Adventist, and we believe that the preservation of the values that are so important to us as a community must be maintained.

Pastor Clarke mentioned concern in relation to Section 16(2) of the Working Draft, and we too share very common concerns in relationship to the use of some of the language in that section. And we are particularly concerned in relationship to the definition of "discriminatory" and would like to suggest that one of the considerations that is given during our discussion is that the term "unjustifiably" will be added to that clause and we can discuss that in more detail once we look at that specifics of that document.

In short, the CMA would point out that Section 16 as well in defining "government" also includes the word "courts", and we have reservations also and concerns about the inclusion of the "courts" in that section.

Finally, the CMA has taken careful note of Sections 5(2) as well as PART II of the Constitution dealing with the Governor and his powers. The CMA would like to make abundantly clear that: number one, no individual in any capacity should be placed above the law; secondly, they should have unfettered powers; thirdly, they should not have ability to make or amend laws. We believe this is a function of the Legislative Assembly only and that neither the judiciary nor any other individual or body who may be appointed but is democratically unaccountable to the people of the Cayman Islands should possess such powers. This quite obviously is not the hallmark of a strong democracy or good governance, nor can it be rightly be claimed that this will result in the kind of open, transparent and accountable governance that Her Majesty's government expressly proclaims in it desires to achieve in the Overseas Territories.

The CMA once again expresses sincere appreciation to all for the opportunity to be a part of these historic discussions. We take this privilege seriously and will continue to work diligently with others in our community. We have sought to fairly and firmly represent the concerns expressed to us by many in the community and believe our views have substantial support and weight, being based also in solid research. We therefore have no option but to state emphatically that we cannot support the current draft proposals as put forward by HMG.

Thank you, sir.

THE CHAIRMAN: Thank you very much. Thank you very much. Ms. Collins, would you like to say some opening words on behalf of the Human Rights Committee?

MS. SARA COLLINS: Mr. Hendry, I have the easy brief this morning. I will defer to Ms. McLaughlin who is the chair person of the Human Rights Committee's working group on the constitution, with your permission.

MS. MELANIE MCLAUGHLIN: Mr. Chairman, thank you. I like my colleagues would like to dispense with the formal salutations and simply say welcome back. Thank you for joining us again for the second round.

The HRC remains very grateful, Mr. Chairman, for the opportunity to participate in these talks, and particularly to given input on the proposals relating to the Bill of Rights and the establishment of a Human Rights Commission.

The HRC is encouraged that the delegation was able to reach consensus on a number of points during the first round of constitutional talks, such as the inclusion and enshrinement of the Bill of Rights in the proposed new constitution and the inclusion of rights to education and the environment.

In this second round, the HRC hopes the momentum of constructive and mature discussion on the remaining issues in the Bill of Rights can continue as we all work towards one common goal of positive constitutional change for our Islands and our people, through improved human rights.

In that regard, there remain a number of issues on which the HRC's views have not yet been taken on board, and we do look forward to fully addressing those in this second round of constitutional talks.

The HRC's objective in these talks remains to seek the best protection of rights for the people of the Cayman Islands. Among the remaining issues to be discussed in this second round:

- i. The drafting and language of the proposed Bill of Rights;
- ii. The inclusion of aspirational rights of healthcare and housing in the Bill of Rights; and

- iii. The wording and language used for the right of non-discrimination in the Bill of Rights.

Taking those in turn, Mr. Chairman, firstly, we do also acknowledge and applaud the hard work of all persons involved in producing the working draft documents. However, the HRC remains firmly of the view that the Draft Constitution and the Bill of Rights must be drafted in clear, simple and positive language. In order for the Bill of Rights to have the most value to its people, it must be understandable by all sectors of the populace.

The HRC believes that the importance of having a Bill of Rights which can be understood by all sectors of Cayman's community, including our children, cannot be overemphasised. For this reason, we remain of the view that the Bill of Rights can be better balanced in its drafting, and it should set out the rights in a positive way rather than as a negative concept.

You can take, for instance, Mr. Chairman, the section on non-discrimination in the current working draft. It's phrased from the outset as rights subject to a number of exceptions:

Section 16(1) reads: **subject to subsections (3), (4), (5) and (6), government shall not treat any person in a discriminatory manner.** And that's an easy example of where a lay person may necessarily have to cross-reference the four different subsections of the Constitution in order just to try to understand what right he or she actually has. That type of drafting is not conducive to ensuring that all members of the public clearly understand their rights.

We also believe that the overall format of the current working Bill of Rights is less manageable than it can be. The current working draft Bill of Rights sets out a number of different limitations and qualifications or exceptions to each and every right within the same section. That makes it a bit more difficult to understand and is far more cumbersome.

Instead, the Human Rights Committee would recommend that the Bill of Rights set out all of the rights in positive, simple language and then concisely set out all of the limitations to the preceding rights, together in one separate section.

We believe that that alternative approach will enable all of the rights to be expressed in clearer and simpler language, which we do have the benefit of some suggested wording that we would be happy to contribute to during the talks more substantively.

As an easy example, the right to a fair trial, we do believe we have alternative wording that could deal with that right in a much more succinct way, whereas the current section in the current Working Draft runs for over three pages of the constitutional document alone.

Overall, it appears the current working draft Bill of Rights is based on the ECHR and it includes a number of 'carve-outs' and exceptions based on the current caselaw. However, we believe that the alternative and preferable approach is to draft a Bill of Rights with the underlying

legal principles in mind, while also taking proper account of Cayman's history and culture. That will enable the Bill of Rights to still be ECHR compliant in a Cayman context and be more understandable by the public.

In that regard, the HRC would recommend the following language for the nondiscrimination clause:

(1) Everybody has a right not to be discriminated against.

(2) A person is discriminated against if they are treated differently to another person or persons in an analogous situation, whether directly or indirectly, or suffer any detriment, on the grounds of their racial or ethnic origin, colour, creed, nationality or place of origin, sex, sexual orientation, pregnancy, mental or physical disability, age or other status.

(3) Nothing in (1) requires the legal recognition of same-sex marriages or gender reassignments, such matters being in the discretion of Parliament.

For the sake of clarity and understanding by the wider Cayman community, the HRC fully endorses this alternative approach to the drafting of the Bill of Rights.

There was a previous document circulated to the delegation during this process which the HRC would endorse.

In relation to drafting, Mr. Chairman, the introduction and use of vague, undefined concepts in the current working draft is also problematic. Concepts such as "values", "morals" and "social justice" will be difficult for the courts to interpret and will create greater scope for legal challenge in future.

The HRC is nonetheless pleased to see the inclusion of environmental rights, as well as a right to education in the current working draft Bill of Rights. However, the HRC also believes the inclusion of other aspirational social rights, such as a right of healthcare and a right to housing, are also rights which the Caymanian people generally aspire to give to all of its people and therefore it should also be included.

In conclusion, Mr. Chairman, the HRC will endorse drafting of the kind reflected in an alternative draft Bill of Rights previously circulated to the delegation in the course of this process. We believe that document offers a number of important advantages to the current working draft as it a more balanced document; it sets out the rights in positive and clearer language; it expresses the rights without qualifications or exemptions and simply gives all the limitations in one section. The current working draft by comparison is far more cumbersome. It sets out the right along with a myriad of limitations, qualifications and cross-references all within the same section.

The current document is more easily accessible and understood by all persons; and would be less open to legal challenge as it avoids the overuse of vague concepts such as "social justice"; "morals" and "values";

and overall was drafted with the underlying legal principles in mind, while also taking proper account of Cayman's history and culture.

We remain on hand, Mr. Chairman, to expand further on our position in relation to each of the foregoing points in the coming days. As before, the HRC does not take any formal position in relation to any of the constitutional modernisation proposals which are outside of our mandate or purview.

Thank you.

THE CHAIRMAN: Thank you very much.

Well, unless there are any other comments, I would simply like to wind up by saying thank you for all your contributions this morning. I thought many of the comments made were extremely helpful and upbeat.

I'm always optimistic and will continue to be optimistic to try to reach a result which is satisfactory to all; and as I said earlier with which both the Cayman Islands and the United Kingdom can live comfortably, but above all which will mark an advance for the people of the Cayman Islands and future generations.

So, with that, unless there are any other comments, I would like to bring this session to a close now and then we'll reconvene at half past ten to carry the work forward.

Thank you very much.

RECESS

RESUMED

THE CHAIRMAN: Right. Ladies and gentlemen, I think we should crack on. Is that — can you hear me better now?

In accordance with my suggestion during my opening remarks, I would like to start at the beginning of the Draft Constitution by looking at the preamble, and then move on straight away after that to the Bill of Rights.

So, starting with the preamble, there are I think three gaps where there's a marker indicated that there might be some language forthcoming from elements of the Cayman Islands delegation. And I wondered whether we could check whether any of those gaps can be filled; need to be filled; whether they still represent a wish by the respective parties to add some language.

And the first one is the second bullet point: **Include statement from your position where religion finds itself expressed in moral living and social justice.** Is there a text that we could look at to insert in there?

HON. D. KURT TIBBETTS: Mr. Chairman, I think the Opposition were going to prepare one of the three; the other two we are in the process of preparing a draft. So, rather than belabour that at this point in time, we will get that as swiftly as we can and then we will — we can come back to it and deal with it.

THE CHAIRMAN: Page 10.

All right. Well, as I say, you know, we're open to examining in as positive a light as possible any language you come forward with for filling those gaps. I hope it won't be controversial and that we can simply write them in when they're ready. But, as you know, obviously, as soon as — as soon as possible, I hope this week that we could have those.

Is there anything else on page 10 and the top half — top part of page 11, the preamble that anyone would like to mention at this point? If not, I hope we can go into the deeper waters of the Bill of Rights.

[pause]

THE CHAIRMAN: Good. Well, we look forward to the drafts to fill in the gaps to the preamble.

As far as the Bill of Rights are concerned, you'll see that there's a note under — on page 11, immediately under Part I. **The UK delegation has a reserve on this part pending further consideration. Some points will require further discussion.**

This is merely a marker that I am obliged to put down and repeat now that we will have to consider, and in particular my Minister, Gillian Merren, will have to consider the Bill of Rights in whatever form it emerges from our discussions, in the round of the wider Draft Constitution.

I'm not by saying that suggesting that the draft Bill of Rights is a bad one. I have discussed it with the Minister; and she recognises that putting for the first time in the Constitution of the Cayman Islands a Bill of Rights, protection of fundamental human rights for the people is a major step forward and appreciates the efforts and difficulties that have been difficult in arriving at even at this point.

However, we all know that this draft — there are some elements in this draft which are unusual by comparison with the equivalent parts, fundamental rights chapters of other Overseas Territories constitutions; it has its own features. That's not to say that that's a bad thing. I mean, I take the point that was made this morning that a constitution of the Cayman Islands ought to reflect the culture and history and special features of the Territory. There is no one-size-fits all which is taken down off the peg. But there are features of this that our Minister will need to take a final view on in the round. So, all I'm saying is, we have to maintain that overall reserve so that she can examine the result in the round.

Subject to that caveat, which I'm obliged to make, we are open to discussion of the draft, with a view to trying to iron out any wrinkles in it. One or two points were referred to this morning which we shall — we knew we would have to come back to.

But what I would simply suggest as a method of work is that we go through it section by section and see where we stand with it starting with Section 1.

And by way of explanation, there is a note at the bottom of Section 1 which says **By contrast with the working draft of 30 September — that was the working draft of the Cayman Islands delegation — (3) includes the courts. This is consistent with the UK Human Rights Act and the constitutions of other British Overseas Territories which do not restrict the application of the Bill of Rights to the courts.**

And we changed — made this change in this draft because we were unclear — remained unclear after the first round why it was that the courts were excluded except to the extent that provisions such as those relating to fair trial which obviously apply to courts. We were unclear why the courts should be excluded from the application of the Bill of Rights at the end of the first round. I don't know whether there is any comment on that point that anyone would like to make.

PROFESSOR JEFFREY JOWELL: Can I comment, Mr. Chairman?

The Section 1(2) (b) and (c) make it absolutely clear that the application of the Bill of Rights under this Constitution will only have vertical effect. In other words, it is a document that restricts the rights of government against individuals and it doesn't apply to matters between individuals. And this was a point which seems to be accepted because 1 (2) (b) and (c) have been accepted.

In the United Kingdom definition of “public official” — not government but public official — includes the courts. It was a bit of a surprise when it was introduced and it's unique to the UK. I — the other BOTs don't have the provision; they don't say anything particularly about it. But it was inserted in the United Kingdom because the United Kingdom seemed less concerned about horizontal application, and it was thought at the time of its introduction that the courts might, since they are bound by the Bill of Rights, feel that even in individual-to-individual litigation they should therefore apply the Bill of Rights. It hasn't worked out that way in the UK. There has been, of course, some horizontal application, but not because of that provision.

So, the Government feels that including the courts in the definition of "government" is unnecessary because it seems as if it may, although it's very unlikely that it would, contradict the very clear provisions of Section 1 (2)(b) and (c) which makes it absolutely beyond any doubt that the Bill of Rights does not affect directly or indirectly our rights against anyone other than the government.

Secondly, to call the courts part of government is misleading. Courts are not regarded as part — and even in the UK definition courts aren't considered government, judges are considered public officials. That is true, too, to some in Section 79 of the Gibraltar constitution. It includes under the definition of "public office" judges, but not for this purpose, not for this purpose at all, for purposes of civil service positions.

The BVI and the other constitutions say absolutely nothing about courts being public officials. In fact, they're specifically excluded. And you look at BVI Sections 2 and 3 where they define public office, courts are excluded from that, not included at all.

So it's confusing to regard courts as part of government. That's not the purpose of the Bill of Rights, not to — for individuals to have rights against the courts when they invade their rights. And that's made absolutely clear also in Section 29, the definitions of — Sections 28 and 29, the definition sections that excludes courts from the definition of public official.

So, this provision is unnecessary insofar as it might imply — although it hardly probably would — that the intention of only vertical application is called into question by bringing the courts into the notion of "government". It's confusing because courts are not part of government. And indeed elsewhere where government is defined, it is Her Majesty or the Governor, we would say also the Cabinet, but never the courts. So it's inconsistent with other parts of this constitution and unnecessary. So, we would ask that that provision be as initially drafted and the courts be taken out.

PASTOR AL EBANKS: Mr. Chairman, if I might. In the text of our — full body of our written submission, we similarly deal with this subject on page 5. And while we are by no means attorneys, we have had the benefit of some legal advice on this issue.

And as Professor Jowell has so capably put it, we do have concerns about the general inclusion of courts in the definition of governments — of government in this section, and our concern that it could either explode or destroy the intention to restrict the vertical application as we've pointed out in our letter, sir. Thank you.

HON. SAMUEL W. BULGIN: Just a general observation. In addition to the point made by Professor Jowell, the — there's some practical issues that have — probably need some clarification, and it has to do with enforceability.

Let's assume, for example, that there's an allegation that the Grand Court has breached someone's right or go to the Court of Appeal, for example, as an allegation. How is it envisaged that that would be enforced in order to translate to some sort of a remedy under the Bill of Rights?

THE CHAIRMAN: Do you want to say something, Susan?

MS. SUSAN DICKSON: Thank you.

I think the point that Sam has just — I think the point that Sam has just made, if I understood it properly, is the concern I had in reading this. Because if you exclude the courts — I see what you're saying, the point of the courts not being government, and then there's this concern about horizontal application. But if you exclude the courts specifically from this, what happens if somebody's being discriminated against by the courts? For example, the court is sitting alone, the judge is sitting alone, male juries or, you know, and they allow certain things to happen and the courts are discriminating. How does the person bring a case? Because the effect of this is not that it takes the court outside of the application of the rights of provision in this chapter.

PROFESSOR JEFFREY JOWELL: I'll respond to that.

In the previous draft it is of course accepted that in a number of provisions the courts are bound in respect of fair trials, articles, various articles under the convention rights 5, 6 and so on. Under discrimination provisions courts — there are other principles, we discussed this last time, such as the rule of law which require equal access to law, which is a basic constitutional principle and it was not necessary to be placed in the Bill of Rights.

So, in respect of those areas — and this was the intention the previous draft — where the courts are — it is relevant for the courts to adopt the standards of the Bill of Rights. Of course they should be included, but by no means across the board. And, of course, there is, then, the question rightly raised by the Attorney General of enforcement. Do you go to courts to enforce a duty of the court, or do you simply appeal and then go up to the Privy Council in the normal way, if necessary just go to a higher court? It's very difficult to deal with the situations from the point of view of enforcement.

But I think the principal issue is that there is no other Bill of Rights anywhere that includes the courts under the definition of public officials specifically in that way. And it's unnecessary for these purposes insofar particularly as it may seem to contradict, although it's doubtful that it would, and for the avoidance — and it's important to be clear on this matter, the provisions of Section 1 (2)(b) and (c).

THE CHAIRMAN: I — sorry I'm sounding terribly loud. I frightened myself. No, I wondered this point about horizontal effects seems so clear in Section 1(2)(c) that I didn't really follow why there was a worry about the courts being included.

I mean, let me say I don't think from my point of view, from our point of view this is a big issue. I think it's — I think it's a soluble issue.

But I just wanted to be clear, there are two ways of fixing it in your favour it seems to me. One is to revert to the language in your draft of — from the last round which would say **but shall not include the courts (except in respect of certain specified sections)** your draft Sections 5, 6, 18 and 21 to 26 inclusive which would need to be modified slightly because the numbering is slightly different in this text. That's one way of looking at it.

The alternative is simply to delete **and the courts** in Section 1(3). Public officials is defined in section 29 quite rightly — thank you for pointing out that typo — and the legislature.

Do — I'm not sure that — I suppose the first is a better way of dealing with it because it does actually recognise that the courts — there are some sections which obviously affect the activities of the courts.

PROFESSOR JEFFREY JOWELL: I think that's right. I think that certainly we couldn't deny that the courts would be affected by those sections which speak to judicial procedures in particular.

THE CHAIRMAN: You're quite right to say that the other Overseas Territories constitutions don't actually say anything about this point. And I suppose the — it is left therefore for the courts to determine in a particular case to what extent these fundamental rights are directly applicable to them or not.

So, I take the point that by turning it round in this draft and specifically saying that the government includes the courts, we're actually sort of going a step further than is done in other Overseas Territories' constitutions.

I mean, can you leave that one with us? We'll consider it amongst ourselves, but as I say I think my inclination would be to — if it causes serious concern for you, to see if we shouldn't revert to the drafting that you had earlier and mention specific article — I think it would be Sections 5, 7, 19 and 22 to 27 probably because of the renumbering.

Would that make you happy, Pastor Al? I'm very keen to make you happy.

[Laughter]

THE CHAIRMAN: Okay, can we then move on to — unless there's anything else on that section can we move on to Life?

I didn't have any note of any — anything else stemming from last time, nor did I on torture and inhuman treatment, except that by comparison with the earlier draft the Cayman Islands draft we had moved to a separate section, the provisions about treatment of prisoners,

and they now appear in Section 6. And I think we telegraphed that we preferred that at the last round because it seemed to us slightly unhappy to lump together the treatment of prisoners with the fundamental prohibition on torture and inhuman treatment, which is rather a higher grade of bad behaviour, if I can put it that way, than the treatment of a specific category of people/prisoners. So, we thought it would be preferable to separate those out. There is no substantive difference between them. It is simply a matter of presentation. And I quite like the short, sharp prohibition single sentence in section 3 so that's why we did it that way.

PASTOR AL EBANKS: Mr. Chairman, if we might just step back to 2 for a moment.

Among the discussions that we have had — and again we make a note of this in our presentation on page become page 6 just for your reference if you want to look at it at a later stage — again we don't want to be an unnecessary fly in the ointment over some of these matters, but we are concerned about the rights of the unborn in relationship to this section. And while right at this particular point in time we are — we don't want to argue any particular points, we are doing some further research on this and I just wanted to flag it as a potential issue that we may want to come back to in the next round of talks if necessary.

[pause]

THE CHAIRMAN: Right. Section 4: Slavery/Enforcement of Compulsory Labour.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, just to — a small sort of drafting point, really. Is — there is a — there is a definition of “disciplined force” in the interpretation section at the back, Section 29.

THE CHAIRMAN: Yep.

HON. ALDEN M. MCLAUGHLIN, JR.: And since — since this phrase, this term really only appears in the Constitution in relation to this section, we are suggesting that it makes more sense and would lend to easier reading and interpretation of that section if we moved the interpretation of disciplined force, which is in Section 29 at page 31, to this section. As I said, it's just a drafting point, but we think an important one.

THE CHAIRMAN: Yes. I thought there were other references to it, but I may be mistaken. Anyway, I note your suggestion. I mean, I'm in favour of putting definitions closer to where they're referred to if that's possible. So, let me just make a note.

Section 5.

MS. MELANIE MCLAUGHLIN: Mr. Chairman, in relation to Section 5, as we alluded to in our opening statement, the HRC has some suggested language that we think will substantially improve this section on drafting. The suggested language which we will circulate later this afternoon deals with the right to personal liberty in a much more concise way. As we mentioned, this particular section is very extensive. It goes on for around two, almost three pages. We do have suggested wording which we think accomplishes the same objective in a much more succinct way.

More specifically in relation to this section, if we look at Section 5(4) overleaf on page 13, amongst the various points with which we would recommend the drafting be revised, the right of representation alluded to in this particular (4) seems to be somewhat at odds with the section, Section 7(d) which relates to legal aid.

And the principal point here is that in some places in the Bill of Rights it appears as though the Bill of Rights itself actually prescribes down to legislation rather than taking a — an overarching view of the substantive legislation which flows beneath.

For instance, where we've used language such as third sentence after (4) **when a person arrested or detained is unable to retain a legal practitioner of his or her own choice or be represented by a legal practitioner at the public expense as may be prescribed by any law, he or she may be represented and hold private communication with such person as the court may approve.** But the use of the language such as **may be prescribed by any law** again, as I mention, seems to us to defer down to the subservient legislation rather than taking an overarching view. And again, that point will appear in a number of other places in this — in the draft Bill of Rights.

With that said, Mr. Chairman, we would obviously like to circulate the suggested wording which we hope will find agreement and favour with the delegation and with yourself.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, if I ... this I think comes from the draft produced — the Working Document produced by the government at the last talks. And it is — the language is quite deliberate and that is because a number of these rights bring with them considerable cost to the government if they remain open ended, and we talk about that when we come to the treatment of prisoners and some of the ensuing sections.

But the reason why the legal representation point speaks about **as prescribed by law** is to recognise that under — or in the present system which we have, legal aid is granted in prescribed — only in prescribed circumstances which are set out in the Legal Aid Law. So, we are — we are trying to be careful not to grant an overriding right to legal

representation in all circumstances, else we already have significant issues with funding legal aid in this jurisdiction. We are truly going to be in trouble if that's — if that's the outcome of this exercise.

THE CHAIRMAN: Thank you. I have two comments really.

I mean, I think the ... I — on this point about legal aid.

Personally, I don't think it would really matter if in this subsection, Section 5(4) the words **as may be prescribed by any law** were deleted because all it's saying here is that the rule here **where a person arrested or detained is unable to retain a legal practitioner of his or her own choice or be represented by a legal practitioner at the public expense because it is not allowed to that person under law** you don't need to say that. Then the rule is that **they may be represented and hold private communication with such person as the court may approve**. That's all it's dealing with, so it's actually providing a test here for legal aid. For that you have to look at two pages on to Section 7(2)(d). That's the crucial place to find out what the fundamental rights of free legal assistance is. So personally I wouldn't have thought there was a problem.

The second point — but I mean, you know, that's just as a matter of drafting. I don't think it matters one way or the other in this particular place.

But the more general point is this, and I hope this won't be taken the wrong way. But taking note of what Melanie was saying in her opening remarks, I am slightly concerned that there is — she referred to a text, an alternative text to this Bill of Rights, and no doubt you will be pulling bits out of it and circulating them to us, but I have never seen that text before. I don't know what you're talking about when you refer to that text.

What we have done with this draft Bill of Rights is taken the Bill of Rights, which was put forward by the Cayman Islands delegation — which you all form part — last time. And on the assumption that that was a consensus text between you, it's the only way we can view it. And then we reproduced it with some changes in this revised working text but respecting 90 per cent of the language which you put to us in a great effort to be as helpful as possible.

Now, please don't take this the wrong way. I'm not suggesting that any revised language you might suggest would make matters worse. I'm only concerned about two things: one is time. Have we got time to look at substantial revisions of text, especially if they are now only produced the first time today? And this is a complicated matter, you know, that we have to try and focus on. And the other is how do we treat such alternative language? Is it simply the language that the Human Rights Committee, with all due respect, would regard as good, or is it endorsed by the Cayman Islands delegation? Because in the end this is, from our

point of view, a bilateral discussion; it's the UK government on one side, it's the Cayman Islands delegation on the other.

So, we would just want to know that anything that's — is it text put forward by the Human Rights Committee, its own preference and only its preference, or is it endorsed by the Cayman Islands government and their representatives and your representatives and the Opposition? We just need to know what it's — or backing it has. And my main concern, really, is effective — effective, you know, using the time effectively to get to a result.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman?

MS. MELANIE MCLAUGHLIN: Mr. Chairman?

HON. ALDEN M. MCLAUGHLIN, JR.: Shall I say that the text which we regret, as the Government, the Human Rights Committee has referred to is an early — a very early draft on our part of the Bill of Rights which was mistakenly sent to them which we backed away from based on the consultation that we had had with the other stakeholders around this table, on the basis that we concluded it would not meet with their approval. And as I say, we regret that they referred to it.

I doubt seriously, unless they have been really changed positions on the part of the other NGOs — and I say that because we met with them, including the HRC, very recently — that the proposals put forward, or proposed to be put forward by the HRC in this regard, are going to be helpful to getting us to a point where the entire team, Cayman Islands team, can support the document that goes ahead.

There is — there is a great deal of merit in what the HRC say about the need or their desire for greater clarity and for these rights to be expressed in more positive terms. Personally I share that view. But our experience, a lot of it bitter, over the course of these past eight years tells us that we will not achieve unanimity on that basis. The reservation is not just within this room, but within this community about the impact of a Bill of Rights are still considerable and if we proceed down the road that we want an ideal document I fear, sir, we will wind up with nothing.

MS. MELANIE MCLAUGHLIN: Mr. Chairman, if I may elaborate further on Mr. McLaughlin's points.

Just to confirm that the draft that was circulated by the government did not represent consensus on behalf of the HRC. We made that very clear in the very first round and we stated for the record that we had not had an opportunity to address a number of the points that we had raised, so the subsequent draft did not represent our position. I believe it also did take some pains to say that was the Government's belief on issues in which they had received consensus, but there remained a number of still outstanding issues which needed to be

ventilated, on which we did not at that time have an opportunity to discuss fully.

In any event, the document to which we have referred to would not be — is not being produced for the first time. It was circulated to the Cayman aspect, to the delegation, unfortunately not to yourselves, so the other NGOs and the Opposition, for instance, will have seen the language.

PASTOR AL EBANKS: We haven't seen it.

MS. MELANIE MCLAUGHLIN: You haven't seen it. But it's simply a style point, it's not a content issue, and that's why we've made reference to that. And we still think there is going to be some merit in having that. The language certainly — and everyone seems to be agreed to this, the language can certainly be improved considerably.

THE CHAIRMAN: Well, I think the — I think the best way to proceed for the time being is to continue to go through this text in this draft. You — we can spend a lot of time arguing about whether this is presentationally better than that and, you know, there are different points of view about that.

But actually it — you know, much as I would like to see simple language where one can get it, all of my professional life I learned the lesson, mostly actually in the context of treaty negotiations — and I know Susan will agree wholeheartedly with this — is that to reach agreement on language, it is often necessary to use more words than you would like to. And one could draft in the most beautiful, concise, precise language using no more words than are absolutely necessary and that would respect the English language perfectly. But if the — if the people you're negotiating a text with still are not happy because they fear that it could have some consequence or another, that might not even be precisely foreseen at the moment, then you look for a different way of saying it. And sometimes you say it in a very circulative and very long-winded way and they're happy; and the pragmatic solution is to go with the circulative long-winded way because that gets an agreement more easily than the short way.

But anyway, if — what I would suggest is, you know, if there is — if there is — I don't want to say that it would be a waste of time to look at any language the Human Rights Committee might come forward with in the alternative because, for example, I recall that you read out language specifically relating to discrimination, which we're coming to which might, you know, which might help us to solve the problem.

So, I think what my plea would be is much as though it would go against your grain to have a perfectly drafted document, to — if you could concentrate on this text for the time being and see as you have done where there are improvements that could be made in substance as

you've indicated already once or twice, that would be very helpful and then we can examine that. What I fear is if you produced text which is really more root and branch revision we might not — well, you know, we could sit here till two o'clock in the morning. I'm quite happy to do that, but I'm not sure everybody else would.

MS. MELANIE MCLAUGHLIN: Agreed, Mr. Chairman. We do accept that presentation is actually fundamental. The effectiveness and usefulness of the Bill of Rights to the people that it affects in large part hinges upon how accessible it is, how easily understood it is. And where we introduce unnecessary wording I think we only leave ourselves more open to room to be misunderstood, and therefore — and furthermore open to more legal challenge.

For the record, I think we can leave it to — suffice it to say that we think it would be a mistake to lose the opportunity to improve the drafting where we can both for presentation and substantively. We must appreciate that the Bill of Rights is meant to articulate rights to people across all sections of the communities, and fundamentally important that it's accessible and easily understood, and where we're able to accomplish that I think it would be remiss of us not to do so.

With that said, where we have suggested language to possibly improve that substantively or presentation-wise, we'll be happy to put those forward moving along against this current draft.

Thank you.

THE CHAIRMAN: Thank you very much.

Just on your point on (4), I'm just looking at Alden McLaughlin. Are you happy to — would you be content to leave out **as may be prescribed by any law** in this subsection because the real test is — for legal aid is in section 7(1)(d) when we come to it.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, you're absolutely right. The real test is in the other section, but we felt that because this bit came first that it was important that we — we make it clear, for anyone who might think otherwise or may wish to argue otherwise, that this is also subject to — or is only permissible as prescribed by law.

THE CHAIRMAN: But don't you think — and I think the Human Rights Committee is actually right on this part, that as it's drafted now there's an inconsistency with section 7(2)(d), because it looks as if the test here is as may be prescribed by law and the law could prescribe yea or nay or anything. But section 7(2)(d), which of course we've yet to come and look at, has the crucial questions, the crucial tests the interest of justice will require. That's the dominant controlling factor as to whether the law may or may not prescribe legal aid. That's the key test.

But that test is not reflected in section 5(4) I think that was the point if I understood it correctly, and that if it doesn't really do any harm to take out **as may be prescribed by any law** — because I don't think it does in section 5(4) — why don't we just do that and then make sure we've got wording that's appropriate in 7(2)(d)?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I'm afraid I don't see the inconsistency at all. Section 7(d) speaks about ... 7(2)(d) that **everyone charged with a criminal offence has the following minimum rights. (d) is defend himself or herself in person or through legal assistance of his own or her own choosing, or if he or she has not sufficient means to pay for legal assistance, and the interest of justice so require through a legal representative at public expense provided to an established public legal aid scheme as prescribed by law.** And the section that we are discussing talks about — I've lost it now.

PROFESSOR JEFFREY JOWELL: 5(4).

HON. ALDEN M. MCLAUGHLIN, JR.: 5(4) that **a person arrested or detained** — the relevant phrase **a person arrested or detained is unable to retain a legal practitioner of his own or her own choice or be represented by legal practitioner at the public expense as may be prescribed by law.** I just don't see how that is inconsistent with —

THE CHAIRMAN: Would it help if we instead of saying **as may be prescribed by any law** we inserted that — we substituted for those words in accordance with Section 7(2)(d)?

HON. ALDEN M. MCLAUGHLIN, JR.: That's fine.

THE CHAIRMAN: Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: I just don't want there — it to be possible that people can argue that —

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: — the two provisions are, in fact, inconsistent and that one confers a right that the other doesn't.

THE CHAIRMAN: Okay. So we'll say **in accordance with** — **in accordance with Section 7(2)(d)** instead of **as may be prescribed by law** and then you've got a cross-reference to it. That's where the test is.

HON. ALDEN M. MCLAUGHLIN, JR.: Fine.

THE CHAIRMAN: Okay, good. Anything else on this section? If not, treatment of prisoners. And as I said earlier, we simply took from the Cayman Islands draft (2) to (4) of Section 3 of that draft and put them into a separate section. There is a typo I noticed in Section 6(3) the third line. Instead of — in the middle it says **to have any criminal proceedings**. It should actually say **shall have any actual criminal proceedings** to make the grammar correct. But I've heard it muttered since coming here over the weekend that there's a substantive difficulty with this section, so we better have a look at it in substance.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, let me just start by saying, sir, that the Government thinks that these provisions should remain. But we have to acknowledge that there is — we have a problem in this country with the segregation, the proper segregation of prisoners. It is something that we must absolutely address and address as quickly as we possibly can. But the fix has a significant price tag. Millions of dollars. Essentially we're talking about the need to build separate accommodation for juvenile prisoners. And we believe that this is such an important provision that notwithstanding that, that it should remain. But what we are — what we are recommending, what we are suggesting, sir, is that when we — when we come to talk about when the Bill of Rights actually takes effect in these Islands that we look carefully at this particular provision. What is proposed in the working draft which — or Working Document which was sent back is that the Bill of Rights would not come into effect for two years —

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: — after the appointed day.

Looking at it from Government's side in terms of the need to have the funding and the time to actually construct the facility, we would ask for a longer carve-out — a special carve-out to give a longer time in relation to compliance with this particular provision. But we believe the provision ought to remain in the Bill of Rights. It's just not right not to have segregation of juvenile and adult prisoners.

And just, sir, to say that we — from the Government end we thought four years would be what the government would need to make sure this happened.

THE CHAIRMAN: I see. So, one would have — one would have — one would have a provision in the covering order which would delay the coming into force of this part of the Constitution for, say, two years, then a further one saying and Section 6(2) and (3) may be brought into force at a later date even than that perhaps without even — well, one could

specify how long, a further two years or something like that. Is that the idea?

HON. ALDEN M. MCLAUGHLIN, JR.: Yes, sir.

THE CHAIRMAN: I think from our point of view it's preferable to have that than to take these provisions out. I mean, I think it would be an awful shame, especially by comparison with some other Territories which have been able to accept them and are not as well endowed as Cayman Islands.

HON. D. KURT TIBBETTS: Mr. Chair —

THE CHAIRMAN: But I do know the problem I mean I know your history of the problems with the prison, so please don't misunderstand me.

HON. D. KURT TIBBETTS: Well, we wouldn't want to leave it open ended because that's good for no one.

THE CHAIRMAN: No, no.

MS. MELANIE MCLAUGHLIN: Mr. Chairman —

THE CHAIRMAN: There should be a time limit.

HON. D. KURT TIBBETTS: A defined time limit.

MS. MELANIE MCLAUGHLIN: Would the Government be able to indicate whether there are any other carve-outs which they are considering so that we may properly consider those rather than doing so piecemeal on an ongoing basis? That would be helpful as well, please.

HON. D. KURT TIBBETTS: Mr. Chair, I don't think we're dealing with it piecemeal, sir. As we come to each section we will deal with it when it comes and what's — and anyone can have the right to consider all of them together or singularly after it's done. I just — I don't have any specific — any other specific one at this point in time, but I don't think it's going to disrupt the way of thinking as we proceed.

THE CHAIRMAN: So, should we then think in terms of allowing a further period of grace of two years/one year two years after the initial two years, so two plus two? Two years beyond the first two. Yes, Susan, please.

MS. SUSAN DICKSON: Thank you.

I'm just looking at the reservations that the UK made to the International Covenant on the Civil and Political Rights ratified, and there is — there is a reservation in relation to mixing juveniles and adults for the OTs. It says **where any time there's a lack of suitable prison facilities or where the mixing of adults and juveniles is deemed to breach the government of the United Kingdom reserve the right not to apply the provision prohibiting mixing of juveniles and adults.** I think — I mean ultimately we would want to remove that reservation so you know we should still be moving towards segregated.

The other point I wanted to make is in fact that there is a reservation about separating remand prisoners from convicted prisoners, but that is only in respect of Gibraltar, Montserrat and the Turks and Caicos Islands. So, currently the Cayman Islands does have an obligation to segregate remand and convicted prisoners. So I think that that's probably more a priority and that's something that really has to be sorted out because you're in breach of that obligation and reservation applied. So I think we should be moving towards segregation of juveniles and adults and the remand and convicted prisoners. Probably the second category is the more urgent one.

MS. MELANIE MCLAUGHLIN: If I may add one — two final points.

Bearing in mind the way the talks have progressed, I think it's helpful if we state that although we've heard the Government's point in relation to the carve-out, the Human Rights Committee are not agreeing upfront to this. We will need to consider it in full with the committee. And on that vain, we have already previously issued a report in relation to Cayman's obligations under the Convention on Rights of the Child which does apply to Cayman which obliges the government not to treat juvenile prisoners in a particular way. At the moment they take pleas without representation, they are mixed with adult prisoners, and various other *prima facie* breaches continue to occur. So, we will have further — a further position to — and a point to make in relation to the proposal for an additional two-year grace period carve-out in relation to this section.

GOVERNOR STUART JACK: There's just one further point for consideration I just wanted to throw in which is not suggesting one solution or another.

We have certainly in the last couple of years given quite a bit of thought to these issues, specifically the treatment of juvenile. And one of the arguments which has been made is, if we had a situation — and we have had this situation certainly with girls — we only had one person who fit into that category, and we had that one person alone in an institution, that would actually raise other issues of whether treatment was inhumane or not. It's not just a matter of [inaudible recording] it is

actually quite complex under the human rights issues involved in this simply because of the issue we're dealing with.

THE CHAIRMAN: Thank you.

MS. SUSAN DICKSON: Sorry, can I just add to that? There is a similar reservation under the Child Convention in relation to juvenile [inaudible recording].

MS. MELANIE MCLAUGHLIN: We have already published a report outlining our position in relation to the treatment of juvenile prisoners which we can provide copies of if. It's for ease of reference if anyone is keen. But we have stated our position and we simply want to say for the record that we're reserving our position in relation to the additional proposed carve-out relating to this section and any others as may arise.

Thank you.

THE CHAIRMAN: Right. Shall we move on, then, to Section 7?

Well, the first two words should be joined **everyone** instead of **every one**. And I wanted to raise a point here myself with your indulgence because it only occurred to me when reading it. And that is at the end of (2) there is little (g). **Everyone charged with a criminal offence has the following rights: (g) when in the Grand Court to have the right to trial by jury.**

Now, the trial by jury, of course, is regarded in a sort of sacrosanct way in many common law jurisdictions, but it is not in this day and age even [inaudible recording] inevitable. And moreover there is no international obligation of which I'm aware which requires a person to — requires that person to have the right to opt for trial by jury or consistent with trial by juries.

This isn't one where there's an allegation of meeting an obligation which needs to be reflected. I wonder whether — I think this provision here (g) because it is taking [inaudible recording] constitution of Bermuda and the constitution of the Turks and Caicos I think on my memory. But it's not a thing which is in some other overseas constitutions.

And I'm wondering whether it would be wise to keep this (b) in because there may be circumstance in the future where it would be thought appropriate to legislate to provide for non-jury trials in respect of certain offences. And there are certain offences in the UK which can be tried without jury, and it is a bit of a live issue. So I don't know whether, Sam, would you like to comment on this point or?

HON. SAMUEL W. BULGIN: [inaudible recording] I hear the point you make about the trial being [inaudible recording] for other jurisdictions [inaudible recording] block trials where it is for a number of reasons

including where juries are intimidated [inaudible recording] it's impractical to have a jury trial. I don't [inaudible recording] but we certainly at some stage might have to give consideration to [inaudible recording] trial particularly as it relates to offences [inaudible recording] firearm offences. But if current trend continues we might well have to look at [inaudible recording] them matters. And so, we think in the circumstances [inaudible recording] certainly to [inaudible recording] if language is not [inaudible recording] certainly [inaudible recording] object to that the language would be [inaudible recording].

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, spoken like a true prosecutor.

[laughter]
[inaudible recording]

THE CHAIRMAN: Michael, yes, please.

MR. MICHAEL BRADLEY: I don't want to delay matters further in this respect, but I think possibly one of the downsides of — and I'm speaking for myself living here — in keeping this in **have the right to trial by jury** can mean in certain circumstances that in order to cure an illness in the society that we're part of that legislation could be passed enlarging greatly the power of the magistrates court where there's no right to trial by jury and not on indictment. And I think that for very serious offences that if possible a trial should be in the Grand Court rather than reduced to a magistrate's court, and I think that there can be a knock-on effect if in order to solve a social ill it's determined that trial by jury is not appropriate. And the only way to do it is to put it in to a court other than the Grand Court.

THE CHAIRMAN: Governor.

GOVERNOR STUART JACK: Without being a lawyer, I understand Mr. Bradley's logic. But I'm aware we have a problem in this community, and we do have this problem in this community and I think everyone around this table knows we have a problem in this community with actually the most serious offences of serious violence of gun crime, of murder, where even if a jury is not actively intimidated by the actions of somebody associated with a defendant, the jury may not, to be absolutely blunt about it, have the courage to convict somebody because they may fear the consequences.

And while I am the last person that wants to erode any human right or any safeguards, if we're going to deal with the sort of problem which concerns everybody in this community, has for a while and does particularly at the moment, it may be regrettably that we would have to

look at some such provisions for trial by judge alone, with all the other safeguards and possibly other additional safeguards built in to make sure that it is a fair trial. That is my personal view.

THE CHAIRMAN: I mean, the — the fact is that at the moment there is no constitutional right to a trial by jury because there's no constitutional provision in the current constitution about it at all, as far as I'm aware.

So, I mean, the question that went through my mind was introducing — if there is a new constitution which the first time introduces a constitutional right of trial by jury on indictment in the Grand Court, one is then for the first time taking away the flexibility to do otherwise. I mean, that doesn't sound quite right to say one is losing flexibility.

So, it isn't as if by deleting paragraph (g) one is deleting the right to trial by jury. It would still be a matter for the legislature to determine whether to make any alternative provision in the light of the situation at the time it came to consider it. It's a matter of not closing off an option, I think, rather than, you know, deciding a policy one way or the other. But I mean I quite accept that this has come a bit out of left field for you to consider immediately, so I mean, by all means if you want to think it over further then do that.

Okay, shall we go on? Is there anything else on this page 15?

Sixteen?

No punishment without law on page 17 which is —

PROFESSOR JEFFREY JOWELL: Mr. Chairman, just above that, disciplined force comes up again —

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: — in 7(11)(c) so you're right. It does come up occasionally.

THE CHAIRMAN: We could cope with that. If there — if these are the only two references we can make cross-reference here rather than having it at the end of the chapter if that's what you prefer.

PROFESSOR JEFFREY JOWELL: There's one in 16 (5) so that's three.

THE CHAIRMAN: If there are three then I'm more inclined to leave it where it is.

Section 8.

Section 9.

HON. D. KURT TIBBETTS: Mr. Chair?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: If you don't mind. Mr. Chair, quickly on Section 9 there are two little additions that we'd like to have in 9(2) on the second line **to the search of his or her person or his or her property** or the — we want — we would like the word “unauthorized” added before the word “entry”. Just for clarity.

THE CHAIRMAN: Or the unauthorised entry of persons on his or her premises.

HON. D. KURT TIBBETTS: Yeah, where it's “search before” too, **shall be subjected to the unauthorised search**.

THE CHAIRMAN: Oh, I see. **Shall be subjected to the unauthorised search of his or her property**.

HON. D. KURT TIBBETTS: Or **the unauthorised entry**. I think some people were just wanting that added just to make sure it's absolutely clear. Section 9(2) “unauthorised” to be added in front of the word “search” and in front of the word “entry”.

THE CHAIRMAN: I mean, the — the effect of doing this I'm not quite sure what it would be, but the way — without those words — without those words you have to look to (3) to see what is authorised. You can lawfully provide in a law or act under a law for search of a person or person's property or entry on the premises of a person for any of the reasons set out in 3(a) (b) (c) (d) or (e). That's the long and the short of it as I understand it. But if you put in “unauthorized” in both places in (2) I'm struggling to see what effect that would have. I mean would that — would that mean — it would raise a question of what it meant. Unauthorised by whom? And is it in an additional exception to the right not to be — have your person searched against your — without your consent, that's what I'm concerned about.

HON. D. KURT TIBBETTS: But as you rightly said, Mr. Chair, you move straight on to (3), and (3) qualifies wherever it's authorised.

HON. SAMUEL W. BULGIN: I think they mean the concern is what is meant by unauthorised. Is it prior authorisation? You have instances, Mr. Leader, where you have police making searches, entry searches without a warrant.

HON. D. KURT TIBBETTS: Um-hm.

HON. SAMUEL W. BULGIN: Under the common law that is permissible in some circumstances.

HON. D. KURT TIBBETTS: Well, that's authorised.

HON. SAMUEL W. BULGIN: Well, the use of the expression unauthorised, as opposed to unlawful, would certainly pose some difficulties for law enforcement.

HON. D. KURT TIBBETTS: So are you suggesting changing unauthorised to unlawful?

HON. SAMUEL W. BULGIN: Well, I don't know if you need to put unlawful there in light of (3) because it will be part of —

HON. D. KURT TIBBETTS: So you're saying totally unnecessary then? Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: I think so. Yeah.

MR. MICHAEL BRADLEY: Mr. Chairman, I'm slightly concerned about this proposed introduction of unauthorised in two cases. To take an extreme example, if the word is put in it would infer authorisation by law. So a law could be passed here which would give, for example, the right of Immigration officers the search and entry any premises of any person who is not a believer which would be very draconian legislation and which I feel it would go against the whole spirit of the private and family life rights. But it might be considered in the circumstances justified to meet the needs of a community perceiving a threat. But I'm concerned that putting the word unauthorised in here just opens up a whole right of the government to erode completely this right to contend in section 9.

HON. D. KURT TIBBETTS: Okay, that certainly wasn't the intention. Okay. Okay.

MS. MELANIE MCLAUGHLIN: Perhaps, Mr. Chairman, the inclusion of the words after **except with his or her consent**, if you perhaps included the words **or as permitted under (3)** may actually achieve the outcome that the Leader seeks. Would that be helpful? If you add in the words **or as permitted under 9(3)**.

THE CHAIRMAN: Yeah, we were thinking along the same lines here. But it's up to you. I mean, I could live with that so I think that's what is — what is the way that the section is supposed to work. Would that help you or would it...

HON. D. KURT TIBBETTS: It doesn't hurt.

THE CHAIRMAN: Except with his or her consent or as permitted under (3).

HON. D. KURT TIBBETTS: And I have one more to try on you.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: Mr. Chair, (e).

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: 3(e). It reads **to regulate entry into the Cayman Islands**. And again, for clarity, I would like to suggest to delete **entry into** and for it to read **to regulate the right to enter or remain in the Cayman Islands**.

THE CHAIRMAN: The right to enter or remain — and remain. Or remain?

HON. D. KURT TIBBETTS: The right to enter or remain in the Cayman Islands. It's two different things so we wouldn't want to say "and".

THE CHAIRMAN: Yeah. Okay, I don't think that's a problem because it's all covered —

MS. MELANIE MCLAUGHLIN: Mr. Chairman?

THE CHAIRMAN: It's all covered by the first two lines of (3).

MS. MELANIE MCLAUGHLIN: Yes.

THE CHAIRMAN: It has to be reasonably justifiable in a democratic society any of these exceptions.

Sorry, Melanie, yeah.

MS. MELANIE MCLAUGHLIN: Sorry, it's not relating to the same thing. We have a separate point on section 3(a).

Would there be any ex — can someone explain what is the development of mineral resources? We're not clear on what that term is meant to encompass. And also whether that particular — the development of mineral resources stands alone, or is it the development of mineral resources in such a manner as to promote the public benefit?

Firstly, what it — what — to clarify exactly what is meant by that and secondly to explain how it's meant to work.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Mr. Chair, that was probably taken from somewhere else.

HON. ALDEN M. MCLAUGHLIN, JR.: That comes from the Falkland Islands.

[Laughter]

HON. ALDEN M. MCLAUGHLIN, JR.: I'm serious.

THE CHAIRMAN: Well, that's not just the Falkland Islands actually. It's in the BVI constitution. It's pretty standard.

HON. D. KURT TIBBETTS: That's what I thought.

MS. MELANIE MCLAUGHLIN: But what does it mean?

THE CHAIRMAN: But the way I interpret it is, **if it is reasonably justifiable in a democratic society, which is a matter for a court to determine, you can** — yeah, **provided it's reasonably justifiable in a democratic society to do so, which ultimately is for a court to decide, a Cayman Islands law or action under a Cayman Islands law may provide for, in the interest of the development of mineral resources provide for access to a person's property.** I can't imagine it would effect the search of a person, but access to a person's property against their — without their consent, or indeed entry on the premises of a person.

And, that's my understanding of what it means. I think it personally I think it does — it is qualified by the words at the end **in such a manner as to promote the public benefit** because it — it's — the development of mineral resources I can't imagine would be — for purely private purposes would give, you know, the developer of the company concerned that was — that was drilling for whatever it was under the ground, should have access to a neighbour's property to go and, you know, for the — to help — to help make his profits. On the other hand, if it's a public benefit concern then there's an exception. However, having said all that, if you would like to delete the words I would be more than happy to do so.

HON. W. MCKEEVA BUSH: Mr. Chairman, I would think that would be the best thing to do.

THE CHAIRMAN: Good. Let's do it.

[laughter]

THE CHAIRMAN: And then we can make the text shorter. Should we take it out, McKeeva?

[inaudible comment by the Leader of the Opposition – microphone not turned on]

MS. MELANIE MCLAUGHLIN: I think it's probably covered by the words **or the development or utilisation of any other property in such a manner.**

THE CHAIRMAN: Let's take it out.

MS. MELANIE MCLAUGHLIN: If it doesn't add anything I think it can come out just for the sake of ease and expediency.

THE CHAIRMAN: Excellent. Excellent.

HON. ALDEN M. MCLAUGHLIN, JR.: As the Government would agree on the basis that there doesn't appear to be any mineral resources in Cayman.

[laughter]

HON. W. MCKEEVA BUSH: One never knows.

THE CHAIRMAN: One never knows.

HON. D. KURT TIBBETTS: Mr. Chairman — so, Mr. Chair, if we're agreed on that, did we accept **the right to enter or remain?**

THE CHAIRMAN: Well, we're still having a little internal debate about this. And I'll tell you why —

HON. D. KURT TIBBETTS: Can I expand? You go ahead.

THE CHAIRMAN: I'll tell you why. I'll tell you why.

The question of family life, potential breach of family life arises in the immigration field frequently under the European Human Rights Convention. The UK has had lots of cases to answer as do other countries of the operation of immigration laws which keep spouses apart

or keep children apart from their parents. That's where the right to private family life comes into play.

And we would have a concern if through the operation of the Immigration Laws of the Cayman Islands, for which the UK will be answerable in Strasbourg Human Rights Court a family was divided. And one could imagine where this could happen where one spouse is Caymanian and another spouse is not, or one is and the children are not or one child is or is not. So one could see. Now, I hope you're going to reassure me that this could never happen because the operation of your immigration laws are so decent that families are not divided in that way.

My comfort — the only comfort I draw from the amendment you suggested is that it's all covered by the test of being reasonably justifiable in a democratic society.

HON. D. KURT TIBBETTS: You see —

THE CHAIRMAN: If you operate the immigration laws, the right to enter and remain in the Cayman Islands to interfere with a person's private and family life, it must be — and if necessary — before a court demonstrated to be reasonably justifiable in a democratic society. I mean, I hope that that is a satisfactory safeguard that my harder lined colleague on my right is still thinking about it.

HON. D. KURT TIBBETTS: You mean she's known to be that?

THE CHAIRMAN: Pardon?

HON. D. KURT TIBBETTS: Nothing. Nothing, sir. Nothing.

But if — if we are going to be just blunt about it, sir.

THE CHAIRMAN: Let's do it.

HON. D. KURT TIBBETTS: And I totally respect what you're saying, and we've had long debates about that, and I can say that as a matter of principle, we certainly respect the right for families to remain together rather than to be divided. But when there are certain level of criminal activity involved and courts recommend, for instance, that individuals be deported and/or declared...

THE CHAIRMAN: Undesirable.

HON. D. KURT TIBBETTS: Undesirable, whatever the term is again, prohibited immigrant, then certainly with respect to your situation, you would not like to not have the ability to do something about it.

THE CHAIRMAN: No, I accept that.

HON. D. KURT TIBBETTS: And that's the purpose of the "remain".

THE CHAIRMAN: Yeah, I accept that. I accept that.

HON. D. KURT TIBBETTS: You see, as it reads it simply says regulate entry.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: It has no dealing with after the person has entered —

THE CHAIRMAN: No.

HON. D. KURT TIBBETTS: — is the point. No?

THE CHAIRMAN: Okay. Susan.

MS. SUSAN DICKSON: I understand that, Mr. Tibbetts but that's my concern because I think the enter parts I think we're more relaxed about because there's no absolute right to enter a Territory. But once you're in the Territory, then there are these issues of family life. You know, we sympathise with what you're saying, but the problem is that there are these issues. And I'm just concerned that the reason you're —

HON. D. KURT TIBBETTS: What it would mean is that our immigration laws should bear all of those things in mind. This is the umbrella. This is the umbrella is what I'm saying.

THE CHAIRMAN: Yeah. Leave it with us anyway because I think the argument hinges, from our point of view, on whether the safeguard of reasonably justifiable in a democratic society is enough.

HON. D. KURT TIBBETTS: And I understand what you're saying, and while you're saying to cut —

THE CHAIRMAN: That's — that's a barrier to abuse. Barrier to abuse sending somebody out —

HON. D. KURT TIBBETTS: And we're not suggesting abuse.

THE CHAIRMAN: Yeah. Okay. Okay.

HON. W. MCKEEVA BUSH: Mr. Chairman, I don't know if this is the right place to ask but I would — I would think so in having the question

here. Touching on what we're talking about, the children and their parents and so on, if a person is given residency, with the advent of the Bill of Rights would [inaudible – microphone not turned on] through government policy be able to hold back allowing a child or children to be with their parents? Would or could we get away with giving a couple the axe but small children who are in their care but living somewhere else being reviewed, as has been done? What affects this Bill of Rights how on that [inaudible – microphone no turned on] time?

THE CHAIRMAN: Well, I think you would have the principle set out in Section 9(1) that the government must respect every person's private and — every person's family life. That's the basic. So you start — your starting point is, if you have a couple residing here and they have children, one should think very carefully about not allowing the same rights to reside here to the children as the parents have. And one would only be able to lawfully separate them for one of the reasons set out in 3 here.

So, the general — I mean, I think if I — ultimately, one is putting into the hands of the courts to decide whether it's - the test here is stated to be reasonably justifiable in a democratic society. In other words, reasonable action in a decent place to deprive the children of parents who have a right to reside here of also having a right to reside here.

And my answer I think would be — but I'm not a judge but my answer would be you have to have very good reasons for keeping children — I mean, I'm talking about minor children now, you know, dependent children, out of the same place of residence that the parents have a right to reside in. I think that's — I mean, do you agree — that is common humanity.

HON. W. MCKEEVA BUSH: Mr. Chairman, I mentioned permanent resident but — and the case here would be work permit, to keep them on a work permit.

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: Who have a legal right to preside on their work permit.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, if I can make this observation because that's all it really is.

Insofar as this relates to permanent residents, that is persons with the right to permanently reside here and work, I think that — I think your assessment is right. And I don't think that that would really —

will really pose any great difficulty to us given the new — well, the relatively new provisions of the Immigration Law, because the numbers of persons who would qualify to apply for permanent residence significantly reduced. We've pretty much gone through the transition period. I think virtually anyone who would have been entitled to that right under the old system, this is just about there or would shortly be considered. So, going forward over the next few years I don't see that as that big an issue. So, when we consider whether or not to grant the permanent residence, assuming they tell the truth about how many children they have that will be taken into account as to whether or not the permanent residence — so I don't see that going forward as that big an issue for us.

But the point the Leader of the Opposition made about the work permit thing is a huge issue, and it's a huge issue for a number of reasons: (a) we've got at the moment just over 26,000 people on work permit of a population of I think we're guessing somewhere around 60,000 people. Now, the rule that is applied is that if you and your spouse are earning sufficient salary to be able to provide maintenance and upkeep of those children, we'll let the children in. But the vast majority of people on work permit don't have that right because their combined salaries falls below the figure that is set by — not all the time but the vast majority. And so that is — if this provision were to require — or interpretation of this provision were to require that every person who resides in Cayman on work permit were entitled to bring all their children, I'm going to tell you, sir —

THE CHAIRMAN: But do they have — they don't have permanent residence?

HON. ALDEN M. MCLAUGHLIN, JR.: No.

THE CHAIRMAN: You see the crucial point is the point of entry in the first place because if it's made clear before a person who has no right to enter comes here to do work, you can come here to work but only in the following circumstances can you bring your family.

HON. D. KURT TIBBETTS: The application form says so.

THE CHAIRMAN: Yeah, so then it only — so they can then choose whether to come here.

HON. ALDEN M. MCLAUGHLIN, JR.: That's how it works, sir. That's how it works.

THE CHAIRMAN: Or they can not. And if they don't like the conditions then they can go somewhere —

HON. ALDEN M. MCLAUGHLIN, JR.: Then we're okay.

THE CHAIRMAN: We have this in other Territories. You know, Gibraltar has Moroccan workers who come without their families, the Virgin Islands have that situation, I'm sure the Falklands do as well. So — but it's the point of entry that's really the crucial thing, isn't it?

Okay. Conscience and Religion?

Expression?

Assembly and Association?

Freedom of Movement?

Marriage?

MS. MELANIE MCLAUGHLIN: Mr. Chairman?

PROFESSOR JEFFREY JOWELL: Mr. Chairman?

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: I'm just going to raise under Movement Section 13. Section 13(1)(3).

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: The requirements to be satisfied for the purpose of (2)(d)(3) sets out a number of procedural provisions which it is simply queried whether those provisions are now needed there in the light of the new Section 19 which provides the right to fair procedures/fair administration/lawful administrative action. That would be an overriding section that requires all decisions of public officials to be lawful, reasonable and fair. We're going to suggest a couple of amendments to those words later, but it isn't really necessary then to specify to such an extent the detailed provisions in Section — in that subsection. The purpose of this question is not to take anything away in particular, but to simply shorten the section and — which is now provided for under Section 19.

THE CHAIRMAN: Well, I think 13(3) really sets out sort of minimum — minimum safeguards for someone being deported; and part of them — part of it is procedural and part of it is a right to have a case reviewed by a competent authority in (c) and be represented before that content competent authority referred to which at first sight seems to go beyond the general words of Section 19(1). I mean, is there substantive difficulty with this?

HON. ALDEN M. MCLAUGHLIN, JR.: We're keen — sir, we're keen not to introduce yet another level of bureaucratic — of bureaucracy into the process.

If we look at how things work in Cayman, when your work permit expires unless you gotten permission to remain beyond that your right to remain in the Cayman Islands expires. So it's not a question of action being taken to expel you, but that your right to remain has expired.

And what we certainly don't want in those circumstances is for there to be a basis for a separate action to be launched now complaining about the fact that you're being expelled from the Cayman Islands. You are being expelled but your permission to remain has been expired, and if you don't regularise your position you'd be arrested and brought before the courts on the basis of overstaying. That's how the system works.

We — what we don't want is another process, another layer to be added to this matter because that's not — you're not expelled in the sense that I think this subsection is trying to deal with.

The professor's point is that if you have the right to — what's it called? — lawful administrative action and so forth, if there are any breaches in how the immigration's regime has dealt with you, there is your avenue. Let's not introduce another — another one because people's work permits expire every day. It will be — it will be ... it will be a difficult — difficult exercise for us.

THE CHAIRMAN: Can we think about that and come back to it — you said you were going to check those and suggest some changes to 19. When we come to that we could — we could — we'll consider it over lunch anyway and...

Okay, moving on to Marriage.

MS. MELANIE MCLAUGHLIN: Sorry, Mr. Chairman.

THE CHAIRMAN: Yes. Oh, sorry, Melanie. I forgot.

MS. MELANIE MCLAUGHLIN: We did have one query in relation to the right of conscience and religion, Section 10 on page 18. Section 10(7).

Are you able to say — it reads **if a court's determination of any question arising under this part might affect the exercise by religious organisation itself or its members collectively of the right of freedom of conscience a protected by this section, it must have particular regard to the importance of that right.**

What I would ask is whether we can have some explanation of the meaning of the words **particular regard to the importance of that right.** It seems to want to elevate —

THE CHAIRMAN: Yes.

MS. MELANIE MCLAUGHLIN: — this right perhaps to a higher plane than other rights. Or why do — why do the religious organisations — are they intended to have better rights than other groups in — or community?

THE CHAIRMAN: Jeffery might know this better than I. My recollection is that this reflects a provision in the UK Human Rights Act which was put in as an amendment in the House of Lords under pressure from the churches. Just to show that in the UK churches have influence as well.

[laughter]

THE CHAIRMAN: Occasionally. But I don't think it actually — I mean, I think it's very carefully wording actually. Without being too cynical one could almost argue that it's a sop to the church's desire to have their — have this point given any extra sort of status or extra emphasis.

MS. MELANIE MCLAUGHLIN: Well, I think it goes further —

THE CHAIRMAN: I don't think it has — I mean if I was a court I would say, 'Okay I have particular regard to the importance of this particular right, but there's another one which trumps it because it is actually more important and, you know, I've considered it and it is a particularly important right.' I mean that is my view but I don't know what you think.

PROFESSOR JEFFREY JOWELL: Well, I agree and I accept. There is also one other group which had tremendous influence and that was the press.

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: And there is a corresponding section which is not reflected in this draft. In curtailing freedom of expression you ought to have particular regard to the importance of freedom of expression. In practice it has meant very little, but this has simply been adopted from that.

THE CHAIRMAN: Yes. I mean, I don't have a strong view about retaining this paragraph one way or the other, you know. It's something I would regard as very much optional.

But anyway, shall we move on if everyone's happy with that?

MS. MELANIE MCLAUGHLIN: Section 11(2)(b) on page 19.

THE CHAIRMAN: Yes. 11(2)(b).

MS. MELANIE MCLAUGHLIN: Yes. It seems to us that the various factors, if you will, that are listed seems to go above and beyond the language in the European Convention on Human Rights. Was there a particular reason to add most of these additional factors?

THE CHAIRMAN: No. I think it is — again, I think this is fairly standard language in Overseas Territory constitutions.

Well, the European Convention lists **in the interest of national security, territory integrity, public safety, prevention, disorder or crime**. So, they're really in (a) aren't they?

And then (b): **protection of the reputations or right of others**. That's in (b). **Preventing the disclosure of information received in confidence**, which is there. **Maintaining the authority and impartiality of the judiciary** that's the next one. And then we come to new ones, **regulating, telecommunications, broadcasting**. These are not new in terms of Overseas Territories constitutions. They seem to be going beyond the HCO; is this that right?

MS. MELANIE MCLAUGHLIN: Yes. It doesn't appear — well, it doesn't appear in the BVI. It does? To an extent to in the BVI, but it doesn't mirror the identical wording. It doesn't have entertainments and public entertainments and so on.

THE CHAIRMAN: No.

MS. MELANIE MCLAUGHLIN: It doesn't appear to have entertainments. It has other ones.

PROFESSOR JEFFREY JOWELL: I think this is taken from the 2003 Draft pretty well as it was. Yes.

THE CHAIRMAN: I mean, you know, I'm open to suggestions to cut down this list because this is interference with freedom of speech isn't it and freedom of expression?

MS. MELANIE MCLAUGHLIN: Sir, we were just simply querying why the additional language was being brought in, if that was deliberate or there is a particular concern that it was meant to look after.

HON. D. KURT TIBBETTS: Mr. Chairman, that is the 2003 Draft.

THE CHAIRMAN: Yeah, I think it was. Yes.

It is very similar to the list in the Turks and Caicos Islands equivalent provision which does refer to public entertainments.

You know, what we're talking about here is — what was the Lord — not the high execution of the Lord Chancellor ... no, the Lord Chamberlain, Chamberlain who would prohibit certain chose because they were disgusting and immoral and therefore shouldn't go on. So that was a breach — that whatever amounted to freedom breach of, freedom of expression. But there are still things that can be sensed, you know, as being beyond the pale and they should still be —

PROFESSOR JEFFREY JOWELL: Well, it lengthens —

THE CHAIRMAN: Provided it's reasonably justifiable —

PROFESSOR JEFFREY JOWELL: That's just what I was going to say. It doesn't in any way lessen that test. It simply lengthens the list.

MS. MELANIE MCLAUGHLIN: Yes, we are comforted by the inclusion of the reasonably justifiable in a democratic society, that language as well. So, thank you.

THE CHAIRMAN: Okay. Shall we plunge into marriage?

[laughter]

THE CHAIRMAN: Having reread this subsection — Section 14(1) there was a question which occurred to us which we should have spotted earlier. And it says **government shall respect the right of every unmarried man and woman of marriageable age as determined by law freely to choose to marry a person of the opposite sex and found a family**. And we wondered why it says to choose to marry and not simply to marry. I don't know. This comes from your draft of the last round, to choose to marry. It's either a right to marry or it's not a right to marry. It's not a right to choose to marry and —

PROFESSOR JEFFREY JOWELL: I suppose it was trying to conflict forced marriages which have become quite pronounced these days as an issue.

THE CHAIRMAN: Yes, but there's no obligation to marry. This isn't addressing an obligation to marry.

I mean, you see, for example, if you look at the BVI there is a separate paragraph dealing with that which would be much clearer to work it in. It says — this is section 20 of the BVI constitution. Subsection (2) says **no person shall be compelled to marry without his or her free and full consent**. And if the concern is about forced marriages, I would suggest that that's a better paragraph to write in than

qualifying the right to marry by saying this is only a right to choose to marry.

MR. MICHAEL BRADLEY: Mr. Chairman, I think the words **to choose to marry** greatly weakens the import of what you're seeking to do. There is a distinction between saying I have — you have the right to marry and you've the right to choose to marry because you may choose to marry without having the right to implement that choice.

THE CHAIRMAN: Yes.

MR. MICHAEL BRADLEY: It may be semantics but I think it can have a practical application.

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, we proceed with great caution on this issue because we have the — we have our reverend brothers here and we'd want to hear what they say — lest we incur their wrath again.

[laughter]

THE CHAIRMAN: You'll note that the only two words in this section I'm querying are **to choose**.

PASTOR AL EBANKS: Yes, we can remove them as far as I'm concerned, sir. We agree. We agree. That was too painful, Alden.

[laughter]

THE CHAIRMAN: And I think should we go on to add in subsection (2) from the BVI which says **no person shall be compelled to marry**.

HON. D. KURT TIBBETTS: Say that again, sir.

THE CHAIRMAN: Yes, it says **no person shall be compelled to marry without his or her free and full consent**. I mean, if you want to reflect that I'd be very happy to put it in.

PROFESSOR JEFFREY JOWELL: If I may say that the reason why this — as opposed to the BVI constitution this Bill of Rights specifies THAT the government shall, in order to stress the —

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: — vertical applications. So all of the sections are started that way rather than **Any person**.

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: And therefore just to be consistent with those other sections, we're talking about government respecting that right of every person to marry. It would be inconsistent with the other sections to start it with **No person**, that's all.

THE CHAIRMAN: No, I'm not suggesting changing —

PROFESSOR JEFFREY JOWELL: Then, of course. I'm so sorry, I must have misunderstood that. I think that's absolutely fine.

MS. MELANIE MCLAUGHLIN: Mr. Chairman, if I may make — revisit one of our earlier points.

Yet again the BVI constitution we see is a positively drafted constitution which we are actually now referencing and possibly incorporating wording from. I think it is completely possible for us to have a constitution which sets out the rights positively and in a clear and concise manner. And yet again we have another clear example of that, where another overseas Territory who's been able to accomplish that with the same objective as we are seeking to do today.

HON. SAMUEL W. BULGIN: And Mr. Chair, just to follow-up on that, the language **no person shall be compelled to marry without his or her full consent** assuming that would be referring to the state. It's quite unlikely that you would have a situation where the state is forcing someone to marry without his or her consent.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, the AG is right and we're conscious — we've just had a discussion about it. That particular provision I don't think anyone would object to that having horizontal application and therefore — therefore for it to be expressed as the BVI constitution has done so. I think we're — we'll be okay with that. And I don't want to speak for my — for my reverend brothers there, but I don't think they have a problem with that either but they can speak for themselves.

[inaudible comment by the Honourable Leader of the Opposition — microphone not turned on]

THE CHAIRMAN: Well, McKeeva what we're doing is in paragraph — in Section 16 (1) the second line we're going to delete the words **to choose**.

HON. W. MCKEEVA BUSH: Yes.

THE CHAIRMAN: Because it's a right freely to marry, not to choose to marry. And then we were thinking of putting in as a new (2) ... as a new (2) ... as a new (2) something from the new BVI constitution which says the following: **No person shall be compelled to marry without his or her free and full consent.** So, it's the other side of the coin, you see. Paragraph 1 is **a person has a right to marry** and paragraph 2 would say **no person shall be compelled to marry without their free and full consent.** So it's a prohibition of forced marriages which some people regard as just as important. Is that all right?

HON. W. MCKEEVA BUSH: Yeah —

THE CHAIRMAN: No shotgun weddings.

[laughter]

PASTOR AL EBANKS: Mr. Chairman?

THE CHAIRMAN: Yes, who is ...

PASTOR AL EBANKS: Mr. Chairman.

THE CHAIRMAN: Sorry, Pastor Al. I couldn't see who was —

PASTOR AL EBANKS: We were just having some discussion among ourselves.

Again the — while we have no problem with the intent of that, the concern that we have with that is really as expressed by the AG that, you know, the potential opening of the door again to the horizontal application of it.

THE CHAIRMAN: Well, you — remember it's covered by the provision right up at the front in Section 1 that **this part of the constitution does not affect directly or indirectly rights against anyone other than the government except as expressly stated.** So, the effect of this would be to prohibit any law I think, in effect it would prohibit any law being passed or action taken in a law which would require people to marry against their consent.

PASTOR AL EBANKS: I will let my learned friend, if you would so permit, Mr. Cole just to make a comment on that, please.

THE CHAIRMAN: Okay.

MR. COLE: My only comment would be that as it is only enforceable against government how would you enforce that?

THE CHAIRMAN: Well, but only enforce it if there was — that's exactly what I just said. If there was a law or action taken under a law by government authorities which purported to force people to marry, then you could enforce against the government. I don't see how you could enforce it against parents who force the child to — force their child to marry another child under the —

MR. COLE: So the compulsion is purely compulsion by government, it's not —

THE CHAIRMAN: Yes. Yes.

MR. COLE: So, that's what it should say then.

THE CHAIRMAN: **No person shall be compelled by government to marry without his or her,** that's what you want. Yes. I don't care, you know. Either have that or nothing. I mean, I don't care really. I think it's almost better to have nothing than to suggest that government is going to compel people to marry one another.

Leave it out?

If in doubt leave it out.

[laughter]

THE CHAIRMAN: Property?
Non-discrimination?

HON. D. KURT TIBBETTS: I think we need to go for lunch now.

[laughter]

THE CHAIRMAN: Anything on Property?

HON. D. KURT TIBBETTS: Mr. Chair?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: I am warned that number 16 Non-discrimination that section may take a little while to fully digest and talk through and some stomachs are —

THE CHAIRMAN: You would prefer to it after lunch?

HON. D. KURT TIBBETTS: That's what's being suggested, sir.

THE CHAIRMAN: Well, can we just use — can we just use the next six minutes? We'll break at quarter to one.

HON. D. KURT TIBBETTS: Okay.

THE CHAIRMAN: To see if we can jump over that for the time being. I mean, there's nothing on Property. We're coming back to discrimination after lunch when we feel stronger.

Is there anything on 17 or 18?

HON. D. KURT TIBBETTS: Say that again.

THE CHAIRMAN: 17 or 18?

HON. D. KURT TIBBETTS: We past 16?

THE CHAIRMAN: No, we're coming back to it.

HON. D. KURT TIBBETTS: Oh, you're coming back to 16. Sorry.

THE CHAIRMAN: I mean I'm happy to pass it.

17 or 18?

If nothing there, 19? You said you had some different —

MS. MELANIE MCLAUGHLIN: Mr. Chairman, we would like to come back to Section 17 which relates to the rights of the child.

THE CHAIRMAN: Go ahead.

MS. MELANIE MCLAUGHLIN: We would like to examine — have the opportunity to examine some — suggest alternative wording which we can go through and put forward as the amendments. Perhaps we can do that after lunch.

THE CHAIRMAN: Okay.

18?

19?

PROFESSOR JEFFREY JOWELL: Yes. Mr. Chairman, the — 19(1) reflects the drafting first from the South African constitution, and it's a formulation that has been accepted in a number of other countries since.

However, in practice it's a little vague and ... **all decisions and acts of public officials must be lawful**, that's not vague. "Reasonable"

is a term that is meant to connote an arbitrary — not arbitrary and rational and proportionate.

And in the recent Northern Ireland Bill of Rights drafted by the Northern Ireland Human Rights Commission which has recently come out, they went through this discussion as to whether “reasonable” was a good word to use. It has so many different meanings and they preferred the terms to reasonable — rational and proportionate.

And “fair”, again it's so general that refers to procedural fairness, the kind of fair hearings that we've been talking about.

So, the suggestion is that the provision read — 19(1) reads **all decisions and act of public officials must be lawful, rational, proportionate and procedurally fair** simply to specify more clearly what is meant by all this. Rational, proportionate and procedurally fair. That's the exact wording of the new Northern Ireland Bill of Rights after a considerable discussion around these points to which I declare interest, I was privy. Only administrative lawyers could properly understand what these terms mean, so therefore the purpose is to spell them out so that they're more generally accessible.

THE CHAIRMAN: Well, I think I'd be quite happy with that I think.

HON. SAMUEL W. BULGIN: Northern Ireland has proportionally head of reviewability for public administration?

PROFESSOR JEFFREY JOWELL: That's a very good question. Not generally except in some decisions in — under the Human Rights Act yes, of course. And, increasingly, proportionality seems to be intruding into reasonableness particularly when we're talking about an arbitrary interference with the person's rights or interest. Not all aspects of reasonableness, therefore rationality would cover most of those. So it spells it out a little bit. It isn't a general ground of review in Northern Ireland or anywhere else, but it doesn't imply that every decision has to be tested by proportionality. It can be tested by rationality instead. But you raise a very good point.

THE CHAIRMAN: All right. I think we should break here because —

HON. W. MCKEEVA BUSH: Mr. Chairman —

THE CHAIRMAN: Sorry, do you have...

HON. W. MCKEEVA BUSH: Are there changes here on 19?

THE CHAIRMAN: Well, I was saying that the suggestion that Professor Jowell made would be okay with us, I think. So it will read now **all decisions and acts of public officials must be lawful, rational,**

proportionate and procedurally fair. Is that — have I got that right? Yeah. Procedurally fair.

MR. MICHAEL BRADLEY: Can I ask Professor Jowell, does — is his proposed amendment to read rational and proportionate and reason — and procedurally fair, or rational and proportionate, and procedurally fair because there could be a distinction.

PROFESSOR JEFFREY JOWELL: I think all commas is what was suggested: **rational, proportionate, and procedurally fair.**

MR. MICHAEL BRADLEY: Thank you.

PROFESSOR JEFFREY JOWELL: That's the Northern Ireland one.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: Mr. Chair, you did say you were going to break for lunch. And just to say, so that everybody doesn't be looking all over the place, lunch is next door.

THE CHAIRMAN: Excellent. Thank you very much.

So if we break now, can I ask everyone to be back around 2:00 to start again at 2:00? And then I promise there will be a break or breaks in the afternoon. I'm not suggesting we go from 2:00 right through to 5:00.

Thank you for your helpful contributions.

RECESS

RESUMED

THE CHAIRMAN: Ladies and gentlemen, I hope we're all refreshed, strengthened and ready to plunge on.

We've been trying to keep a note at our end on two or three points that we need to come back to in this Bill of Rights, but perhaps we should do that when we reach the end of it. I think we can — we for our part can give some answers on one or two of the questions that we said we'd like to think over, discuss amongst ourselves other lunch. But shall we try to deal with 16 on discrimination?

HON. D. KURT TIBBETTS: 16, sir?

THE CHAIRMAN: Yeah.

Just by way of introduction, I ought to say that as the note at the end of this section indicates that I recall and I'm perfectly well aware that we had quite a discussion at the first round about whether (2) should list possible grounds of prohibited discrimination exhaustively or not exhaustively. And in this draft we opted for a non-exhaustive list which tallies with the list of grounds in Article 14 of the European Convention on Human Rights, plus age and mental/physical disability.

And then as the note says to balance this we introduced (3) which is new as a general exception to the prohibition on discrimination, drawing on section 16(6) of the new Falkland Islands constitution, and (3) is a genuine attempt to try to provide a balance to a non-exhaustive list of grounds of discrimination. And what it does it encapsulates long-established caselaw of the European Human Rights Court and of national courts applying the European convention by saying that nothing in any law done under its authority should be held to contravene this section to the extent that it has an objective and reasonable justification and there's a reasonable proportion between the provision of law in question or the thing done under it and the aim in which that provision or the thing done under it seeks to achieve. This is the proportionality test and the objective and reasonable justification test that allow governments a margin of appreciation to make provision which would be otherwise discriminatory and prohibited.

Now, I think it's a useful thing to have it in any case, but as I say, it was expressly designed to try to provide some reassurance to those who disliked or feared or were uneasy about a non-exhaustive list of grounds of discrimination. That's all I'll say by way of introduction.

But perhaps we could hear what comments there are on — Pastor Al.

PASTOR AL EBANKS: Mr. Chairman, again if I might refer back to our document on page — bottom of page 3, I'd just like to read from that because that probably better expresses our concern.

We're particularly concerned with this section that the non-discrimination section of the most recent draft proposal Cayman Islands Constitution does not meet the standards that the Government, the Opposition, the Adventists and others including ourselves have advocated and also promised to uphold to the people of the Cayman Islands. And we have made some comparisons on page 4 to the Government's original document that was submitted which we were in agreement with, and also we have noted the difference that exists in the working draft that has come back from the UK.

And the reason that we have highlighted those particular phrases is in order to reveal that the evolution of which we are concerned is an evolution that as we said has occurred completely outside of these Islands. And we are concerned that in the absence of — in the absence of some kind of assurances that we will not be able to — well, I would

say the people of the Cayman Islands substantially will not accept the language as it is current — in its current draft and that's the concern that we have. We state that on page 4 under section 3(1).

We also — and I think we had touched on this previously, but under page 4(3) on our note we've also had extensive discussion about the use of the word “discriminatory” or “discrimination”. And we recognise that discrimination is not only a negative thing, it also has positive elements to it. The example that my colleague has used repeatedly, for instance, even during the — a political campaign the fact that if a person votes for one candidate over the other they are discriminating against the person that they are not voting for in the process. So, we were suggesting that consideration be given to the inclusion of the word, affording different and unjustifiable treatment to individuals because we believe that that seem to be really what the intent of the law is, not just simply discrimination, but really an unjust discrimination against anyone.

Having said that, we did have a meeting with the Government last week I believe it was, and we had extensive discussion on this particular issue. NGOs — all the NGOs were there including the Human Rights Committee. And we know that the Government had some thoughts on this particular issue as to how particularly our concerns could be addressed, and I raise them now and, you know, for — for further dialogue. But this is an area of serious concern for us, and if there is a solution and a way forward we are open to hear what that is.

Thank you, sir.

THE CHAIRMAN: Thank you very much. So, as I understand it from the point of view of Cayman Ministers' Association, there are two changes you would like to see: one is to make the list of grounds in (2) exhaustive; and the other is to say at the beginning **in this section “discriminatory” means affording different and unjustifiable treatment to different persons**, et cetera. Is that right?

PASTOR AL EBANKS: That's correct.

THE CHAIRMAN: A correct summary? Okay.

PASTOR AL EBANKS: If I might, you know, again the third option is that if there's an element of this that we have overlooked or maybe that we're not properly understanding, we are very much open to learn from the experts as to how, you know, the concerns can be — our concerns can be addressed, or if — if you believe that they are addressed in some other way in the — in the section.

THE CHAIRMAN: Well, I would only repeat before offering the floor to others that one — the one thing I tried to do is adding in this new (3),

which actually goes in the same sort of direction as your point about unjustifiable, because what it's doing is adding another limitation on the prohibition on the discrimination provided that it's — if something is done which is — or provided for in the law which is discriminatory provided it has an objective and reasonable justification and is proportionate, then it's lawful. And without that subsection, the only exceptions to those are set out in the following subsections.

This is an additional — I hate to say it, but sort of additional let-out clause, but one which is well accepted in the caselaw of the International Tribunal of the European Court of Human Rights.

You know, I — as I said, I think it's — it's impossible for me honestly to say that this would cope with the problem which I believe you're concerned with because, ultimately, it's a judgment for the courts whether a particular legal provision in a law or executive action taken under a law has a reasonable has an objective, a reasonable justification and is proportionate, is reasonably proportionate. So, you know, one is putting one's faith in the courts to, you know, to find that something is — something which would otherwise be discriminatory is lawful.

Now, would anyone else like to comment? The Government or Human Rights Committee...

PASTOR SHIAN O'CONNOR: We would not just to multiply words but we are in sync with the sentiments expressed by Pastor Al and echoed by the CMA. We do have a concern. In fact —

THE CHAIRMAN: Yeah.

PASTOR SHIAN O'CONNOR: — we see that as our major concern as we noted that in our words.

THE CHAIRMAN: Thank you. I noted that in your opening statement. Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman?

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: As we have understood the concern expressed by the CMA and by the Seventh Day Adventists Conference, their concern is that the final two words in the subsection "other status" having been interpreted by the European Court to include sexual orientation, that to have the section — subsection worded as it currently is will — and I should also add this, and because that subsection is not limited in its application to the rights under — or the rights contained in the bill in this Constitution, but is worded unlike other provisions in a way that allows, or possibly allows horizontal

application of the non-discrimination provisions across a wider range of government activity and legislation, that that would be unacceptable to them. That's — that was my understanding from our discussion.

From my understanding of the Human Rights Committees' position which I think is, one would expect, that to permit or to agree to a clause in the Constitution which allowed discrimination on the basis of sexual orientation would simply be wrong and they could never agree with it. And I can — the Government can see that.

So, what we've thought about is that this provision which is 16(2), if the application of that could be confined to the rights in this Bill under this Constitution in a similar way as has been done with the corresponding right in the European Convention on Human Rights that that might go some way to alleviate the concerns of — of the CMA and the Seventh Day Adventists, but also because it is — it would be expressed then in similar terms to those in the European Convention on Human Rights that — I'm choosing my words carefully here — that the HRC might find that less objectionable as a concept.

We have — we've had a discussion around the table and subsequently among ourselves. And again, I don't want to go out on a limb, but my read of the situation is that that might just be acceptable to the three groups and it certainly would be acceptable to the Government. Obviously you'd have to tell us your position, but having looked at it, Professor Jowell and myself, we don't see that there would be any — or there could be any objection on the basis that it didn't meet Convention requirements because it would be expressed in terms quite similar, if not identical, to those in the European Convention on Human Rights.

THE CHAIRMAN: Recall in Article 14 the European Convention is in the following terms: **The enjoyment of the rights and freedom set forth in this Convention.** So, just trying to get the concept — I'm not drafting now, but — **the enjoyment of the rights and freedom set forth in this Bill of Rights** — yeah? — **shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.** That's what Article 14 says.

So, it's a non-exhaustive list of grounds, but it is tied to the rights and freedoms set forth in the Convention and it's not more widespread than that. That's the concept. So if one translated that into this Bill of Rights one would be saying that there would be — one would be describing or defining discrimination in a non-exhaustive way but tying the provision into the other rights and freedoms set out in this Bill of Rights. That's the thought is it?

HON. ALDEN M. MCLAUGHLIN, JR.: Yes, sir.

THE CHAIRMAN: Right.

HON. ALDEN M. MCLAUGHLIN, JR.: Just to expand a little bit on some of the concerns that were raised. There were — there have been discussions about of course a more extensive list of rights, some of the second and perhaps third generation rights which appeared in other constitutions or other Bills of Rights around the world — the right to healthcare and the right to housing and a range of other things, some of which were alluded to by the HRC members this morning. And the concern expressed principally by the CMA was that when — when you start applying this non-discrimination clause to those sorts of areas, then, they saw potentially looking — and they've been looking at the Canadian Charter in particular and how that has impacted the ability of people like counsellors in relation to obligations to counsel same-sex partners and so forth which ran counter to their Christian beliefs and ethos.

So, if we limit it in this way and we don't expand the range of rights beyond those that are generally well known and accepted —

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: — then we limit the scope for — for that sort of thing happening and hopefully the concerns which have been raised by the CMA and the Seventh Day Adventists Conference can be allayed.

THE CHAIRMAN: Yes. Well, I mean if that would be a way through, we would — we would consider that very carefully. But what about the — I mean, what about the Human Rights Committee? Do you have a view on this or...

MS. SARA COLLINS: Mr. Chair, I was mistaken earlier when I said I had the easy brief. It seems that Ms. McLaughlin is now deferring to me, and with your permission, Mr. Chair, I will address this point.

THE CHAIRMAN: Okay, please do.

MS. SARA COLLINS: I think it should be taken in two stages and the first stage is the easy one.

The Human Rights Committee welcomes the Government's proposal and thinks it has admirable attractions for resolving the problem, the issues of debate between our group and the Minister's Association. But in relation to the right positively not to be discriminated against for other groups, we wouldn't want to lose the value of Section 16. So if there's a compromise suggested in relation to the way the right not to be discriminated against works in the context of sexual

orientation, that's accepted. But the wider preservation in relation to other groups should remain.

THE CHAIRMAN: How does that —

MS. SARA COLLINS: Well, the way Section 16 is currently drafted.

THE CHAIRMAN: Yeah.

MS. SARA COLLINS: The Government undertakes a positive obligation not to discriminate.

THE CHAIRMAN: Yeah.

MS. SARA COLLINS: We wouldn't want to lose that in relation to all of the groups set out in 16 (2).

THE CHAIRMAN: No.

MS. SARA COLLINS: Even if we're going to make a carve-out about sexual orientation.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, we are not proposing a special carve-out for sexual orientation at all. We are proposing that the entire provisions, that is (2), be limited in its application to rights under this Bill of Rights in this Constitution in the same way that Article 14 is so limited in the EHCR.

MS. SARA COLLINS: Yes, and I suppose the point is we then lose the benefit in relation to, for example, the grounds of sex, race, colour, religion, of the positive reinforcement of the right not to be discriminated against that's currently reflected by Section 16(2). So while we accept the compromise about the way Section 16(2) deals with sexual orientation or other grounds, what we don't want to do is throw the baby out with the bath water if that makes it clearer.

In other words, we have on the table something to which I don't think that anyone objects, that the Government will undertake this obligation to treat this — if you want to make it is a closed category, so ignoring our other status, to — not to treat any of these groups of people in a discriminatory manner. Why shouldn't we preserve that even if we introduce the Article 14 compromise to address the difficulty which is presented by the inclusion of the words “or other status”?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, conceptually the difficulty I see with that is that — is that it will — by inference or by

implication, it will suggest that it is okay for government to discriminate on the basis of sexual orientation.

MS. SARA COLLINS: But that's what we're doing. That is what we're doing.

HON. ALDEN M. MCLAUGHLIN, JR.: No —

MS. SARA COLLINS: We're suggesting, I think, that persons falling outside of the closed list of grounds can be dealt with differently, and I think that's the reason why the difficulty arose.

The Human Rights Committee's original position was that all groups should be treated the same way and all groups should be treated in a non-discriminatory manner. The fundamental problem which had been identified to us was that those representing the religious community did not accept that and felt that there were certain groups including those — including persons of a different sexual orientation against whom it would be permissible to discriminate. So, in relation to extra constitutional matters and in relation to the right to marry.

We have endeavoured, in the spirit of reasonable cooperation, to come to compromise on that and that's why we say the Government's suggestion represents a reasonable compromise. What we don't want to do is lose the value of this wide-ranging positive obligation not to discriminate in relation to the groups about which nobody has a problem.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, Mr. Chairman, I come back to my original thought. Conceptually the difficulty with that is that we will constitutionally create two separate provisions, one which says that for the purposes of — for general purposes government is not allowed to discriminate against people on a range of factors or characteristics or whatever the case may be. But then in relation to this — to these other matters which would include sexual orientation, government is allowed to discriminate which I think sends absolutely the wrong — the wrong message and — the law of unintended consequences has never been repealed, and I believe that this is one of those instances —

MS. SARA COLLINS: Just — just — just.

HON. ALDEN M. MCLAUGHLIN, JR.: — where — one moment, sorry, Sara, if you don't mind.

I believe that we would be setting up a very — a very dangerous regime by doing it that way. I'd think that we would all be happier with — with this provision being limited to the rights under this Constitution, and whatever — whatever other non-discriminatory provisions that we believe ought to obtain can be dealt with or should be dealt with in the

individual pieces of legislation, whether it's labour legislation or legislation relating to healthcare or whatever the case may be individually rather than creating two categories within the Consti — within the Bill of Rights.

MS. SARA COLLINS: Well, since we're talking about absolute principles, I suppose because we've been trying to address or find the lowest common denominator, we find ourselves throwing out something of significant value to which I hadn't understood there'd been any objection.

And let's face it. What we are saying is that a different regime should apply to different persons of a different sexual orientation. If we want to express that in plain and clear language, then, we must be clear about it. We must put up or shut up. There's no point in throwing away the benefits, which the earlier draft had secured, to all of these other groups because we have a problem with this particular group. It's a problem with which I think we must grapple.

I also want to be clear we don't want to put a barrier in the process. We have already said we're prepared to consider and indeed to accede to the compromise which has been proposed about sexual orientation and the inclusion of the wording "or other status", but we think we should look very carefully at not losing the value which Section 16 has in relation to these other groups.

PASTOR AL EBANKS: Mr. Chairman? Mr. Chairman, sorry — Professor Jowell.

PROFESSOR JEFFREY JOWELL: Just a point of clarification. With respect, I think that the last two contributions are talking slightly past each other. I think there's more agreement there than I think has been apparent.

What Minister McLaughlin was suggesting was that the other status, the open-ended, the non-exhaustive list be kept, and that no overt distinction was made between treatment on grounds of sexual orientation or anything else, and that is precisely the language of the European convention. And it has been included because it is the language of this year company convention. But the European Convention, similarly, does not have the free-standing discriminatory — anti-discriminatory clause. As you read, the discrimination is limited to the enjoyments and rights and freedoms in this convention. So that all that would happen is here if this amendment as proposed by Minister McLaughlin were accepted would be that 16(1) would read something like **subject to sections (3), (4), (5) and (6) government shall not treat any persons in a discriminatory manner in respect of their rights under this part or in respect of their rights under this Bill of Rights.** So it would limit as it does in the European Convention.

A protocol of the European Convention as we discussed last time does provide the free-standing right, but the UK has not accepted that, and for that reason I would respectfully suggest that it would be quite in order for the Cayman Islands also to simply take the — take up the parallel to Article 14 alone and not the later protocol to which the UK has not acceded.

In that — and the addition of the word perhaps “unjustifiable” would make things even clearer that there's some forms of differentiation that might in accordance with the culture of a particular country, namely this country, be acceptable and not regarded as disproportionate or unreasonable. And that is the compromise really that is being suggested but not, I think, in any way to diminish the extent of the list of rights but only to lengthen, piggyback them, to the — to the Bill of Rights here and no further.

THE CHAIRMAN: Yes. Well, that was my understanding. That was my understanding. And just to deal with the sort of subsidiary point first. Different and — different and justifiable — what was it? — different and unjustifiable treatment linking into the (3) over the page which picks that up and spells it out really and sets out the proportionality test, you would be happy with that, would you, from your side?

So, then the — if I understood it correctly, the question — can I then just go to Pastor Al next to see what he thinks?

PASTOR AL EBANKS: Yeah. I want to make clear that the — that, you know, there's two aspects of this section 2 that are of concern to us: one is the first statement is “such as” —

THE CHAIRMAN: Yeah.

PASTOR AL EBANKS: — because it's open-ended; and then the “other status” which is also open-ended. All the other — all the other issues can be defined in some way, shape or form whereas those two terms cannot.

I can say that we had — as far as the CMA was concerned we had complete agreement and support with the original proposal put forward. This is open-ended, that was more of a close-ended presentation put forward by Government and we had complete agreement with that. And I can say unequivocally that if we had that language I could sit here today and tell you that you would have our full support.

I think what will be critical is if there's — if there's any changes to that, then our processes are going to be a little different because I have to go back to talk to our people to make sure again that we fully understand and can throw our full weight behind it. So I just wanted to clarify that, that we did have complete agreement with the Government's original proposal for that and either — either this or some variation to

this even if it — even if it has some attraction to us will be something that we have to have further dialogue and discussion on among ourselves, to make sure that we have a clear understanding of the implications of it.

Thank you, sir.

THE CHAIRMAN: So what you've just — if I understand it correctly, the compromise suggested by Alden McLaughlin and elaborated by Professor Jowell to tie it to the rights in the Bill of Rights you're not sure that you can go with that, are you saying that, or you would have to consider that further with your...

PASTOR AL EBANKS: Again, this is something totally new coming out of the discussions that we had with Government last week, and also, you know, we have not — we have not put full consideration into this matter to see whether it fully addresses our concerns or not. So, it is something that we would consider as a group because we have not discussed it as, you know, as a collective body. And again, it's, you know — we would have to see it in order — see what it looks like in order to be able to assess whether it fully addresses our concerns.

THE CHAIRMAN: Yes.

Well, I mean, I think the — I think one of the clear results of doing that — if one went down that road tied this definition of discrimination to the other rights in the Bill of Rights, one of the clear results is that you would know the scope of it then. You would have to look and see whether there's another right or freedom set out in the Bill of Rights, and it's only in relation to those that discrimination would be prohibited.

So, it would deal with the point that other alleged rights or freedoms or asserted rights or freedoms could not be affected by it. Or other areas of life or government activity or whatever would not be affected by that. That would be a clear result.

And we're perfectly conscious of this having dealt with human rights cases for decades in the Strasbourg Court of Human Rights and now in the national courts with Article 14 of the European Convention. You know the scope of it, and a case can be defeated by persuading the court that there may very well be discrimination that it doesn't attach to any of the list of rights. So it's out of court and we have one case that's on that reason. So, that would be a clear effect.

I mean, it seems to me unless we want to — unless anyone has any further thoughts or comments on it, but our position is this: that a compromise has been suggested to try to help with your colleagues' difficulties, which we are not entirely sure you can yourself go along with at the moment. There are reservations from the Human Rights Committee because although, as I understand it, you could accept the basis of it for the “or other status” parts, but you're not sure about it as

far as the other grounds are — the other grounds listed which in your view could continue to apply across the board whether related to the list of rights or not. The difficulty with that is it will be a sort of two-tier system and different standards applying according to what the ground of alleged discrimination is.

And then there's the UK position which at the moment is as expressed in this text, and would come as no surprise to you that this section is the one that our Minister is most interested in, and so, at least as a sort of concordance in interest focusing on the same area —

But so I think what we should do is reflect on this. I mean, I think — I think the — I am not going to rule out that we could accept compromise suggested by the Government and explained by Alden and Jeffery. We'll need to give it some thought. And I would ask others around the table to give it some thought, but urgent thought so that if we think it could run and solve this problem we could at least sort of coalesce around it in a provisional way during the course of this week. I know we're all being very cagey here and for good reason, but shall we do that?

Unless there's any further comments on it. McKeeva, would you like to —

HON. W. MCKEEVA BUSH: Mr. Chairman, just to basically say — to repeat, I guess, that we've taken the position of the church, that is that the church don't take so much the position of the government, but we'll wait and see in writing what the Government is proposing.

THE CHAIRMAN: Well, that's a very good suggestion. I was going to say that if — Jeffery, Professor Jeffery read out something out of the top of his head; it may have been more considered than that. But I would think it would be very helpful if we come back to this maybe tomorrow or the next day with the text and then we can spend a little more time focusing on it.

HON. W. MCKEEVA BUSH: They should be very clear, though, what they say.

THE CHAIRMAN: Yeah.

MS. MELANIE MCLAUGHLIN: Mr. Chairman?

THE CHAIRMAN: In fact — sorry, I was going to suggest — well, no, you go first, Melanie.

MS. MELANIE MCLAUGHLIN: In the interest of not being cagey, I think it will be helpful I think if we can state our position as I think it would be extremely clear for the record. But also due to scheduling difficulties, we

may or may not be able to attend tomorrow. We would appreciate having the position in writing. We will articulate our position in writing. However, short of the two-tier system, we cannot in good conscience agree to giving away the right of non-discrimination for all of these other groups of our community. So, short of the two-tiered compromise — sub-compromise we wouldn't — we would have to revert back to the wording as is in the — to the FCO's wording in this current draft.

THE CHAIRMAN: Yeah. Okay, well that's what we're saying.

Okay, well, I think — I was going to say that perhaps we ought to come back to it if not tomorrow but the next day, and if that helps you — is that helpful to you because that will give each of us a little more time to think it over? Is that — would that help you a bit more?

Pastor Al, would that help if it was Thursday rather than tomorrow?

MS. MELANIE MCLAUGHLIN: We will do our best, Mr. Chairman, but again, we both work full-time and it's going to be a bit tricky to juggle our schedules. But we will do our best to put our position in writing at minimum.

THE CHAIRMAN: Okay.

MS. MELANIE MCLAUGHLIN: But we will endeavour to attend.

THE CHAIRMAN: Okay. And then if I could ask the Government with Jeffery's help to put down on a piece of paper how it might look, and then we can have a look at it on Thursday. Would that help?

HON. W. MCKEEVA BUSH: Yes. And you're saying, Mr. Chairman, that in section 2 all these things would remain, or that is what's going — that's how — what might be changed?

THE CHAIRMAN: No — well, I mean my understanding is that the list of grounds as it currently stands —

HON. W. MCKEEVA BUSH: Yes.

THE CHAIRMAN: — including age and disability and all of that and “or other status” at the end. That would be there, that would stay the same. But as proposed by the Government as their compromise, this prohibition on discrimination on any of these grounds would relate to the rights in the Bill of Rights — the other rights listed in the Bill of Rights, not to areas outside. That's the idea. So, it would not cover — a prohibition on discrimination will not cover the area of public health or

any asserted right to clean water or, you know, food on the table or that kind of thing.

HON. W. MCKEEVA BUSH: No.

THE CHAIRMAN: Would not apply to that is my understanding.

HON. W. MCKEEVA BUSH: To these matters, yeah.

THE CHAIRMAN: So, shall we proceed in that way? And we'll try and, I mean, see how we get on with the other stuff, but we must come back to this because it's so central. I would think on — best to do this on Thursday, possibly Thursday afternoon. But if it would suit anyone better to do it at a particular time, please let me know and we can always slot it in at the appropriate moment.

Okay?

And the next point is Protection of Children, and I recall that the Human Rights Committee wanted to talk to that as well.

Do you want to have a... Sara? Melanie? Did you want to say something about protection of right, protection of children at this point?

MS. SARA COLLINS: Mr. Chair, thank you.

I think really this is just a drafting point, and it's a question we hope of style rather than substance. It might be easiest just to take it by reference to the paper which we circulated to everyone immediately after the lunch break at page 14.

And by way of general explanation, there is an appendix attached to that paper which sets out what we say would be the exemplary provisions which could be redrafted without offending I think against anyone's concerns but so as to make them simpler and more positive. One of those is in relation to the rights of children and young persons at page 14.

And I think really our request is just for consideration of the more positive, simple, comprehensive, itemised drafting of the rights of children and young persons. In the style at least subject to comments about substance, but speaking about style first of all set out in the alternative draft in the very last column on that page. Sorry, I should — just as a point of clarification there's reference within the draft section to alternative sections that have to be clarified if they could just be ignored for the time being.

THE CHAIRMAN: I mean, my immediate reaction is that I don't know whether — I think a major substantive difference anyway between — this is just a first comment — between the text in Section 17, which comes from the Cayman Islands draft text draft Bill of Rights from last

time. That text imposes an obligation on the legislature to pass various laws that affect children in various ways.

And your alternative text is a catalogue of rights of children and young persons enforceable in the courts. So, a court could be asked to judge whether, for example, a child had been sufficiently protected from maltreatment, neglect, abuse or degradation. In other words, it's a catalogue of enforceable individual rights of children rather than obligation on the legislature to pass laws no doubt designed to produce the same result.

And the only observation I'd make is that that puts a lot of power and discretion in the hands of the courts rather than the legislature. Now, you know, one can argue about whether that's desirable or not, but...

MS. MELANIE MCLAUGHLIN: Mr. Chairman, perhaps as a compromise we could incorporate the wording so that the obligation on the legislature which is currently reflected in the current working draft would be better incorporated into this language. However, I think some of the difference in style here comes because we've sort of approached it from a more positive standpoint. But even in relation to this section, the right itself protection for children, is not — is not articulated in this language.

THE CHAIRMAN: No.

MS. MELANIE MCLAUGHLIN: Moreover, the other advantage to the suggested — this type of approach is that it will enable Cayman to be more compliant with its other treaty obligations beyond the ECHR, which included the Convention on the Rights of a Child which have been extended to us for some years. And we think this language will be far more conducive to that while also being user friendly.

MS. SARA COLLINS: There's another important point and it comes back to us harping on about style. But children are an important special interest group for whose rights we're advocating, and we think they deserve more than just passing reference in our Bill of Rights. We think it's worth actually being clear and specific to the extent that we can about the areas either in which the government must undertake responsibility to legislate or the areas in which the children have positive rights. And we hope and anticipate that there could be some consensus about that.

HON. W. MCKEEVA BUSH: Mr. Chairman, what I see that they have proposed spells out something that I would support.

HON. D. KURT TIBBETTS: Mr. Chair, just to be clear, so legislation such as the children's law, how would that fit into what you're saying? Are you saying the Constitution should have all the —

MS. MELANIE MCLAUGHLIN: No.

HON. D. KURT TIBBETTS: That's what I want to make sure of.

MS. MELANIE MCLAUGHLIN: Again, this is — the Constitution is meant to be the umbrella, the subservient legislation being the Children's Law. The legislation will expand further on the principles articulated and complied with; the principles are articulated in the Constitution itself.

So, to the extent we're giving children, a special interest group, in need — a vulnerable group that we know to be in need — of protection, we've given them a definitive and clearer right in the Constitution. The Children's Law will then follow as a matter of course in due compliance, to further articulate exactly the ways in which the government will seek to offer protection practically and tangibly to that special interest group.

HON. W. MCKEEVA BUSH: But just to be clear, Mr. Chairman, because the main thing here as I say spells out the protection as far as I would like to see it spelled out. You're not saying — you're not saying that you're removing any rights from the legislation as the —

MS. SARA COLLINS: No. No. No. I think we take the point. The problem is that the difference in approach comes because we advocate this positive approach. But if you want to fit what we're saying within the framework that seems to have met with the approval by everybody else, then you'd say you're measuring the legislature's obligations against the specific category rather than simply including a couple of sentences as is currently drafted.

[inaudible comment from the Honourable Leader of the Opposition]

MS. SARA COLLINS: Yes. I hope that makes it clear.

THE CHAIRMAN: I mean, in terms of substance — in terms of substance, subject to a couple of points I'll make in a moment, of course all of this should be given effect in legislation. Maybe a lot of it is already — yeah, a lot of it is already.

The two points of substance that I would mention which I think should be deleted, one is in little (a) which says **every child and young person has the right to a name and a nationality**. I would recommend deleting **and a nationality** because that is an obligation on the UK, and the UK is responsible for the nationality, British nationality under the British nationality act. And it would be I think wrong to impose an

obligation or to — well, impose an obligation on the Cayman Islands to ensure that every child has a nationality because it doesn't have it in its gift to ensure that a child has a nationality.

So, anyway — so I think that those words should be deleted and you should leave it to the UK to give effect to that obligation.

The second point is paragraph 2.

HON. W. MCKEEVA BUSH: Mr. Chairman — what is there — [inaudible – microphone not turned on]. What is there says that from our point of view they must be given a nationality?

THE CHAIRMAN: Well, from your point — my point is only this: there is an obligation that, you know — for those who accept the treaty obligation, and the UK has done and extended it to the Cayman Islands — under the rights of child, a child should have a nationality, every child should. You shouldn't let a child come into the world and leave it stateless. Okay?

My point is this: that it's for the UK to solve that problem even with children in the Cayman Islands because it's the UK Parliament that enacts nationality law. Cayman Islands legislature doesn't have that power. It can't. You see what I mean?

HON. W. MCKEEVA BUSH: I understand that.

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: That the UK is the one making the grant.

THE CHAIRMAN: Yeah. That's right.

GOVERNOR STUART JACK: Can I just make — raise a question about this which may — you may judge — does actually make some provision in here relevant, which is your — as I understand it you're absolutely right. the grant of nationality, British nationality, rests with the UK. But under the current Nationality Act —

THE CHAIRMAN: Yes.

GOVERNOR STUART JACK: — I cannot naturalise or register somebody if they are subject to immigration controls in Cayman Islands. So, in other words, as I would interpret that, the Cayman Islands Immigration Law in practice could frustrate the ability to deal with this issue in the case of a child.

THE CHAIRMAN: Yes.

GOVERNOR STUART JACK: So, I want to make sure that the Cayman Islands government is under some obligation not to frustrate that.

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: We've seen that but we've had it stateless children, something I certainly can't believe [inaudible – microphone not turned on] we had it before. And so what I am saying is what is there to stop that situation from our point of view? Yes the UK has the powers to grant, but what stops any government from frustrating as the Governor said?

THE CHAIRMAN: Yeah. Okay.

HON. W. MCKEEVA BUSH: There's nothing in our Constitution that says that we must do something even though — even though we might not have that right to grant it.

THE CHAIRMAN: Yeah, that's all right.

HON. W. MCKEEVA BUSH: But we seem to get it done.

THE CHAIRMAN: Okay. Well, I'm prepared to leave that in, bearing in mind that it would be something which if a child asserted, or it was asserted on behalf of a child that it was being kept stateless by virtue of action here and it was not something that we could fix, then there may be value in having this language here, keeping it in.

MR. CLINE A. GLIDDEN, JR.: Can I just make sure I understand?

We're saying that we don't have the power to correct this, but we're going to leave it in. So, what does that do if we can't —

THE CHAIRMAN: No, no, you don't — I'm not saying you don't have the power to correct it. What I'm saying — the point the Governor made is this: that he — the Governor here what the power under British Nationality Act to grant naturalisation or registration of British citizenship or British Overseas Territories citizenship to people here, but he cannot do so if they don't have — if they — unless they're free from immigration control.

So, you could have a situation where a person — a child is stateless, remains under immigration control. And the situation can't be corrected and nationality can't be granted to that person by the Governor because of that. Now, this is a very unlikely situation to arise, but if it did arise I could foresee that child being represented before the court and saying 'I'm being denied any nationality at all.'

MR. CLINE A. GLIDDEN, JR.: Right.

THE CHAIRMAN: Which could be granted by the Governor if only I was freed from immigration control. Do you see what I mean?

MR. CLINE A. GLIDDEN, JR.: But that's not necessarily the position — so, we're saying that we want to take away the limitations on immigration control?

THE CHAIRMAN: In that particular case, yes, if there is to be a meaningful right to a nationality for any child. We're only talking about children who are stateless, which are very few, but it seems to me a logical consequence.

HON. D. KURT TIBBETTS: But, Mr. Chair, I think what Mr. Glidden is talking about and what we have to be a little bit careful with... I hear what you're saying about that this is only referring to a child who is stateless; it certainly doesn't say that. And we are seeking to — we are considering seriously putting this into a constitution.

There are restrictions regarding children in the Cayman Islands including, strange as you might think it is, children born in the Cayman Islands. Not every child born in the Cayman Islands is automatically a Caymanian. Okay?

THE CHAIRMAN: Um-hm.

HON. D. KURT TIBBETTS: And that's not because of any prejudice. The way our laws are, somebody can't just hop a flight as is done in other territories including the wonderful United States, just to be able to land in the country and have the child here so that the child can be considered a Caymanian. Well, in the US yes, but I mean for here that is what obtains in our law. So, any child born here in the Cayman Islands not automatically BOTC, nor does it necessarily have connections to the Cayman Islands.

MR. CLINE A. GLIDDEN, JR.: That's a stateless child.

HON. ALDEN M. MCLAUGHLIN, JR.: No, it's not necessarily.

HON. D. KURT TIBBETTS: So I'm just trying to make sure that we know what we're saying here or —

HON. ALDEN M. MCLAUGHLIN, JR.: But, Mr. Chairman, I — I'm hesitating to get into this because I don't have the law, the act in front of me, but I'm not sure that what the Governor has actually said is correct.

We're struggling to remember that provision. There is — it is possible to register children, not adults.

THE CHAIRMAN: Who are residents.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah, who are resident in the Cayman Islands and for them to go on to — to be — to become British.

THE CHAIRMAN: I think you're right actually. We'll look at that.

HON. ALDEN M. MCLAUGHLIN, JR.: I know — I'm pretty sure.

THE CHAIRMAN: We'll look it up. We'll look it up.

HON. ALDEN M. MCLAUGHLIN, JR.: But I think for me the bigger question is in relation to this:

The Cayman Islands as you have stated is absolutely right. We have no power to confer nationality. Our legislature cannot confer nationality. So, I'm not sure that we should be writing into our Constitution an obligation on the Cayman Islands and the Cayman Islands government to ensure that every child has nationality. It's not something that is within our power.

THE CHAIRMAN: I think it's — actually, I think it's ultimately the UK.

HON. ALDEN M. MCLAUGHLIN, JR.: Absolutely.

HON. D. KURT TIBBETTS: You all are okay with that, to delete it?

MS. MELANIE MCLAUGHLIN: Yes.

THE CHAIRMAN: Okay.

The other one was the second paragraph over the page, bottom of page 15. It's **every child prisoner shall be segregated from adult prisoners**, and this of course we discussed under Section 6. So, I think this would just be repetition, we should just delete this. So (2) should not be there, and then (3) would become (2), which I think is a very splendid sentence, probably the best sentence in the entire draft.

HON. D. KURT TIBBETTS: I consider —

THE CHAIRMAN: **Child best interests are of paramount importance in every matter concerning the child.**

HON. ALDEN M. MCLAUGHLIN, JR.: That's fine.

THE CHAIRMAN: I can't argue with that.

HON. ALDEN M. MCLAUGHLIN, JR.: No. But, Mr. Chairman, just so I can get my head around how we're planning to do this. Is it being proposed that we — we cite these as each individual rights that stand alone, or are we proposing that something along the lines that **the legislature shall in addition to the provisions in this part which are for protection of children enact laws which confer on children and young persons the following rights.** The reason I'm saying that is that some of these — it's not possible for the government — the way we are trying to draft this bill, it is between the government and the individual, not as between the parents and the children themselves. So, if we are going to create that obligation that is going to require legislation to do so.

THE CHAIRMAN: Yes, which —

HON. ALDEN M. MCLAUGHLIN, JR.: Which generally exists already anyhow.

THE CHAIRMAN: No, I think —

MS. SARA COLLINS: I think that's been accepted. It's not our approach, but because we understand we've probably lost that argument, that is the best compromise between our approach and yours.

THE CHAIRMAN: I mean, I think it would —

MS. SARA COLLINGS: It's been accepted.

HON. ALDEN M. MCLAUGHLIN, JR.: Good. I'll say no more, sir, so I don't lose it.

THE CHAIRMAN: So I think it should start out the **legislature shall in addition to the provisions in its part which are for protection of children enact laws to provide the following rights.**

HON. D. KURT TIBBETTS: To provide what?

THE CHAIRMAN: **To provide the following rights to children and young persons,** and then list the (a), (b), (c), et cetera.

HON. D. KURT TIBBETTS: So, what about — Mr. Chair, what about the latter part of the original Working Document which speaks to **providing such facilities as would aid their growth and development.** Do you want to have that included or not?

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: Right. I thought so, that's why I asked you the question. So, in other words, where you stopped short and just added these things.

THE CHAIRMAN: **And to provide them with such facilities as would aid their growth and development.** Right, we'll try and do an amalgamation.

HON. D. KURT TIBBETTS: Right. Okay.

THE CHAIRMAN: Yes. Shall we? We'll try.

MS. SARA COLLINS: Mr. Chair, we're very grateful to have succeeded to a small extent on one point.

[laughter]

THE CHAIRMAN: The children of the Cayman Islands will thank you forever. We'll try and do an amalgamation and circulate it tomorrow morning.

Good.

And we'd done 18 and 19.

Now, 20 is Education.

Education, education, education.

Are we all happy with that?

HON. ALDEN M. MCLAUGHLIN, JR.: No, sir. No, sir. Not at all. If we go back to the first round of talks —

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: And the first draft — well, not the first draft, the draft that the Government put forward for discussion, we sought to include not just primary education but secondary education as a right of every Caymanian child. That did not find favour with you.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: Because I think you said that the Convention requirement doesn't allow you to discriminate —

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: — on the basis of nationals and non-nationals.

The problem with this provision as it is, even in this limited scope to primary education, is that the Cayman Islands does not have the resources or facilities to provide free education to all primary school students.

HON. D. KURT TIBBETTS: Who are resident.

HON. ALDEN M. MCLAUGHLIN, JR.: Nor does it have the — nor is it likely to have that ability for the foreseeable future, notwithstanding our millions and millions of dollars invested in new facilities which are — some of which are underway and some of which we've had to discontinue because of the global downturn in the economy.

So, I'm not sure how — I recall that the UK has a reservation in relation to this right itself for, if I remember correctly, similar reasons - an inability or perceived inability to cope with the number because of the number of immigration, the huge amount of immigration the UK has had.

So, from two ends I'm dissatisfied with this. One it doesn't accord — doesn't propose a right to secondary education which we do as a matter of course in Cayman. Every Caymanian child has a right to secondary education free. We've been doing it for years and years and years and years, nothing new, so it falls short in that respect. But it goes beyond what we're able to do because it requires provision to non-nationals as well.

THE CHAIRMAN: Only at the level of primary education.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah.

HON. D. KURT TIBBETTS: Both.

THE CHAIRMAN: No.

HON. ALDEN M. MCLAUGHLIN, JR.: This limited — as drafted this is limited to primary.

THE CHAIRMAN: Primary. That's what reflects the international obligation —

HON. ALDEN M. MCLAUGHLIN, JR.: Right.

THE CHAIRMAN: — you see.

HON. ALDEN M. MCLAUGHLIN, JR.: Right.

THE CHAIRMAN: And —

HON. ALDEN M. MCLAUGHLIN, JR.: That is problematic for us as well.

THE CHAIRMAN: Yeah. Even in terms of a delayed application?

HON. ALDEN M. MCLAUGHLIN, JR.: Well, it depends how long it will be delayed for.

HON. D. KURT TIBBETTS: Mr. Chair — Mr. Chair?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: I understand exactly what you just said, too.

I don't know if you know what obtains presently, but that specific point regarding primary education, although it does extend to secondary also, is an important part in our immigration dealings with work-permit holders and their ability to have their families with them, not only with their earning power, but it is clearly stipulated that they have, if they're able — if all other criteria are met, it is clearly stipulated that they have to show the Immigration Department acceptance of the child or children into a private institution. All right?

Now, when Minister McLaughlin spoke to the government's affordability of the issue, it just wasn't teachers, we're talking physical plan. And I say to you, the situation that we talked about with being incarcerated with the youngsters and the adults and us wanting two years to be able to — two years beyond the first two years to sort that out. If we have to go anywhere near what is proposed here, then, we are going to seek to be gradated (phonetic) from the UK *ad infinitum*. I'm not making any other statement but simply telling the truth. The numbers are — the numbers can be unbelievable.

HON. ALDEN M. MCLAUGHLIN, JR.: And they're growing all the time.

HON. D. KURT TIBBETTS: Physically we just cannot handle it. This is not theory, sir. And I understand whatever your obligations that you talk about. But I can promise you if you put us under this obligation you can jump on that flight and kiss us good-bye.

MS. SARA COLLINS: Mr. Chair?

THE CHAIRMAN: Yeah.

MS. SARA COLLINS: Just to contribute —

HON. W. MCKEEVA BUSH: Bill of Rights.

MS. SARA COLLINS: — the Human Rights Committee's perspective on this which has been articulated to the Government as well.

As we understand it — and the Human Rights Committee's position generally is that inclusion of aspirational rights such as this one should be considered and we are largely in favour with the drafting contained in this draft.

The obligation we think comes from the Convention on the Rights of a Child Article 28 unless we're told that there's a reservation that applies to the Cayman Islands. And as we understand it, this is a progressive right, so that it's perfectly acceptable for any government to say 'We can't afford this and it would be ludicrous to think we could, but what we're going to do is make a commitment. So at this stage primary education can and will be provided free only to Caymanian children but we make a commitment towards implementation of the rights". And that's the position that we've articulated to the Government.

And for those reasons and in that context we would support an inclusion of a right along these lines.

[inaudible comment from the Honourable Leader of Government Business – microphone not turned on]

MS. SARA COLLINS: No, no, no, but I would like to say, first of all, I am here on behalf of the Human Rights Committee. So if you're addressing me personally, my personal views have no place in this forum, I'm articulating the position of my committee. And I would like to abide by protocol and hope that I'm going to be dealt with accordingly.

[inaudible comment from the Honourable Leader of Government Business – microphone not turned on]

HON. D. KURT TIBBETTS: For all children resident in the Islands.

MS. SARA COLLINS: Let me just say what the mandate of the Human Rights Committee is so that I am clear.

Our mandate is to make comment where there is a treaty obligation which is binding on the country. Our understanding, which can be corrected is that there is a treaty obligation in the Convention on the Rights of the Child, and that the obligation is a progressive one. And it is in that capacity and on behalf of my committee that I have made the statement that I have made.

And I also don't think it is an entirely controversial proposition to say that where children are lawfully within the country that the

government should at least express a commitment towards their welfare including in the context of education, but that's a personal aside. That's — the committee's position I hope I have made clear.

HON. D. KURT TIBBETTS: Thank you. I'm sorry about that, Mr. Chairman. I understand the committee's position.

Mr. Chairman, my only difficulty with what is being said is that unless — unless I can get a very clear understanding, I don't — I don't see this as a progressive situation. I mean it's either or. Unless you tell me how this go.

THE CHAIRMAN: Well, I think — I think that there's also an obligation under the International Covenant on Economic, Social and Cultural Rights which is confined to primary education, but which is one of the reasons why we couldn't.

HON. D. KURT TIBBETTS: Say it again.

THE CHAIRMAN: Which is one of the reasons why we couldn't accept the way it was drafted before and limited only to Caymanian children, because there's no nationality criterion there, or no — there's nondiscriminatory.

But I hear what you say. I mean, the other Territories that we've discussed and had new constitutions have been able to go with this in spite of similar hesitations beforehand. That's not to say you should necessarily go with it because your circumstances may be very different.

I'm — I — this section on education I cannot pretend is a sine qua non.

HON. D. KURT TIBBETTS: Is a?

THE CHAIRMAN: A sine qua non. Is an essential — not an essential, it is an optional.

HON. D. KURT TIBBETTS: Yeah. Yeah.

THE CHAIRMAN: And if you're telling me — and I'm getting the message loud and clear — that it would create more difficulties, insuperable difficulties, then I think the best thing is to take it out. If in doubt take it out.

HON. ALDEN M. MCLAUGHLIN, JR.: Okay.

THE CHAIRMAN: Terminate the discussion. No Section 17.

HON. ALDEN M. MCLAUGHLIN, JR.: That's fine.

HON. D. KURT TIBBETTS: Mr. Chair —

THE CHAIRMAN: Sorry.

HON. D. KURT TIBBETTS: You go ahead, sir.

THE CHAIRMAN: Take it out and have a break for tea.

HON. D. KURT TIBBETTS: Take it out and have a break for tea.

THE CHAIRMAN: Yes. You know, you see my point? I don't want there to be a provision which is nakedly discriminatory and, therefore, on the face of this important text would be contrary to treaty obligation. I would much prefer to say nothing and for you to solve the problem in the fullness of time in the best way that you can. All right?

Anyway, right.

Susan would like me to remind you that there is an obligation. I thought everyone knew there is an obligation, but the question is whether to advertise it here when there is difficulty in giving effect to it. Or not to advertise — I would prefer not to advertise it if it cannot be complied with because of current difficulties. There are other obligations in the human rights field which are not reflected in this Bill of Rights. It is a selective list.

[inaudible comments from Cayman Islands delegation]

MS. SUSAN DICKSON: I do think the Cayman Islands need to bear in mind that you're still expected to work towards a...

[inaudible comments from Cayman Islands delegation]

THE CHAIRMAN: Shall we break and come back at half past 3?

HON. D. KURT TIBBETTS: Yes, sir.

THE CHAIRMAN: Thank you very much.

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THE CHAIRMAN: All right. Ladies and gentlemen, let's crack on if we may. Is there anything else to be said about education?

HON. ALDEN M. MCLAUGHLIN, JR.: Yes, thank you.

Mr. Chairman, we have thought about this over the short break, and it really would look quite odd, we think, to have a long list of things relating to rights of the child with no mention of education. So, what the Government is proposing is something along these lines. It'll be an aspirational right in the real sense of that term:

The government shall seek reasonably to achieve the progressive realisation within available resources to provide every child with primary and secondary education which shall subject to (3) be free.

THE CHAIRMAN: Could you read that once more, sorry, so that everyone's got the ... The government...

HON. ALDEN M. MCLAUGHLIN, JR.: This would be Section 20(2).

THE CHAIRMAN: Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: **The government shall seek reasonably to achieve the progressive realisation within available resources to provide every child with primary and secondary education which shall subject to (3) be free.**

THE CHAIRMAN: Thank you very much. That sounds very helpful in the circumstances.

[pause]

THE CHAIRMAN: I'm advised that this is acceptable.

[laughter]

THE CHAIRMAN: Ish.

PROFESSOR JEFFREY JOWELL: It's very much mirrored on the provision of socioeconomic rights in Constitutions like the South African and others —

THE CHAIRMAN: Okay.

PROFESSOR JEFFREY JOWELL: — where it's aspirational which doesn't require immediate realization, but simply asks government to think about it in years to come. And the key phrase is "within available resources" so it lets them out of the resources that aren't there.

THE CHAIRMAN: Okay. Fine.

Shall we move on then to Public Emergencies?

Public Emergencies: protection of persons detained under emergency laws.

Declaration of Incompatibility. Now, this feature of this Bill of Rights is of course one which is different from that in other Overseas Territories Constitutions, and I understand the reason for it at this stage of ... at this stage. But it is — and I'm not going to say anything more about this section because I think the way it's drafted, if it's to be there, is — does what is necessary. But it is the feature of it — it's a feature of it — not the only, but an important feature of the draft Bill of Rights which our minister will need to take a view on. In other words, is it going to be acceptable to our British government that there shall be a Bill of Rights in any new constitution which is not absolutely enforceable in this way? That's all I'll say.

So, this is one of the reasons why we have to maintain a reserve on the whole Bill of Rights, but I do understand perfectly well and have already explained to our minister the reasons for it as I understand them. And she will need to make a judgment on whether this is acceptable in the particular circumstances of the Cayman Islands.

Unless anyone else wants to say anything on section 23 then we can move on.

HON. ALDEN M. MCLAUGHLIN, JR.: Just —

THE CHAIRMAN: Alden, yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: Just that you will express your usual optimism about the prospects of that clause.

THE CHAIRMAN: You're asking me to? You know I'm always optimistic. I hope so, yes. Yes.

[laughter]

THE CHAIRMAN: I might be able to answer that question more after the next couple of days.

[laughter]

THE CHAIRMAN: Shall we move on to 24? I hope — I hope these provisions are not controversial actually. I think they're all helpful.

Then turning to page 30 we do have a couple of suggestions about Section 28 to do with the Human Rights Commission, and it's handy to discuss them with the Human Rights Committee representatives here.

You may have thought of this already, but there is in (6) a rather broad-ranging statement that the **commission shall have all powers necessary or reasonably incidental to the performance of its primary**

responsibility as set out in (2) and (2) is primary responsibility shall be promoting, understanding and observance of human rights in the Cayman Islands.

Now, it occurred to us to wonder whether that was to imprecise to say all powers necessary because when you then look on to paragraph 7, (7) it lists some powers, but I imagine that that is not intended to be an exhaustive list of the powers. What would have to happen as envisaged over the page under (10) is that there would be a law passed by the legislature which would set out in more detail the Human Rights Commission's functions and powers and so on and so forth.

So, I wonder whether actually (6) is necessary or indeed desirable drafted in the way it is. If one deleted it you could simply go to 7 — subject to a couple of other points I'll make in a moment to supplement 7, but to set out in 7 something like 'the commission shall have power to do (a), (b), (c) and (d)', whatever, and then such other power — at the end add a new paragraph, subparagraph saying **and such other powers as may be prescribed by law passed by the legislature** if you see what I mean.

I think that would be a safer way to proceed than setting out in 6 that all powers necessary, which is very imprecise, and I think one needs actually to have precision about powers of new bodies being set up. That's my thought anyway.

Just so that you have the full picture, I'm going to ask Susan to say what additions we think ought to go into 7 that ought to do with education, power to educate — it's in the educational field, really. Hold on a minute and I'll just find it on my piece of paper.

Yes.

You know, some wording such as — some wording such as commission shall have power to (a), (b), (c) and (d), then to provide by appropriate means education to the public on human rights. Something like that. I haven't drafted it precisely. And —

HON. D. KURT TIBBETTS: Is that an (e)?

THE CHAIRMAN: Yeah, and then an (f) something like power to provide or to draw up reports on human rights matters of their own initiative. This is general, not in response to complaints.

And then a final — so that would be (f) and then there would be a little (g) saying such other powers as may be conferred on it passed by the law of the legislature as a sort of sweep up thing. Do you see what I mean? I mean, if you thought there was value on that we could draft something overnight and circulate it.

Does that sound sensible?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, we're happy with it, but I think we'd be interested in hearing what the Human Rights Committee —

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: — think about limiting their proposed powers in that respect.

MS. SARA COLLINS: I think we take the point about (6). We'd like to come back if we can think of any useful powers that might be added to the catalogue, but subject to that I hope you'll be pleased to know we're happy with it also.

Sorry, there is one other point.

We're not sure why the section on the Human Rights Commission is within the Bill of Rights, but it may — it's really just a structuring point, but whether it shouldn't be moved to the later sections which deal with the Complaints Commissioner and the other commissions.

THE CHAIRMAN: Well, we certainly don't feel strongly about that one way or the other. I mean, I think there's a logic to where it is now, but there's also a logic to putting it later on. I think actually — I mean I don't know — it's really more a matter for you, but I would think presentationally there's a slight advantage to having it up here, up front where human rights are talked about, even though it's a sort of — you know, it's a structural point — structural section rather than a rights section. But on the other hand, you get the full picture of ... you know... Don't you want to be up front?

Yes, Governor.

GOVERNOR STUART JACK: Can I make something that's maybe both a slightly jocular point but also a slightly substantive one?

If, as has been discussed, there is any idea of limiting the discrimination provisions to only the Bill of Rights, that would allow the Human Rights Commission to act in a discriminatory manner without being embraced by the — that revision unless they're within this Bill of Rights itself. Is that right?

THE CHAIRMAN: I don't think it would because it would hinge on the other rights, not on... but anyway, what we'll do if you're basically content is try and just revise (7), delete 6, revise (7). And then if you in the interim think of anything that should go in there, we can look at it again on Thursday.

And then one would keep in (10) over the page: **Further provision relating to establishment and operation of the commission may be made by the legislation but such legislation should not derogate**

from any provision of this section. That would remain the same so that the details of the operation of the Human Rights Commission be set out in an ordinary law in good time before this new Bill of Rights comes into force. Does that sound good?

Section 29.

I think in view of the fact that there are three references to disciplined force, we might leave that where it is. The other thing I did was to — the other two things I did was to include a definition of “minor”, which allows a flexibility for the age of 18 to be altered for this purpose by ordinary law. This is something done in other Territories. And I also included a definition of “primary legislation” — it means a law enacted by the legislature just for clarity — because there are references to that earlier on.

So, unless there are any other comments, I just wanted to summarise where I think we are and where I think we should go next in regard to the Bill of Rights.

We, for our part — no, first of all, I would like to ask you all to come back to the Bill of Rights not I hope for very long but for a while first thing on Thursday. This is designed to give a day in between where we can do a bit of drafting and thinking and consulting, and also to allow Melanie to come back on — first thing on Thursday. I hope everyone will accommodate her as we are. So then we would at that time look — come back to the non-discrimination point with a text to be supplied by — or a draft to be supplied by the Cayman Islands government.

We would look at children, protection of children provision which we discussed earlier, combining the existing provision in Section 17 with the Human Rights Committee’s suggestions and we will take that one on. And we’ll come back with our answer to you about the three things that we said we would think about: one is the question of courts in Section 1, which as I said earlier I don’t think it’s a big problem; the other one we said we’d think about — the second one we said we would think about is the question of the right to family life and to the extent to which it could be affected by Immigration Laws, the right to enter and remain; and the third one is the question about minimum safeguards for people who are to be expelled.

Now, actually on those second — those last two points I could say something now if you have the energy for it and we could save having to come back to it on Friday. Shall I tell you? Shall we do it? Okay.

Well I think our conclusion on the family life point is — this is Section 9 — is I think that — I think we could go with that, I think we could accept that. That’s to say (e) would say **to regulate the right to enter or remain in the Cayman Islands on the basis** — enter or remain, your proposal — on the basis that the opening words of (3) remain as they are including the as is reasonably necessary — sorry reasonable justifiable in a democratic society. That’s the safeguard. So,

I think in the interest of compromise and progress, we can go with that one.

The second one is in Section 13, and this is (3). These are these minimum guarantees for a person who is not a Caymanian or does not hold permanent residence and is to be expelled. And you asked me whether we could — whether this was necessary, this provision, in light of the later Section 19(1). And we've analysed and that and we think that Section 19(1) covers part of the ground but not all of it.

And what I just wanted to do is to take a few minutes to analyse this (3) in Section 13 and try to see whether there's any real problem with it, because I would be very surprised actually if there was when one actually sits down and considers it carefully. Because what it's doing is saying — turning back to (2)(d)(iii), that's what it relates to: **No person who is not a Caymanian or does not hold Caymanian status or permanent residence — no person shall be liable by virtue only of this paragraph to be expelled from the Cayman Islands unless the requirements specified in (3) are satisfied.**

We then turn to (3). The requirements to be satisfied are as follows:

(a) the decision to expel that person is taken by an authority in a manner and on grounds prescribed by law. That is referring to the executive authority which under the law is given power to decide on the expulsion of a person. Okay? That's the administrative decision. And I presume that your immigration law gives power to somebody, some body or authority to take the decision to expel Mr. 'X' or Mrs. 'Y'. So (a) should be no problem.

(b) the person has the right save where the interest of defence public safety or public order are otherwise required to reasons against his or her expulsion to a competent authority prescribed by law. I presume also that the normal case is that a person who is informed, or given a deportation notice or whatever the process you go through, is in a position to write back and say I — the Governor is shaking his head already. This surprises me.

No, but is it — well, there may be as it says here exceptions on public order grounds or public safety grounds, but those would be highly exceptional, you know, when someone very dangerous has to be removed very quickly. The normal procedure just as with any other administrative decision the subject of that decision should be able to make representations about it.

(c) the person has the right save as aforesaid to have his or her case reviewed by a competent authority prescribed by law. In other words, the obvious one would be a court or a special tribunal set up under the Immigration Law to consider applications by people against their expulsion. And I would be astonished if it was not possible under the existing law in the Cayman Islands for a person who is served with

expulsion or deportation to be able to challenge it in the courts. So (c) should not be a problem.

And **(d) the person has the right save as aforesaid to be represented for the purposes before a competent authority to have legal representation and have the right to be represented.** They're not saying at public expense but the right to be represented. And again, I would be astonished if that was not possible under existing law.

So having gone through it — you're shaking your head, I'm terribly upset. This all seems to me so basic and such minimum rights and guarantees.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, I'm afraid you're going to be astonished a lot.

Our system doesn't — the way our system works doesn't fit neatly into this provision. The way the system works is if you are convicted of an offence of — which is — which is capable of — for which it is possible for you to be deported, what usually happens is the magistrate or the court makes a recommendation for you to be deported. But it is Cabinet that actually makes the deportation order.

THE CHAIRMAN: Um-hm.

HON. ALDEN M. MCLAUGHLIN, JR.: So, it comes the other way around.

In relation to the immigration issues, if you are convicted of over staying, then possibly there's the deportation recommendation made and Cabinet then decides if you should go. And then of course there's the other instance to which I earlier referred which is your right to remain in the Cayman Islands is simply expired.

THE CHAIRMAN: Um-hm.

HON. ALDEN M. MCLAUGHLIN, JR.: And in practice —the Cabinet secretary is a former Chief Immigration Officer so he knows. In practice you are encouraged by Immigration to leave if you haven't regularised your — otherwise they'll pick you up and prosecute you and you get convicted of staying, then you get a deportation order and then you're gone.

So, all of this business about the right to have your case heard by a competent authority and to be reviewed by a competent authority doesn't fit very neatly into our system since you're not going back — if you go back to the court it's the court who sent you to Cabinet in the first place, so I'm not sure where you'd go after that.

HON. SAMUEL W. BULGIN: I'm saying that you are making reference to, Mr. Chairman, cases where the expulsion is triggered by a conviction;

but there are people who can be expelled for other reasons and there are people who have been served with expulsion notice for other reasons and who have filed for judicial review proceedings.

HON. ALDEN M. MCLAUGHLIN, JR.: Perhaps, AG, you're better qualified than me to go in into those particular instances. But in those cases that would be a different procedure.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: So perhaps you better spell those out for the benefit of everybody.

GOVERNOR STUART JACK: Mr. Chair, can I just ask a question of those who are better qualified than me just to clarify what would be a reasonable expectation, if you like from your side in terms of desirable practice, and possibly from the Attorney General on the actual situation. And the area which I am familiar with is the deportation cases which are usually where somebody has a conviction where deportation is the normal practice and is probably supported by recommendation from the convicting magistrate that the person should be deported.

But in those cases what appears to happen and does happen in most cases is that while the prisoner is coming to the — close to their expected release date, and therefore they you know have — would have reasonable expectation that they're going to be deported — they must be aware of that possibility — that they are actually often only given a few days' notice of the fact that they are going to be deported. And they are not aware — I may be wrong on this, but are not aware or anyone drawing to their attention that they have an opportunity to make representations, if that is what is considered to be desirable. If that is what is considered to be desirable, there's some obligation that we should be doing that.

I mean, that could actually be dealt with by quite a simple administrative fix, which is the people are notified in writing, say, two or three weeks — whatever is a reasonable time — in advance of their likely deportation date that this matter is going to go to Cabinet for decision because Cabinet decides on deportations, and they have an opportunity to put forward within a very tight timescale in writing any reasons why they feel they should not be deported.

The issue which is most likely to arise and has arisen is the one which is covered elsewhere in here, which is the right — is the right to family life where somebody's — is due to deported that has family here they should be given an opportunity to set that out.

THE CHAIRMAN: I mean, I think this is — I think that's very helpful. I mean, I think when you actually —

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, just one other element which I've been reminded of which goes into this whole mix, and that is — I'm not sure which law it is but under the provision of one of relevant laws that govern these things, when you are convicted of an offence for which there is a — a term of imprisonment, mandatory term of imprisonment of more than 12 months, you are by operation of law declared or deemed to be a prohibited immigrant, and once you are a prohibited immigrant deportation follows as a matter of course.

So, in the majority of the instances, certainly in those to which the Governor has just referred, when the matter comes before Cabinet, the person has not only been convicted but has been declared a prohibited immigrant.

THE CHAIRMAN: Yes. But it still seems to me that (3), when you actually get down to analyse it is very — is absolutely minimum rights which are designed to prevent arbitrary expulsion. Basically, that's what it's about. And provided that your Immigration Law provides that the decision to expel is taken by an authority in a manner and on grounds prescribed by law (a) is satisfied. And you say the Cabinet has been given the power under the law in certain circumstances to make that decision, that one is already fulfilled. Then (b), (c), and (d) all have qualifications save for the interest of defence, public safety and public order are otherwise required. That applies to all of those.

So, your law can go so far as to provide that a person who's exceptionally dangerous or a person who is a threat to public health or public order — not public health, but public safety or public order has to be removed very quickly because it's allowed for, provided that the initial decision is taken in accordance with the law and it's taken by the right — you know, the person that the law prescribes and taken by no other.

But if it's not an exceptional case, what (b), (c), and (d) provide for is not very onerous actually. It is simply to allow the person in the normal case to make representations and to go to court to have the decision viewed, judicial review, normal judicial review of an administrative decision and to be represented before the court. That's all it is. It's terribly basic. And I would be astonished if the law didn't already allow for this. And bearing in mind, too, as I have said that there are built into this is the exceptional case that can be — that can allow derogation from it. So —

Now, the only reason why I bang on about this thing is because as the footnote says several years ago, back in the 90s, I don't know for certain whether this related to the Cayman Islands but the monitoring committee on International Covenant on Civil and Political Rights raised with the British government the lack of basic minimum safeguards for people being deported from Overseas Territories, some Overseas

Territories and were concerned therefore that there could be arbitrary deportations.

And a dear former colleague of Susan's and mine, Henry Steele who wrote the model chapter, fundamental chapter which some of you remember, he used to have to go alone before that committee and defend the Territories. And he — I mean, it all was sorted out and no doubt the Territories did what they could to put in place minimum safeguards. And Henry Steele then drafted the model factor including these provisions to provide for this minimum — provide these minimum safeguards to forestall any criticism and that's why we put it there. It's not a life and death issue, but I think it is actually respectable to have on the face of the Constitution minimum safeguards for none-belongers, for non-Caymanians and non-permanent residents which are not very onerous and provide for a basic minimum legal process in the case of decision to deport them. That's all it's about.

[inaudible comment]

THE CHAIRMAN: Yes. Oh, yes. Yes. We have all sorts of ghastly people who appeal and appeal and appeal. We're far more generous than this, I can tell you.

HON. ALDEN M. MCLAUGHLIN, JR.: But, Mr. Chairman, I hear all of that but I still believe that that this is both unnecessary, onerous and impractical in the Cayman context. I outlined as best I could how the present system works.

This — I don't see (d) as being a right of judicial review at all. What — what — how that would operate in the Cayman context is this:

'Prisoner' A is convicted of possession and importation of cocaine and is sentenced to five years at Northward. The magistrate who convicted him recommends deportation. He serves four years. On the eve of his release the — the recommendation is forwarded to Cabinet to consider. He's already a prohibited immigrant by operation of law because of the nature of his conviction and the length of sentence that he has. So, now what this would do as best as I can — I can discern is to require — is to require or to give him the right to have his case viewed by Cabinet, which they're doing, to appear before Cabinet with lawyer in hand —

THE CHAIRMAN: No. No. No, that's not — it's the — it's the — sorry to interrupt you.

HON. ALDEN M. MCLAUGHLIN, JR.: I want to be wrong, sir.

THE CHAIRMAN: No, no. Sorry to interrupt you, but it is — when you get into (b), (c) and (d) we're talking about a competent authority prescribed by law which could be a court. You know, the law could say — or allow for ordinary judicial review. That's what it's talking about.

HON. ALDEN M. MCLAUGHLIN, JR.: But, Mr. Chairman, I'm saying to you, sir, that this would turn on its head, or require the turning on its head of the system that we have in place which works well, which is the court is — the courts the one who has made the conviction, imposes sentence and made the recommendation.

THE CHAIRMAN: Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: So, it then comes up to us as Cabinet to consider the individual having been a prohibited immigrant and to look at the circumstances to see whether or not we ought to deport. In the vast majority of cases Cabinet issues the deportation order.

Now, I don't see how — with that framework how it is possible to send you back to the court again. To what end? For what purpose? It is the court itself who made the recommendation for you to be deported.

THE CHAIRMAN: Well, I think — I think that actually that type of case is probably going to be within your **save where the interest of public order or otherwise are required** because if you've got a serious case of a person such that the court recommends deportation, you know, (b) and (c) and (d) don't come into play because it's in the interest of public order that the person is removed without these safeguards.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, we need to make that clear, sir, because we do this routinely.

THE CHAIRMAN: Yeah. Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: At almost every Cabinet meeting there is a list of people who are being deported.

THE CHAIRMAN: I see the logic of it. You know, if the man's or woman's circumstances have already been considered by the courts, then there's very little point in making special provision for it to —

MR. MICHAEL BRADLEY: Ian? Sorry. Could the point not be — Alden's point not be met at the beginning of (c) by saying **except where a recommendation for deportation has been made by a competent court of law** and then continue on?

HON. SAMUEL W. BULGIN: I was just going to explain a bit, Mr. Chair, following up on what Michael says.

In the normal course of things what happened is that the cases that come to Cabinet the order made by a Cabinet is almost a rubber stamping exercise because the court usually makes a recommendation for the person to be — well, it's called convicted and deportable. So that recommendation is made, that's part of the sentencing phase, and invariably that recommendation is contested when the sentence is being dealt with.

And there's a Court of Appeal decision *Maggison v. The Queen* (phonetic) where the Court of Appeal ruled that that contested hearing about the deportation order is part of the sentence already. So, in effect the issue would have been litigated about whether a recommendation ought to be made for his deportation, so he would have lost that. The court made an order. He would have lost that and is entitled to appeal that aspect of his sentence if he so wishes all the way to the Privy Council if possible.

So, to an extent there is an adjudication already on the issue of the deportation; and what happens is that the prohibited immigrant aspect that we spoke about, that kicks in now. The person actually departs the territory. After he departs the territory he becomes prohibited from entering and remaining, so that is what excludes or keeps that person out of the territory.

So, in effect what is — what is — what is enumerated here is almost a codification of the existing arrangement as we now know it. I must confess that not in all cases a deportation recommendation has been made by the court. Sometimes the immigration officer takes a view — Chief Immigration Officer takes a view that the person is an undesirable person to have anyhow and all of that, and that might trigger some of these notices to be served and representations to be made. But by and large where the deportation/expulsion is triggered or is premised on a conviction, the adjudication process has already taken place.

THE CHAIRMAN: Unless we added — if we followed Michael's — Michael Bradley's suggestion and in (c) said **that person has a right save as aforesaid or following** — what was it, Michael?

[inaudible comment]

THE CHAIRMAN: No, I wanted to add it after “save” because “save as aforesaid” picks up the defence, public safety and public order and we're adding another one, okay? So, **save as aforesaid or where there has been a recommendation for deportation by a court, to have his or her case reviewed by ...** would that help? Would that ... **that person has the right, save as aforesaid or where there has been a recommendation for deportation by a court.**

[inaudible comment]

THE CHAIRMAN: Pardon me? **Or deportation of that person by a court.**

PROFESSOR JEFFREY JOWELL: I just wonder chair whether we could ask the Chamber of Commerce to find plain language words that are better than “save as aforesaid”.

HON. D. KURT TIBBETTS: Mr. Chair? Mr. Chair, just to make sure we're all very clear then? AG, are you content with — are you content with the proposal?

HON. SAMUEL W. BULGIN: I am because such a language would avoid the duplication of process Minister McLaughlin is talking about, where you would have a recommendation already made by the court and representations being made again at a subsequent stage either to Cabinet or some other court.

HON. D. KURT TIBBETTS: Okay. So, based on what Mr. Bradley said then, Mr. Chair, sir, sorry, can you just read?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Please.

THE CHAIRMAN: So (a) and (b) would be as they are, (c) would be **that person has a right save as aforesaid where there has been recommendation for deportation of that person by a court, to have his or her case reviewed by a competent authority prescribed by law.** So which would take out —

MR. D. KURT TIBBETTS: There has been a recommendation?

THE CHAIRMAN: **There has been a recommendation for deportation of that person by a court.**

[inaudible comment]

THE CHAIRMAN: No, this is in (c), Arden. This is in (c), **to have his other her case reviewed by a competent authority prescribed by law.** That is referring to a court or special tribunal. The initial decision is under (a) **the decision to expel is taken by an authority in a manner and on grounds prescribed by law.** Provided the law nominate or

specifies which person or body decides it, (a) is satisfied. I think we're clear that (a) is okay.

[inaudible comment]

THE CHAIRMAN: Yeah. So, then when it gets to (c) a person can have the decision of the Cabinet reviewed in the courts or a special tribunal set up. And what we've done with these added words is a person will not be allowed to go and have his case reviewed if when he was convicted by a court there was a recommendation for deportation because as the AG explained the court's already looked at this so it's pointless to go back to it. That's the idea.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, Mr. Bradley's suggestion has been very helpful, and we like its effect. And I am hesitant but I feel that perhaps we could improve, not on what he proposes, but how it is expressed, to avoid the "save as aforesaid" stuff by perhaps a proviso at the end which says **provided that the subsections** — or actually I should say the sub subsections —

THE CHAIRMAN: Paragraphs (b), (c) and (d) —

HON. ALDEN M. MCLAUGHLIN, JR.: — 3(b), (c) and (d) —

THE CHAIRMAN: — do not apply.

HON. ALDEN M. MCLAUGHLIN, JR.: — do not apply, yeah, because having heard you read it out it is quite cumbersome.

THE CHAIRMAN: Yes, I get your drift. So you would just have — after (d) you would have **but paragraphs (b), (c), and (d) do not apply where the interests of defence, public safety, public order would otherwise require**. Fine. We can do that. We can do that. I love "as aforesaid", I think it's beautiful. But I'm happy to go with your suggestion, too.

HON. ALDEN M. MCLAUGHLIN, JR.: Plain speak.

[laughter]

THE CHAIRMAN: So that's very helpful.

GOVERNOR STUART JACK: Sorry, could I just clarify exactly where we are on (b) as in this original draft? Because I mean my interpretation of this has been that the exceptions there — which is defence, public safety and public order — I mean if a matter in one form or another came before some kind of court — whether here or through judicial review or in

Europe or wherever — that one would actually have to show that one had been through due process and that one could show that one of those exceptions applied, and how that is tended to be interpreted, certainly in other contexts here, as being that you have to show that that person continues to present a threat to national defence, public safety and public order. So, somebody who has served their sentence doesn't — and goes through a proper risk-assessment process — which we now do in the prisons here — they may say that this person no longer presents a threat in those terms. So just saying because they had been convicted and recommended, if they can show other reasons why they should not be deported you can't actually show that you have followed due process. That's my concern. Unless there is — you do give them a chance to make representations, however, quickly and those recommendations are considered.

THE CHAIRMAN: No, I think —

GOVERNOR STUART JACK: Because at the moment that does not happen.

THE CHAIRMAN: No, I think (b) would be satisfied unless a proviso can be called in aid. If it can't, (b) would be satisfied simply by a procedure whereby the Cabinet secretary for example, delivers a notice to the person saying 'Cabinet decided yesterday that you should be deported. This will take — this will take place a week tomorrow. You have until, you know, the end of Friday to make representations.' And I think it's satisfied then. You know, if he chooses to make representations he does, if he chooses not to he doesn't. It's a very minimal thing, you know.

GOVERNOR STUART JACK: Or that could be done before it goes to Cabinet.

THE CHAIRMAN: Or it could be, yes, you're quite right. Or it could be either way around. Or he could be given a notice saying 'It will come before Cabinet next week the question whether you should be deported. You have until Tuesday to make representations on that question.' I think that would be very, a very good outcome.

And then the other point which we will come back to on Friday morning if we can — Thursday morning very briefly is the one I left in your — for you to consider a bit further, you guys, about trial by jury, whether to leave in the provision saying everyone has a right to trial by jury when indicted by the Grand Court, and you were going to have further thoughts about that. So, we've got a little agenda for a few Bill of Rights points on Friday morning — Thursday morning at nine o'clock. And I'm very grateful to you for accommodating Melanie so that she can come and deal with that and disappear again.

Pastor Al.

PASTOR AL EBANKS: Mr. Chairman, I think there's one other outstanding matter and that is for the preamble for the three points. I think it would be good if there was just an undertaking that we could deal with that at the same time so that you could move on to it. So I'd just like to make that recommendation.

THE CHAIRMAN: Very good. Thank you very much. I think if we have texts for the missing portions there that would be good.

Okay.

Now, we have done good work; and if you've got the strength and willpower I'd like to begin to go in to the next chapter on dealing with the Governor.

And I would like to — before doing that, though, I would like to say how happy I am that the discussions we've had today on the Bill of Rights have been held in such a good, calm, rational, reasonable proportionate spirit. I know I might be trying your patience a bit by going on, but I think if we can put in another 20 minutes or so and see where we get, we'll be better placed when we come back to Governor Executive, Legislature tomorrow. It's a different set of problems.

So Part II, The Office of Governor, here we have simplified by comparison with the current Constitution Section 30. And I note that the question of prior consultation is outstanding. Would you like to comment on how that stands, then I'll come back?

HON. ALDEN M. MCLAUGHLIN, JR.: Yes, sir.

We have — we have thought about this a lot. We've looked at practices elsewhere and we still cling to the view that there should be consultation with the Territory in relation to the appointment of a new Governor, and indeed the deputy Governor for that matter.

It is consultation we're talking about, no one is suggesting that we have the right to appoint the Governor. But in this modern day and in this true spirit of the partnership which we always talk about in these matters, we think that it's right and appropriate that the Territory do have the opportunity to express a view about the UK's proposed choice of our chief executive officer.

THE CHAIRMAN: So to be clear, your position is that it's not just a matter of following the current practice, which is consultation about the qualities required, or the qualities or qualifications of a Governor of the Cayman Islands which is — which follows the Baroness Amos' introduced policy, but you would want to be consulted about the proposed name?

HON. ALDEN M. MCLAUGHLIN, JR.: Well, I — I'm certainly not aware that there was — that there has been consultation with any government about the proposed appointment of a Governor, or even the qualities relating thereto. But as I say, I just am not aware. I never heard anyone say so locally, so I ...

THE CHAIRMAN: I mean what happened in — what happened in two thousand — what was the year of the Baroness Amos letter, two thousand and?

A MEMBER: Five.

THE CHAIRMAN: Five? You know what I mean.

HON. V. ARDEN MCLEAN: Ian, I don't recall any consultation when the current Governor was appointed. I don't recall it. I didn't see it.

THE CHAIRMAN: Two thousand and three.

HON. V. ARDEN MCLEAN: What I do know is that we were invited to England, the three new — the three new ministers that did not have experience as ministers - myself, Minister Clifford and Minister McLaughlin and this was in October, thereabouts, September/October, and we met the now Governor and had meetings with him prior to his appointment. But I have no knowledge unless the Leader received something at that time.

[inaudible comments]

HON. V. ARDEN MCLEAN: No, no, before — before he took up office, a few days you know after his appointment before he took up office. We knew the name, we didn't know the person, so the three of us and the Speaker got the opportunity to know the person — to be introduced to the person.

THE CHAIRMAN: No. Well, that's — the — what I'm referring to is that in February 2002 Baroness Amos wrote to chief ministers and their equivalents of the Overseas Territories.

HON. D. KURT TIBBETTS: In February of 2002?

THE CHAIRMAN: Two.

HON. D. KURT TIBBETTS: That would be the now Leader of the Opposition.

THE CHAIRMAN: Setting out a new policy which she had been persuaded to institute that before a new Governor was appointed — well in advance of any new Governor being appointed, the chief minister or equivalent — in this case Leader of Government Business — would be given the opportunity to suggest particular skills and expertise that the Governor of the territory should have, and they should be invited to set out their views about 12 to 18 months before a new Governor is appointed, you see.

Now, that was the compromise because there was pressure from many territories that the individuals should be, in effect, veto-able or they should, you know, be consulted about the individuals and that was not acceptable to British ministers. So, the compromise she agreed to in 2002 was that a letter would be written well in advance, not about the proposed individuals to be appointed, but what skills and expertise.

HON. D. KURT TIBBETTS: So, Mr. Chair —

THE CHAIRMAN: Yeah, so you should —

HON. D. KURT TIBBETTS: So, Mr. Chair —

THE CHAIRMAN: You had a letter. You had a letter.

HON. D. KURT TIBBETTS: So, the question is — this is what I need to understand.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Is it that when each Governor is going to be appointed that letter is sent out?

THE CHAIRMAN: Yes, that was the idea. That was the idea.

HON. D. KURT TIBBETTS: Whenever there's a new appointment?

THE CHAIRMAN: Yes, but well in advance, 12 to 18 months in advance of the new appointment the British minister would write the Leader of Government and ask, 'What are the skills and background experience you consider important for a Governor in the Cayman Islands?'

You would then have the opportunity to write back and say, 'We think this person should be — have the following sort of background: be God-fearing, moral, upstanding, go to church, ride a bicycle', you know, anything you wanted to say.

Now, that was the compromise.

Now, I have to tell you — that — I've heard of no indication that that policy would change, and I think it works very well so far as I'm aware.

But what would be very different would be to introduce a requirement that the government of the day in the Territory should be able to say yes or no to a particular individual who it is proposed to appoint. And I don't see, to be perfectly — speaking perfectly frankly, I don't see any prospect of you winning that point even if you put it directly to the minister. I don't see you would get it. But I think the compromise — because we've been around this course so much in the past, but I think the system of seeking — consulting about the qualities which works well will continue and we could, you know — if you have any problem with that then let us know.

HON. ALDEN M. MCLAUGHLIN, JR.: Well it hasn't happen — it certainly didn't happen the last time around. Well, not with this government anyhow so...

Are we proposing, sir, that we should then write this into the Constitution?

THE CHAIRMAN: Okay, we'll come back to this tomorrow. We'll check what happened.

Do you want to say anything, McKeeva.

HON. W. MCKEEVA BUSH: Mr. Chairman, the only opportunity I recall was similar to what was stated by the Minister of Works.

I was in the UK and had occasion to meet with Dinwiddy after he had been appointed, but there was — as you rightly said, there were pressure from the meeting — first meeting I attended in regards of the Territories wanting a say in the appointment and that — what you said we understood to be the compromise. But I don't recall that we had any invitation to say anything in regards to the appointment after — to any appointment after that. We — as I said, I didn't have that opportunity to meet with him before he actually came here. But we didn't have any say in qualifications or who should be appointed. And if I had, Dinwiddy wouldn't have been here.

HON. D. KURT TIBBETTS: Mr. Chairman, just so that we can know, in recent times I have received a request to respond to say what type of qualities looking for in a Governor, now appreciating from this discussion that that would be for the one who will be replacing Governor Jack.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: But I have to be honest with you, I knew nothing of the policy. I thought it was just a general question, and I

would have to have a good sit down and think and tell them what I thought Governors should be like generally. But I now understand.

HON. W. MCKEEVA BUSH: Mr. Chairman?

But if you're saying that you don't think there's any hope of us having any direct say in the appointment, the compromise would be, I guess, as close to being good as possible and that is to say what we feel the person — the kind of qualifications we feel the person should be.

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: And if — I don't know what the Government is going to say about it, but as I say, if we're not going to have any say then we would certainly want that put in place.

THE CHAIRMAN: Yep.

HON. W. MCKEEVA BUSH: I don't believe that any such letter was ever written to us to say that we could have a say in the appointment — the — what qualifications. I don't think that was ever indicated to us here.

THE CHAIRMAN: Okay. Well —

HON. W. MCKEEVA BUSH: Certainly I should say this, that I would have relied on the civil service to have directed — given us some directions, and I just don't recall that ever happened, so I don't believe so. Just an invitation to meet with him once we were in the UK.

THE CHAIRMAN: Yes. Can I tell you what — can I tell you, in case it's helpful to — helps in any way. The very same point was made to us in the very same vigor in our discussion for the Constitution in the BVI, and in the end —

HON. D. KURT TIBBETTS: Mm-hm. Sir Ralph would have — would have been adamant about that.

THE CHAIRMAN: Yeah, well it was all under Smith at the time. But in the end, Lord Treasman, who was then minister, agreed to write to chief minister Orlando Smith, when he was still chief minister a letter on this point where he said the following:

As Baroness Amos made clear in her letter to chief ministers of 5 February 2002 — that's the policy letter — the UK government believes that it is important that chief ministers and their equivalents should have the opportunity to suggest particular skills and expertise that the Governor of their Territory should

have, and that they should be invited to set out their views about 12 to 18 months before a new Governor is appointed.

We welcome your advice as a way of ensuring we select the right person for the job. During the talks on 28 February 2007, I proposed that the Premier of the British Virgin Islands shall be given the right to discuss with the UK ministers the particular skills and expertise that the Governor of the Territory should have. To give effect to this during the selection process for a new Governor of the British Virgin Islands, the Premier will be invited to contact the minister either by telephone or in person to discuss these qualities.

Now, that you may say don't get you anywhere, but it is actually a reaffirmation of the policy that Baroness Amos introduced. And it goes a little bit further in the sense that the letter you have had — that you say you had about the successor to Governor Jack —

HON. D. KURT TIBBETTS: I'm telling you now I'm realising that that's what it must be for.

THE CHAIRMAN: That's what it was for, yes.

HON. D. KURT TIBBETTS: Right.

THE CHAIRMAN: What it adds to it is a recognition of Lord Treasman in the case of the BVI, that the Premier of the BVI could telephone him about it or see him in person to discuss it which is fine. You know, consultation can be confined to an exchange of letters or it —

HON. D. KURT TIBBETTS: But is Miss Gillian of the same —

THE CHAIRMAN: Or —

HON. W. MCKEEVA BUSH: Is Miss Gillian of the same mindset?

THE CHAIRMAN: Well, we haven't put this to her yet; but I mean I think if it's something that you feel strongly about — I do not believe that she will agree to write into the Constitution anything like this or to write into the Constitution that there should be consultation about individuals. But what we could draw to her attention is this, what was done for the BVI, and I can't personally see that she could have any difficulty with it. Because one either writes seeking views and gets a letter back, or one writes seeking views and takes a telephone call, next time you're in town come and see her and she — and you talk it over. That's what convinced Lord Treasman when he was minister that it was a sensible procedure.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman —

THE CHAIRMAN: So, that's what I'm suggesting is a possible way through this if you would find it helpful.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I just want to make this observation. I do not see how that can be regarded as a compromise.

'A Governor is a Governor is a Governor. The functions of the Governor are set out in the Constitution. It is — it doesn't assist very much for the Territory to say, well, we need a Governor who has this ability or that ability or this ability. If we are to have any meaningful input in it, the government needs — or the leader of the government needs the ability to sit down with the minister and she says to him, 'This is the short list of possible candidates. Here are their resumes or CVs and this is what experience they have. What do you think in these circumstances about them? I'm not bound by what you say, but I want to hear your views on it.'

That's all we're asking for; and I think that that is eminently reasonable and in the end may well go a long way to avoid unnecessary problems and difficulties and tensions within the respective Territories, but in particular in this case the Cayman Islands. I'm not sure what our present Leader would say about what are the qualities we're requiring in a Governor and how that is going to help anything.

PROFESSOR JEFFREY JOWELL: Can I just ask, what is the objection to what has just been proposed in theory, in an era of transparency, openness, Constitution and so on, the partnership that the United Kingdom professes?

HON. W. MCKEEVA BUSH: Mr. Chairman, I would concur with what the Minister of Education has said in regards to what we would want. Last resort for me is as I said if we can't get all those things, then being able to say what the qualifications should be is next to good.

HON. D. KURT TIBBETTS: If I might, Professor. Mr. Chair, just to add a little bit of a weight to it. The real truth of the matter is — and I won't try to goad you to step alongside me with this. What they write and what I or anybody else might send they will read, but it doesn't necessarily have any application to where the choice comes from.

Without me going into any detail, I know a little bit of how it's done. I also know by natural attrition that the choices are limited — mostly in our instance because it could never be a coincidence — by age. It's set up like that. So, the qualities don't necessarily equate by us writing that — I mean, I could write that he needs to be a doctor, a lawyer, a masseuse or all of that. He must learn — he must know how

to play cricket, all that kind of stuff. And I'm not making a joke, it was a light moment. But the seriousness of this is simply to say we're not trying to ask the United Kingdom to pull us alongside them in a decision-making process. We're not trying to get alongside them. We're simply saying to them, 'Rather than us sending you the qualifications and any other prerequisites which we might think we have, wait till you get to the real world and let us have a say at that time.' That's what we're saying. There lies a difference in the whole process. And have a say meaning understand very clearly it is not our decision, but if you have these choices to look at allow us an opportunity to look at them also. I am not even talking about meeting the people because I understand the difficulties there.

And the fact of the matter is no one might even have to know what our choice would have been. But at least we have that comfort that at the end of the day whatever the net end result of that is we had an opportunity to look, perhaps in the same way that whoever it is that looks at it makes the decision now. And for us to say, well, if we had to choose, this is who we would choose, not by knowing them personally but by getting all of the facts for them. That's the difference in the whole affair.

Now, what can be done or can't be done is another matter, but clearly there is a difference between what we suggest as qualities and what's available. That's the point.

THE CHAIRMAN: Okay.

Right. Well, you will understand in view of the fact that this is a current policy of the British government that I can't do anything more than to say if you feel that strongly about it then we must list it as an outstanding point. If you wish to pursue it you'll have to present your argument in person to the minister about it — you might persuade her — because I can't agree to it.

HON. D. KURT TIBBETTS: So you don't disagree with it?

THE CHAIRMAN: Don't tempt me. I see the force of your arguments, put it that way. I'm a reasonable man. I see the force of your argument.

Gosh. You nearly caught me there. The end of a long day.

[laughter]

THE CHAIRMAN: And once again, I thank you all for your patience and tolerance. And I feel very good that we've actually started on the chapter following the Bill of Rights; I think we've made good progress. And we'll come back tomorrow at nine o'clock and press on to the difficult issues that arise out of that.

For the time being we list that point as an outstanding point to be taken further.

Thank you very much.

ADJOURNED

WEDNESDAY, 14 JANUARY, 2009

2008/9 CONSTITUTIONAL NEGOTIATIONS

HELD BETWEEN

CAYMAN ISLANDS DELEGATION AND

THE FOREIGN AND COMMONWEALTH OFFICE

THE CHAIRMAN: Well, good morning, everybody. I think we should start because we're already 17 minutes past 9:00.

First of all, I just wanted to indicate a plan of work for today because I'm conscious that we have permitted time.

My intention today is to get through the chapter dealing with the Governor, which is the one we started last evening; the chapter on the Executive; and the chapter on the Legislature, that's to say getting right up to page 67. Now, that's a tall order for today, but I think we should try very hard to do it. If we get stuck on any particular issue and it's pointless to keep banging on about it and wasting time, we can park it and come back to it tomorrow, because looking ahead tomorrow we would have the remaining chapters: Judicature, Public Service, Finance, Miscellaneous; and the Covering Order, where I hope that there are not too many difficult issues to discuss. But in addition to that we'll have a number of things to come back to, you know, starting with the points on the Bill of Rights, we need to come back to preamble, and no doubt a few issues from today's discussions. So, I'm telling you this now as sort of a forward planning, and I hope you'll bear with me that if we get to five o'clock and we're not quite there we carry on until we reach the end of the chapter on the legislature. So that's my plan of action.

And we'll try and work through — have a coffee break obviously, but try and work through till lunch at one, have a slightly shorter break for lunch depending on how we're going. If we're going very swimmingly and, you know, we might have an hour and an hour and a quarter like we did yesterday. But if we're not going very fast I might press for a shorter break, like 45 minutes or even a half on hour.

Okay, so the only other thing I think to announce from our point of view is that we have done overnight a little bit of drafting, two points in the Bill of Rights which I think Susan has given to the Secretariat. So it will be copied and handed out during the course of the day if you haven't gotten them already.

Good.

Without further ado, then, shall we start on Section 31, Oaths To Be Taken By the Governor. I hope there's no problem with that.

And then Section 32, The Functions of the Governor.

HON. D. KURT TIBBETTS: Mr. Chair?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Just before you go any further, we did have a discussion yesterday afternoon regarding the appointment of the Governor. I just want to make sure how we ended.

We ended that when you get to speak to someone else we're going to talk about that?

THE CHAIRMAN: Well, I think the way we ended was inconclusively that —

HON. D. KURT TIBBETTS: But I thought you said that perhaps if we feel strongly about that we could make representation.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: When we move on further.

THE CHAIRMAN: Yes. I concluded that I have no authority to —

HON. D. KURT TIBBETTS: I understand.

THE CHAIRMAN: — accede to your request on that. But so, therefore, I have it marked down at the moment as an outstanding issue —

HON. D. KURT TIBBETTS: Okay.

THE CHAIRMAN: — for a final round.

HON. D. KURT TIBBETTS: Okay.

THE CHAIRMAN: If we get that far next week.

HON. D. KURT TIBBETTS: Okay, good. Thank you, sir.

THE CHAIRMAN: Okay. Well, then The Functions of the Governor, Section 32 which I tried to draft as simply as possible. So, no problem with that?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman?

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: We believe that the draft that you provided does — does provide a decent basis for us to do some more important work on this; but we don't think that it quite goes far enough in some respects, nor does it sufficiently reflect what we believe ought to be the Governor's obligation to look after the interests of this jurisdiction, acknowledging what — in doing so that he ought not to prejudice the interest of Her Majesty. So, we would propose an amendment to 32 (2) along the following lines:

The Governor shall exercise his or her functions in accordance with this Constitution and any other law which is drafting, and add there at the end of that phrase, **in the best interests of the Cayman Islands and not prejudicial to the interests of Her Majesty's government.** And then the rest would follow. That is language modelled on the BVI formulation.

THE CHAIRMAN: In the best interest of the Cayman Islands and not prejudicial to the interests...

HON. ALDEN M. MCLAUGHLIN, JR.: I think Her Majesty's is sufficient. We don't necessarily need to say Her Majesty's government.

THE CHAIRMAN: And not prejudicial to Her Majesty's interests.

[inaudible comment by Leader of the Opposition]

THE CHAIRMAN: Well, this is the question.

HON. W. MCKEEVA BUSH: I don't think that that should be HMG, not prejudicial to HMG [inaudible – microphone not turned on]

THE CHAIRMAN: I mean there's a sort of tautology because, really, in the best interest of the Cayman Islands, the Queen being the Queen of the Cayman Islands as well as the UK, if the Governor is required to act in the best interests of the Cayman Islands it follows that it's necessary to act in the best interest of Her Majesty of the Cayman Islands if you follow what I mean. But I think I understood what you were trying to do is get in a balance between the best interests of the Cayman Islands while not prejudicing the interests of the UK. Is that the idea?

HON. ALDEN M. MCLAUGHLIN, JR.: Yes. I mean, I don't think we ought to stand upon protocol or history. The reality of modern day Cayman is that there are occasions increasingly when there is a divergence of interests between what is perceived locally as being in the

best interests of these Islands and what Her Majesty's representative may think is it actually in the best interest of the United Kingdom. And the Governor is always placed in a very difficult position to balance these issues.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: It's part of — it's — unfortunately it's part of — or is a necessary consequence of the structure because he... I don't want to say he's serving two masters because we certainly are not his master but — if you understand.

THE CHAIRMAN: No, entirely.

HON. ALDEN M. MCLAUGHLIN, JR.: He's trying to balance two interests. So, we think that the Constitution should reflect the need on the part of the Governor to strike that balance. He is after all the Governor of the Cayman Islands, and to the extent that what is being considered will not prejudice the interest of Her Majesty or Her Majesty's government, then the interest of the Cayman Islands ought to come first in his thinking.

THE CHAIRMAN: When you say — just to be clear when you say not prejudiced to the interests of Her Majesty's government, you mean Her Majesty's government in the United Kingdom?

HON. ALDEN M. MCLAUGHLIN, JR.: The United Kingdom. The UK's interest.

THE CHAIRMAN: So, the concept — so we're clear about the concept — is that the Governor should be expressly required to act in the best interest — well, in accordance with the Constitution and the law, that's the first thing so the Governor must act always lawfully, then in the best interests of the Cayman Islands and without prejudicing the interest of the United Kingdom Government. Essentially that's the concept is it?

HON. ALDEN M. MCLAUGHLIN, JR.: Yes.

THE CHAIRMAN: Okay.

PROFESSOR JEFFREY JOWELL: May I intervene here, Chair? In the recent Caicos Islands case this issue was discussed. Paragraph 49.

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: Deals with the question of whether Her Majesty in council is entitled to legislate for a colony in the interests of the United Kingdom, and there's a statement there by Lord Hoffman where he says **no doubt she is also required to take into account the interests of the colony, but in the end she may prefer the interests what he calls the United Kingdom.** So, that kind of balance I think —

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: — is considered necessary, although of course in the end the United Kingdom's interests may have to prevail.

THE CHAIRMAN: Yes. No, I think that statement of Lord Hoffman in that judgment, I mean, I know — you know, I think it expresses classically what the constitutional position is.

Can you just leave that thought with us because I would want to just talk it over and particularly with my colleagues? We can have a little huddle at the coffee break and come back to it. But I clearly understand it. Michael, you understand it?

MR. MICHAEL BRADLEY: Yeah.

THE CHAIRMAN: Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, sorry, in my earlier attempt to address that particular point I skipped over the 32 (1) which we have a proposal to amend as well along the same lines really.

The — it reads now **the Governor shall have such functions as are prescribed by this Constitution and any other law.** And we would like to add there **and subject to this Constitution,** those four words, so that it would then go on to read **and subject to this Constitution such other functions as Her Majesty may from time to time be pleased to assign to him or to her.** It parallels what we're proposing in (2).

THE CHAIRMAN: Why — why is that? I'm not quite sure I understand the purpose of that.

PROFESSOR JEFFREY JOWELL: It's simply — the formulation that's just been proposed for 42 (1) is the formulation that is already there in 32 (2) which says **the Governor shall exercise his functions in accordance with this Constitution and any other law and subject thereto.**

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: In other words, subject to the Constitution in accordance with other such instructions. For some reason, that's not included in 32 (1). It starts exactly the same way: **The Governor shall have such functions as prescribed in this Constitution** and then implies — could be implied — **and may be assigned other functions by Her Majesty outside of the Constitution.** So, the words “subject thereto” as in 32 (2) would I think create exactly the same effect.

THE CHAIRMAN: Well, the point in — the point in (2) is about how the Governor exercises those functions that he has. He must exercise them in accordance with the Constitution —

HON. ALDEN M. MCLAUGHLIN, JR.: But it's also —

THE CHAIRMAN: — and any other law even when instructed at the exercise of Her — whereas (1) is designed to be a full statement of where you've — what the functions of the Governor are, not how they're exercised. And these words at the end, **such other functions as Her Majesty may from time to time be pleased to assign to him or her**, is the classic wording in all of the Overseas Territories constitutions to deal with the sort of residual, I would say, prerogative powers which remain with the sovereign, and in the case of an overseas Territory the sovereign's representative, there which are not expressly stated in the Constitution or any other law.

Now, what are those residual functions you might ask. And I think in modern times they are extremely few because the Governor has a raft of functions prescribed in the Constitution and in various pieces of legislation. Those are clear. But as in the UK there are certain powers which are not dealt with by legislation. They're constantly diminishing prerogative powers of the Crown.

And if I were to think of an example, it would be something pretty limited such as recommending honours. Now, honours is a prerogative manner, you know, honours granted by Her Majesty, and in an Overseas Territory that is a prerogative function by the Governor to recommend honours for people — eminent people in the Territory. Now, that's not prescribed in the Constitution or any other law. There may be other things of that sort, but — and I think — I don't want to suggest that a recommendation of honours is inconsequential, but it's not an earthshaking power.

But if you inserted **and subject to this Constitution such other functions** I'm not quite sure where that would take you. I always thought — think and believe — that the important thing is in (2) which requires the Governor in exercising any of his functions to do so in accordance with the Constitution — in exercising them. The Governor cannot act unlawfully even when instructed by Her Majesty, by the

Secretary of State on behalf of the Queen. Always exercise any functions lawfully. That's the real — really important point.

HON. ALDEN M. MCLAUGHLIN, JR.: But could we try again, sir?

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: Could we attempt to — let me try this formulation and see whether this sits any better with you: **The Governor shall have such functions as are prescribed by this Constitution and any other law and subject to this Constitution ... such other functions — no, subject to this Constitution ... and such other functions that Her Majesty may from time to time be pleased to assign to him or her subject to the scope of her prerogative powers.**

THE CHAIRMAN: Yeah. That's the idea. There was a — I think there was actually a formula in the Gibraltar... something like that. Let me just try and reach it. Yes. Actually there it's **and such other functions as Her Majesty may be pleased to assign to him in the exercise of the royal prerogative.** Is that --

HON. D. KURT TIBBETTS: In the exercise of what?

HON. ALDEN M. MCLAUGHLIN, JR.: Royal prerogative.

THE CHAIRMAN: In the exercise of the royal prerogative.

HON. ALDEN M. MCLAUGHLIN, JR.: We'd be happy with that.

THE CHAIRMAN: You would be happy with that? Good. Because I think that is actually what it is about.
Jeffery?

PROFESSOR JEFFREY JOWELL: That has the benefit of clarity which, as the Leader of Government Business said yesterday, is part of the objective that this Constitution can be accessible and understood. It also has the benefit — or the possible benefit — as prerogative powers decrease those powers would decrease —

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: — whereas at the moment it looks like an open-ended discretion for all time.

THE CHAIRMAN: Yes. Yes. No, I take your point. We had a very similar discussion with the Gibraltar delegation on this very issue and that's where we ended up. So, I think if you're happy with that we'll be comfortable with that too.

And then on (2) your formula is actually novel. I can't think of any — any other Constitution which says it quite like that, so that's why I'd like to just reserve it for the moment and then come back to all of that after — well, we'll try and have a little huddle at the coffee break about that one, okay? I'm not ruling it out I can assure you.

HON. ALDEN M. MCLAUGHLIN, JR.: I hope not.

[laughter]

HON. ALDEN M. MCLAUGHLIN, JR.: We worked hard on that.

[laughter]

THE CHAIRMAN: Anything else on this section?

HON. ALDEN M. MCLAUGHLIN, JR.: Yes, sir. We truly have a problem with the format which follows ... yeah, 32 — 32 is okay, 33 I think is — I mean we've been around this particular point so much, the one about whether ... whether any matter — where the Governor's complied with any matter — **has in any matter complied with any instructions addressed to him by Her Majesty** —

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: I think we ventilated that as much as we possibly could the last time around. We're not happy with it, but...

THE CHAIRMAN: It's a very limited restriction.

HON. ALDEN M. MCLAUGHLIN, JR.: I don't know that we can advance our argument any more.

THE CHAIRMAN: No, this — this formulation by the way in (3) is where we ended up in the new Gibraltar Constitution. We had the same discussions there.

And you see the first half of the sentence notwithstanding the jurisdiction of the courts in respect of functions exercised by the Governor. That is a recognition that the courts generally have jurisdiction to review actions of the Governor. And then it goes on, only this particular question of compliance with the instructions is outside

the jurisdiction of the court. So it actually demonstrates that this is a limited — a limited exception.

Well, I take note that you don't like it. But if you're content to live with it, I think it's...

HON. ALDEN M. MCLAUGHLIN, JR.: If that were the only point between us we would concede it. I'll put it that way.

THE CHAIRMAN: Yes. All right.

Right. Well, Section 33. This is a central provision obviously, and I think that this one and the next one, Sections 33 and 34, are vital to the whole operation of any Constitution. And our intention was to try to make it as clear and comprehensive as possible — as clear and comprehensive as possible — the general effect of which would be that with limited exceptions the Governor consults the Cabinet on everything — with limited exceptions. And then in the next section there would be stated exclusively the occasions on which the Governor may act against the advice given by the Cabinet. And so, in these two sections, which are absolutely fundamental, the story would be told, and I hope it will be clear to all how the Governor interacts with the Cabinet.

Now, your comments.

HON. ALDEN M. MCLAUGHLIN, JR.: I think, sir, rather than talking about specific drafting at this point — because we've spent a long time thinking and researching this point — I think the fundamental issue we have with this structure is that the Governor should consult with Cabinet in relation to the formulation of policy in relation to matters outside his special responsibilities.

The reality — or what should be the reality of this new arrangement, we believe, is that Cabinet should be responsible for the formulation of policy generally, except where the Governor has special responsibilities. In other words, Cabinet should not be constitutionally an advisory body to the Governor in relation to the formulation of policy. The Governor is part of Cabinet, no issue with that, now — but it is Cabinet who should be responsible for formulation of policy, not the Governor. And that's where we'd like to get to.

As I said, the Governor's special responsibilities are a separate matter altogether. But in matters involving any other issues relating to government it should be Cabinet that is responsible for the formulation of policy. It's not a matter of us consulting the Governor about it, he's part of the policy making body, he's part of that, he sits in his chair, or president or whatever you call it.

THE CHAIRMAN: I mean, just pausing there for a moment. Just pausing there for a moment before you go on, Alden, if I may.

I mean, looking ahead to Section 45 on page 38 there is a clear statement in 45 (3): **Cabinet shall have responsibility for the formulation of policy including directing and implementation of policy insofar as it relates to every aspect of government, except those matters for which the Governor — Governor — has special responsibility under Section 55, and the Cabinet shall be collectively responsible to the Legislative Assembly for such policies and their implementation.**

So — and we have no problem with that. So, we agree that there should be a statement in the Constitution that except in the areas of special responsibility it's the Cabinet who has —

Now, maybe — have you got the BVI there, please? Maybe there's a problem with the — the formulation in 33 (1) because I think — on reflection I see the BVI says subject to section — this is Section 40 of the BVI Constitution. **Subject to this section the Governor shall consult with the Cabinet in the exercise of all functions conferred on him or her by this Constitution or any other law for the time being enforced in the Virgin Islands,** and then there's stated exceptions. So it does not use the words “the Governor shall consult with Cabinet in relation to policy”, et cetera. So if that would help you on this point.

HON. ALDEN M. MCLAUGHLIN, JR.: If that were deleted I think we'd be okay.

THE CHAIRMAN: Good. I'm sorry, when I drafted I should have checked with the BVI formula because I think it's actually —

HON. ALDEN M. MCLAUGHLIN, JR.: It's our fault as much as it yours because we allowed it to creep into our draft as well.

THE CHAIRMAN: Okay. Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: But we've thought about it since.

THE CHAIRMAN: So, **subject to subsection the Governor shall consult with Cabinet in the** — delete “in the formulation of policy and” — **in the exercise of all functions conferred on him or her by this Constitution or any other law.** Yeah.

I mean, I think the way that this is reformulated — and this was exactly — you know, the point is exactly the same in our discussions with the BVI — is that in conceptual terms the Governor will have stated special responsibilities. In respect of some of those external affairs there will be a great — a much greater express role in the Constitution for ministers because there will be an obligation to delegate certain external affairs matters to ministers. A National Security Council

would provide a new forum for considering internal security, police matters. There would be a statement that the Premier should be consulted about certain other special responsibilities. That's one side of the thing. So the Governor has formally the special responsibilities, but with an obligation to consult and, in some cases, delegate with ministers. That's one side.

The other side of the coin is that all other matters apart from things like the powers of the courts and the Auditor General and so on with special functions, all other policy matters can be assigned to ministers and are a matter for Cabinet to formulate the policy on. Okay? That's the structure that we intend. And then we come to it later, I guess we're going to have to discuss who chairs the Cabinet and what role the Governor plays in that context, but that's a separate issue. But in terms of executive responsibility I think we're pointing in the same direction.

All right?

Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: Section — Section 33 (3) the second line.

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: You've included the word "solely" before "responsible".

THE CHAIRMAN: Yes. Did I insert that or is it from your draft? I don't think it matters actually.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah, it's just that the Gibraltar sort of equivalent provision doesn't use "solely", and I just wondered if there's any particular reason why that's included in there.

THE CHAIRMAN: No, I don't think the word "solely" is essential here at all. I think it's clear later on when you see. You can take out the word "solely" because it does — it does not fit with what I've just said before about the sharing of responsibility in areas, especially external affairs and internal security.

HON. D. KURT TIBBETTS: Mr. Chair, before you go on we're just looking at 32 (2) (a), and while we may not win this one we still have to ask.

THE CHAIRMAN: 33 (2) (a).

HON. D. KURT TIBBETTS: Yes, sir. 33 (2) (a) reads: **The Governor shall not be obliged consult with Cabinet in the exercise of: (a) any**

function conferred by this Constitution which the Governor is empowered an exercise in his or her discretion or judgment — and then or in pursuance of instructions addressed to him or her by or on behalf of Her Majesty. How hard and fast are you on that?

THE CHAIRMAN: Well, of course, you know, I'm not surprised that you asked the question.

HON. D. KURT TIBBETTS: Thank you for not being surprised.

THE CHAIRMAN: If you actually — if we actually analyse — try to analyse the situation it's clear that the Governor... the Governor is obviously not obliged to consult the Cabinet where on the rest of this text the areas where he's given special responsibilities. He may choose to do so, but he's not obliged to.

[inaudible comment]

THE CHAIRMAN: Pardon?

[inaudible comment]

THE CHAIRMAN: Oh, well this is (c) then because that's special responsibilities.

HON. D. KURT TIBBETTS: I — I see where from your side of the coin you may think that it is necessary to have this written into a Constitution, but you just mentioned the Governor may choose to.

THE CHAIRMAN: Um-hm.

HON. D. KURT TIBBETTS: Now, that obviously translates to depending on who the Governor is, what type of person the Governor is, and it also extends itself to what type of relationship that may exist at any given time between the Governor and his Cabinet. That's just nature.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: So, while the word “consult” is being used — it has nothing to do with advice — I don't know if there's any other word which would be acceptable which would at least cause for us — us meaning at any point in time the members of Cabinet — to be informed. So, how this is worded, what I'm saying is that it is very possible for Cabinet not to be informed.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: And that may be the result of some action which Cabinet discovers after the fact.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: And I don't think that the elected Cabinet of a British Overseas Territory should have to endure that as a constitutional... you know, as part of a constitutional arrangement.

HON. ALDEN M. MCLAUGHLIN, JR.: Constitutional imposition.

HON. D. KURT TIBBETTS: Imposition my colleague reminds me that that's the appropriate word, sir.

THE CHAIRMAN: Okay. Well, there are two issues I think and let's separate them out because (3) deals with the Governor informing the Premier or the Cabinet. Now, we can look at the precise wording of that. That's the informing where.

HON. D. KURT TIBBETTS: Where is that, sir?

THE CHAIRMAN: In (3). But just — that's one issue.

The earlier issue of the Governor not being obliged to consult is a separate one. And, basically, as I'm sure you're well aware — because you operate the current Constitution so you're well aware how it works — where the Constitution or any other law says specifically the Governor acting in his discretion or the Governor acting in his judgment, that means the Governor is not obliged to consult anybody about it, not obliged to consult anybody about his own decision.

Where a Constitution or any other law prescribes that the Governor must act after consulting or on the advice of some other person on the Cabinet — which might be the Premier or Judicial and Legal Service Commission or any other bodies, any bodies other than the Cabinet — obviously that's how the Governor is to act in those cases. All right?

Then, where it simply says the Governor may do something without any other qualification, the general rule according to 33 (1) is that the Governor does that thing after consulting with Cabinet and, generally speaking, in accordance with the advice of Cabinet and there is some exception in the UK.

So, when you actually analyse it through, the words in 33 (2) (a) or **in pursuance of instructions addressed to him by or on behalf of Her Majesty**, it is only in those cases where normally the Governor would be required to consult the Cabinet that he might be instructed not to do so. Okay? So it's only in those cases.

HON. D. KURT TIBBETTS: I'm hearing you but it's not okay.

THE CHAIRMAN: No, no. I'm trying to analyse the situation —

HON. D. KURT TIBBETTS: I understand.

THE CHAIRMAN: — so we're all clear about it.

Now, those cases in my experience are extremely rare because it's an important thing for a Governor to have a power in which he would normally be required to consult Executive Council or Cabinet in a Territory and is instructed not to do so. All right?

One could dispense with these words, but if we did that then one would have to look at the next section, 34, to see whether it was satisfactory as a reserved safeguard, as a necessary safeguard in the executive field for the UK to instruct the Governor: 'Actually, okay, you've consulted, got advice, but we're not happy with the result of this — for whatever reason — and therefore you must disregard it'.

Now, let me give you an example. This may not be an example which arises in practice here in this Territory, but in one or two other Territories there have been — the normal case is that the disposal of Crown land is a matter the Governor is normally obliged to consult Executive Council or Cabinet on. Crown land is obviously very vital for the Territory, and irresponsible disposition of the Crown land could in the end result in a contingent liability of the UK because the Territory finances go up the spout you see. So, there may be very good reasons for a Governor to be instructed not to act in accordance with Cabinet's advice in the Territory in a matter so important as that. That's just an example I pluck out.

HON. D. KURT TIBBETTS: That's the act.

THE CHAIRMAN: Sorry.

HON. D. KURT TIBBETTS: That's the act. We're not talking about the act.

THE CHAIRMAN: Which act?

HON. D. KURT TIBBETTS: No, I'm saying the example you used, Mr. Chair —

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: — is an act on the part of the Governor, not a tell, if you understand my point.

THE CHAIRMAN: No, sorry.

HON. D. KURT TIBBETTS: It's an act, it's a need, not a tell, T-E-L-L.

THE CHAIRMAN: Not a tell?

HON. D. KURT TIBBETTS: Meaning what we're talking about here is not what the Governor's actions are, but the fact of him advising Cabinet of certain things.

THE CHAIRMAN: Oh, I see. Yes.

HON. D. KURT TIBBETTS: I'm saying to you the example you just used is different from the point that we're trying to make.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: Let me just quickly if you don't mind, sir, we can quickly wrap up (3) into the whole affair.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: Here is where my personal experience gives me great discomfort, and it has nothing to do with the individual relationship, but it's the constitutional relationship:

There have been a few occasions when I, as the Leader of Government Business, have been advised of certain things which are deemed to be confidential and I can't advise my Cabinet colleagues. I don't think that's right, in my view. It means that I am trusted to a degree that is higher than my colleagues, and this is personal to me. But I just don't think that that's right. Neither do I think that it is right for an elected Cabinet — remember, sir, my point is not to do whether we can — whether we are asking that we should — the Governor should heed our advice on all occasions — on all occasions — that's not what I'm saying.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: I am saying that the Cabinet should know and this doesn't achieve that. That's what I'm saying.

THE CHAIRMAN: Okay. Well, therefore, we should concentrate on the language of 33 (3). I mean —

HON. D. KURT TIBBETTS: Hold on. But — I wrapped 33 (3) into it, but if you don't look at 33 (2) it still gives him the right not to tell us something.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: And that's where — remember, we're not talking about whether he has to follow any advice, we're talking about him saying to us, 'Listen, there's a Japanese cruiser that is coming here ten minutes to one tomorrow morning, and if our boys don't cut them off at the pass they're going to blow up the Island'. I'm just saying.

THE CHAIRMAN: Yep, okay.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, in furtherance of that I think what we should focus on really is Section 33(2).

As the Leader has outlined this — the present arrangement is just very bad practice. It leads to unnecessary tensions and suspicion between your elected Cabinet and the official arm of government — and I use official arm advisedly because I include there the official members.

We have in the best interest of this country to get rid of this “us and them” approach to the way Cabinet functions. It cannot be right that the elected members of a Cabinet know less and are in a less preferred position than those — than civil servants, that's the way it is - the Governor's a UK civil servant and the other three are Cayman Islands civil servants. And this is something that has been around from the time we had this constitutional arrangement.

But there needs to be one government; and this business of two governments within Cabinet, or possibly three with the Governor separately is a really, really bad idea. It works terribly in practice. As I say, it creates suspicion, it creates tensions when they ought not to be any. A feeling of distrust or a feeling that the elected government is not — are treated essentially like a bunch of schoolboys to whom you have to give little bits of information except when the thing goes bad, and then we're all expected to rally round the leader and say, you know, we have to do this for Cayman. It doesn't work well in practice and there needs to be an obligation on the Governor to share or to consult with Cabinet on all — on virtually all matters except in very exceptional circumstances where Cabinet is behaving very badly or — one can understand all of those sorts of things.

But in the general run of the administration of the country, there is no proper basis in this enlightened age, at a time when the UK has been talking about the importance of a partnership and a maturing of the relationships and so forth between itself and the United Kingdom government. There is no proper basis for the general withholding of information by the Governor in matters relating to his special

responsibilities. There are — as I said, there are occasions and he needs to have the ability to make judgments about whether he should say something because nobody's questioning that. And neither are we questioning, save to the extent that that's already in the draft, the exercise of those responsibilities by him. And I say that because we're proposing a National Security Council and a judicial, all of the matters that relate to his special responsibilities. But save to that extent no one is suggesting that matters relating to his special responsibilities that the Governor ought not to have the power to make the decision. But this business of, you know, 'these are matters which I can't tell you about because of the constitutional provisions' is just a very, very bad idea. And speaking candidly, it has been disastrous in the last three years as far as the elected members are concerned and I think as far as the general community's concerned.

HON. D. KURT TIBBETTS: Mr. Chair, just to make a brave attempt to cement the argument, if that is at all possible.

In reality, Mr. Chair, the other discomfort that is experienced continuously is that the Cabinet by and large, from the president right down, will enjoy personal relationships which are only natural because there is continuous interaction. And then you find yourselves — you find yourself in circumstances where, in order to be able to know — and this is not for any other reason than to make sure that you're not caught off guard and any decisions that have to be made from the elected — the side of the elected arm that we're not blind sighted or anything like that, but you find yourself having to go seeking information covertly. I mean, that's ions ago, that's not in today's world. And when you have to go and seek information in that manner, you put other individuals who are part of the Cabinet in untenable circumstances. And I say no more because I am sure that you absolutely understand, sir.

PROFESSOR JEFFREY JOWELL: Mr. Chair, could I just intervene? It seems to me — I think the main problem with this — and the Government is — has gone through every single provision where the term "discretion" or "judgment" has been used in this Constitution and there are not, you know, major issues. But the problem is that Section 33 (1) seems to set out a norm, a norm of good practice of openness, of consultation and a necessity to follow the advice received. Nothing substantive it's purely procedural. Good governance really is to consult these days. It used not to be but it is now. And then it goes to take away perhaps just as much as it gives. It looks ungenerous and suspicious.

And may I just suggest that the provisions of the BVI Section 40 and Gibraltar Section 50 are in some ways just more generous, shorter, taking away less than they give and may be a better model. We can

perhaps go further even than that, but I suggest they are just better drafted than this section.

THE CHAIRMAN: Well, I'm certainly happy to look at BVI Section 40 if that would help.

PROFESSOR JEFFREY JOWELL: And Section 50 which is even perhaps more succinct.

THE CHAIRMAN: Yep.

HON. D. KURT TIBBETTS: Mr. Chairman, just a gentle reminder. If we go through all of the subsections going down from 33, we see where it is very clear, sir, that His Excellency is not obliged to follow any advice. So, that, to me, is the catch-all safeguard. Remember, what we're talking about now is the Cabinet being consulted/informed.

THE CHAIRMAN: Um-hm.

HON. D. KURT TIBBETTS: You may go back to your thought now, sir.

PASTOR AL EBANKS: Mr. Chairman, if I might.

You know, we — obviously we are — as an association we've heard some of the discussions taking place — the Opposition, Government, others in the community — and while we are not privy to the inner workings of how Cabinet and the relationship with the Governor works, just from a practical point of view from our perspective in the discussions that we have had with — among ourselves and people in the community, I would simply say that it seems reasonable to us that in a day and age where we're looking for open, accountable transparent — transparent governance on all levels, that the idea of consultancy — and I think that it's consultancy that we're only talking about — would seem to be totally desirable and practical. Now, as I said, it may be far more complex than that from a functional point of view, but on the surface of it, and the discussions that we've had, it is a matter that has been — you know, has been discussed by us and we are concerned about as well.

THE CHAIRMAN: I was just looking at — just looking at these texts that you say you'd prefer the drafting of. There are two issues: one is about consultation and acting in accordance with advice and any exceptions thereto. That's one issue. And the second issue which the Leader of Government Business is emphasising is information to Cabinet about functions that the Governor — that are the responsibility of the Governor; is that right? Okay.

As I said, I mean I don't have a problem with reformulating the — on the first issue reformulating if you'd prefer it along the lines of the BVI — actually Section 40 of the BVI Constitution has old-fashioned stuff in it in (2) about the Governor not being obliged to consult when Her Majesty's service would sustain material prejudice and not terribly significant and all that kind of thing. But the basic provisions in Section 40 (1) of the BVI Constitution are very similar to Section 33 (1) (2) of this Cayman Islands draft, very similar, but I don't mind reformulating them in this way if you would find that —

Now, there is a difference here. I notice that at the end of Section 40 (1) of the BVI it says **but in exercising his or her powers in relation to matters to which paragraph (c) applies** — that's to say special responsibility matters — **the Governor shall consult with the Premier**. Now, that is a particular provision of the BVI that they were happy to have. I don't know whether you feel strongly about that. But actually I thought it was rather strange, especially given the fact that there were elaborate provisions for delegating responsibility in the external affairs field and setting up a National Security Council to deal with internal security and police matters. And so, there's a sort of mismatch there. But that's just a side issue really.

I mean, the key point is that it is set out, the circumstances in which the Governor must consult the Cabinet, that's the general rule, and then limited exceptions: acting under instructions; cases where the Governor is obliged to act in his discretion or in accordance to the advice of someone else; and special responsibilities. Those are the three cases.

Now, moving on down that Section 40 of the BVI Constitution (3) is —

HON. D. KURT TIBBETTS: Mr. Chairman, if I might before you go any further. I'm assuming you've gone past this business about advising the Premier. You've gone to another section?

THE CHAIRMAN: No, I'm coming back.

HON. D. KURT TIBBETTS: Coming back?

THE CHAIRMAN: Yeah.

Then going down to (3) in the BVI Section 40 it reads like this: **In any case in which the Governor is required under this section to consult the Cabinet** — is required under this Cabinet to consult the Cabinet — **the Governor shall act in accordance with the advice of the Cabinet unless in his or her opinion such advice will affect a matter for which he or she is responsible under Section 60**. That's the special responsibilities.

Okay.

Now, in terms of substance that is reflected in Section 34 (2) (b) of this Cayman Islands draft — okay? — what is different is Section 34 (2) (a) which under this Cayman Islands draft would give the Governor power to act against the advice of Cabinet if in his or her judgment it would be right to do so in the interest of good governance. Okay? So that will be an additional ground on which the Governor might reject the advice of Cabinet. Good governance. I don't know what you feel about it.

HON. ALDEN M. MCLAUGHLIN, JR.: I should warn you, sir, we have a major problem with that.

THE CHAIRMAN: Okay, so you have a problem with that. So I'm just doing a comparison at the moment in an open and transparent fashion and I hope an honest fashion. So, there are some differences, but, you know, the slightly differently word, but —

Now, coming to Kurt Tibbetts point about informing the Cabinet, I would have thought that there's quite an easy fix for that in Section 33 (3) of this draft, and that would be simply to substitute for the "Premier" in the first line "Cabinet", so — and then to delete the whole of the second part of it. So you'd have a simple sentence: **the Governor shall keep the Cabinet informed concerning the general conduct of all matters for which he or she is responsible.** Full stop. Then that would avoid the embarrassment of the Premier not feeling that he was able to tell his — or pass on to his colleagues, and that would insert a procedure of the Governor passing more information to the Cabinet insofar as he's able to do so, bearing in mind that the invitation is to be recognised.

HON. D. KURT TIBBETTS: I don't know, Mr. Chair, whether the second part of it is unimportant enough to simply be deleted —

THE CHAIRMAN: Well —

HON. D. KURT TIBBETTS: — where it speaks to —

THE CHAIRMAN: — we could keep that in as well. I mean —

HON. D. KURT TIBBETTS: — any matter whether in his or her judgment that may involve the economic or financial interests of the Cayman Islands.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: I don't think that we should simply delete —

THE CHAIRMAN: Well, keep that in.

HON. D. KURT TIBBETTS: If — I understand your point —

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: Rather than take the whole thing out.

THE CHAIRMAN: Yeah, we could keep that. So, if it would help at least to solve that problem, (3) could be kept as it is with the substitution in the first line of “Cabinet” for “Premier” and in the second line deleting the word “solely”.

HON. D. KURT TIBBETTS: You see — right. Right. The importance of that second part of (3), and I think that the reason why that is inserted, has to do with the way the world is today.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: And everything is global and there may be some point in time with the UK's actions with regards to any decisions by way of treaties or arrangements.

THE CHAIRMAN: Okay. I understand.

HON. D. KURT TIBBETTS: Okay.

THE CHAIRMAN: That's fine. That's fine. So, then, when we actually come to analyse the differences, I think it actually revolves around Section 34. It's perhaps as well to look at 34 together with 33, because if you're telling me that — you know, I mean I have been upfront and open in admitting just now that the power in Section 34 (2) (a) of this draft **the Governor to reject the advice of Cabinet in the interest of good governance** is a step different from the BVI, and you could recognise that yourself by doing a comparison.

Now, could you — it would be very helpful, Alden or Kurt, if you told us what your reaction is to 34 as drafted here so that we can get a view of the picture.

[inaudible comment]

THE CHAIRMAN: Pardon me?

[inaudible comment]

THE CHAIRMAN: Yeah — no, the whole of Section 34.

HON. D. KURT TIBBETTS: Oh, okay.

THE CHAIRMAN: If only — if only 34 — if in Section 34 the only problem is (2) (a), then I think there's a — I think it's relatively manageable. If it goes beyond that and we'll have further difficulties with it, then I'm not sure.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, sir, I'll take your advice and consider both Sections 33 and 34 together as essentially part of one, which it is part of the overall exercise of the Governor's functions.

I do not think that by amending Section 33 (3) as we have proposed — which I'm happy with — that we have achieved the result — the desirable result. I'm happy with the amendment as you proposed in relation to Section 33. But I think that the Governor is disadvantaged by not having the benefit of feedback from his Cabinet in relation to the exercise of his functions as they relate to special responsibilities, in some instances. And it will actually improve the exercise of those functions if there is a requirement for the Governor to consult his Cabinet in the exercise of his special responsibilities. Not that he's bound to follow the Cabinet's advice in that regard. But to be informed of the views of Cabinet when he is exercising his special responsibilities can only be a benefit to his office, and it would avoid a huge amount of issues and problems which routinely arise. Because in a place as small as Cayman, I promise you we often know what is going to happen or what has happened before we see the Governor, because if it is going to upset somebody's apple cart you can believe they are going to try to find someone who they think might influence the result and it is usually us.

So, I really would like us to take a little more time to consider Section 33 (2). But as far as Section 34 is concerned, I think our big issue is in relation to (2) (a). We're not at all happy with that. That's a step backwards really in relation to the Cabinet's powers.

THE CHAIRMAN: That's very — that's very helpful to have summary because it seems to me that there are two outstanding problems on this having I hope solved the information problem in 33 (3). Now we're into the question of when the Governor must consult and when may the Governor act against advice, okay?

As I understand it you would like the Governor to be required, insofar as possible, to consult the Cabinet about exercise of special responsibilities, but you accept that the Governor would not be obliged to act in accordance with advice on those matters. Yeah? Is that right?

Secondly, you would not like the Constitution to allow the Governor to act against the advice of the Cabinet in the interests of good governance. So the sole ground on which the Governor would be entitled

to act against the advice of Cabinet would be special responsibility matters, as in the BVI Constitution to be perfectly fair?

Is that correct? Is that — oh, there can't be more?

[laughter]

THE CHAIRMAN: There's more. All right.

HON. D. KURT TIBBETTS: It's to do with good governance.

THE CHAIRMAN: Sorry.

[inaudible comment by the Leader of the Opposition – microphone not turned on]

MR. EDDIE THOMPSON: Mr. Chairman —

THE CHAIRMAN: Just as a — sorry, I'll come to you ...

Just to recall that the current Constitution enables the government to act contrary to the advice of the Cabinet in the interest of public order, public faith and good governance. Now, that is one of those classic, old-fashioned phrases, and I've never read anywhere precisely what “public faith” means, but it's pretty clear what “public order” and “good government” are and there's only a certain amount of judgment that can be exercised in those things. But — so, this reference to “good governance” is a sort of more modern term encapsulating all that. So that's — that's why it is there, it's a sort of reflection of that power.

But before I go on, Mr. Thompson?

MR. EDDIE THOMPSON: Yes. In an effort to solidify what Minister Alden McLaughlin was just saying, we as a chamber very regularly consult with the members of Cabinet in either expressing our concerns on any... a particular example right now is the economic downturn, and they in turn as well consult with the wide range of industries we represent. And having over 700, which constitutes 20,000 of the populace, be it immigrant or local, we concur very strongly with the Minister for the ability to be consulted. We would certainly strongly support that.

And again, also I'd like to echo the comments made by Pastor Al earlier. Thank you.

THE CHAIRMAN: Right. Thank you.

What I would like — what I would like just to know before coming back — because this is a very important point and we on our side are going to have to have a little huddle about it. But before we have a break in order to do that, it would be very helpful just in the interest of morale

— my morale if nobody else's — to know if there's anything else you wanted to raise in the rest of this chapter because I anticipated that, you know, the main discussions would be over 33 and 34.

HON. D. KURT TIBBETTS: Mr. Chair, can I just ask for you to tidy something up —

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: — before it slips me. If we just go back quickly to 33 (3)? This is all to do with drafting style. Madam Speaker brought it to my attention and I think she's right and it's worth saying it to you.

Where we substitute the word “Cabinet” for “Premier”.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: And then we go on to say — so it will then read **the Governor shall keep the Cabinet informed concerning the general conduct of all matters for which he or she is responsible.**

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: And instead of repeating **shall keep the Cabinet informed** we just delete that and say **and of any matters that** —

THE CHAIRMAN: **And of any matters that...** yes, that's fine.

HON. D. KURT TIBBETTS: Thank you.

THE CHAIRMAN: **And of any matters that in his or her judgment...** yep.

I'm just thinking in terms of timing —

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, we don't — I don't think we have anything of real substance — we have some points but I don't think they'll be difficult.

THE CHAIRMAN: Okay. Could you — would you mind therefore just taking those now, and then if we break in about 15 or 20 minutes we might have dealt with some of those and my morale will be much...

HON. ALDEN M. MCLAUGHLIN, JR.: Much improved?

THE CHAIRMAN: Much improved.

HON. ALDEN M. MCLAUGHLIN, JR.: Okay sir.

THE CHAIRMAN: What would you like to mention?

HON. ALDEN M. MCLAUGHLIN, JR.: Section —

THE CHAIRMAN: Yeah, go ahead.

HON. ALDEN M. MCLAUGHLIN, JR.: Section 35 which is the Office of the Deputy Governor.

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: Before we do that we're not finished with the —

THE CHAIRMAN: No, no. We're going to come back to it after break —

HON. ALDEN M. MCLAUGHLIN, JR.: We're coming back to it.

THE CHAIRMAN: — because we — no, no, we need to have a little huddle about it and then we'll come back to it straight after the coffee break. But if we could just in the meantime look at any other smaller points on other sections in this part.

Deputy Governor.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah. Section 35 (2) says that the **Deputy Governor shall have any such functions not of a ministerial nature**. We were — we were — we've been trying to figure out why that was necessary to frame it in that way.

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: And the other point was that we thought that rather than having these functions assigned to him that they should be delegated to him since he is the Deputy Governor —

THE CHAIRMAN: Yeah, I understand the difference.

HON. ALDEN M. MCLAUGHLIN, JR.: — as opposed to a minister.

THE CHAIRMAN: Yeah, that's fine. I think delete the words **not of a ministerial nature**. I think they were a hangover from an earlier draft, but I don't think they are necessary. **And as may be delegated...** fine.

HON. W. MCKEEVA BUSH: Mr. Chairman, I have one quick question which is not clear to me where we say that the Deputy Governor person [inaudible – microphone not turned on]. Is this expected to be a civil servant or is this expected [inaudible – microphone not turned on]?

THE CHAIRMAN: Well, it's — the only qualification is that this person is a Caymanian but obviously not a minister.

HON. W. MCKEEVA BUSH: Yes. [inaudible – microphone not turned on]

THE CHAIRMAN: It doesn't mean — if you're saying that the person already has to be a civil servant.

HON. W. MCKEEVA BUSH: And that's what I'm asking.

THE CHAIRMAN: No. No.

[inaudible comment by the Leader of the Opposition – microphone not turned on]

THE CHAIRMAN: Yes, once appointed.

HON. W. MCKEEVA BUSH: Once appointed.

THE CHAIRMAN: Yes, you would —

HON. W. MCKEEVA BUSH: [inaudible – microphone not turned on] civil servant.

THE CHAIRMAN: Yes. Yes.

[inaudible comment by Leader of the Opposition – microphone not turned on]

THE CHAIRMAN: Well, that would be — that's the intention, you see, because (3) — you may remember, McKeeva, back in 2002 at Lancaster House we discussed this very point, that the idea — the very idea would be that the Deputy Governor would be under the authority of the Governor, the head of the civil service. So this would make clear in a new constitution who is under the Governor in charge of the civil service. That's the idea.

HON. W. MCKEEVA BUSH: And he'll be answerable in the House then for civil service matters?

THE CHAIRMAN: Well, that would be the logic of it. The Governor, not being a member of the House, could say the Deputy Governor should answer to these matters in the House. Okay?

[inaudible comment by the Leader of Government Business – microphone not turned on]

THE CHAIRMAN: Yeah. You happy with that? Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, moving on then to the Acting Governor and the Governor's Deputy, the way this is set out, the titles really are not a model of clarity. And three, four — four lawyers among us have struggled to work out the difference between the Acting Governor and the Governor's Deputy.

THE CHAIRMAN: Ah. I have your very man for that. Mr. Bradley.

HON. ALDEN M. MCLAUGHLIN, JR.: But there are a number of points. There is — one is the distinction between the Governor and the Acting Governor and the Governor's Deputy. We think those things need to be expressed more clearly and of course the unfortunate use of Deputy Governor and Governor's Deputy and the distinction between the two. I mean, lawyers struggle to figure out those things, so the general public will not have a clue.

So, we are urging that somehow we try to collapse these sections into one and — and to avoid the use of terms like Governor's Deputy when you have a Deputy Governor.

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: And that sort of thing.

THE CHAIRMAN: One thing I'd like to ask — I mean, the key difference — although Michael is the greatest authority in the world on this subject. The key difference as I understand it is that an Acting Governor steps into the shoes of the substantive Governor completely and cannot be instructed by the Governor how to perform functions of Governor when the Governor is absent — okay? — or indisposed.

By contrast, the Governor's Deputy is designed to cover a short absence or indisposition — short absence for illness for example — and the Deputy can still be instructed by the Governor as to what functions — sorry, and the functions designated for a Governor's Deputy may be limited. There may be — it could be 'I'm going to be away tomorrow but I know that tomorrow the following bills will come up and will need to be assented to, I instruct you to sign them off'. You know? So it could be

that limited or it could be 'I'm going to be — I've fallen ill, I'm in my bed for a week but I can still —

HON. D. KURT TIBBETTS: Tell you what to do.

THE CHAIRMAN: — tell you what to do, you do everything but you must come and I'll tell you what to do'. Now that's the basic difference.

But the question I was going to ask — and I would like Michael to speak to it because it's such good fun. I just want to ask the Governor, how often here do you actually use a Governor's Deputy? Is it a thing that's useful?

[inaudible comments – microphone not turned on]

THE CHAIRMAN: No, Governor's Deputy.

[inaudible comments – microphone not turned on]

THE CHAIRMAN: I mean, could I just ask Michael, in light of his experiences as a Governor, and he pulled a grimace at me when I said it's such fun. But I do enjoy Michael's interventions on these subjects. Go ahead.

MR. MICHAEL BRADLEY: Flattery will get you everywhere.

I think part of the problem arises in these constitutions is the terminology used because I agree to a layperson Deputy Governor, Acting Governor, Governor's Deputy all seem to be variations of the same functions performed. And I think, you know, that if we could find instead of Governor's Deputy some other title to accord to this man that it would help. Governor's Deputy's kept in there because he is —

[end of recording]

THE CHAIRMAN: — that simple sentence.

HON. ALDEN M. MCLAUGHLIN, JR.: I think that's fine, sir.

THE CHAIRMAN: Great.

So, the next one is Governor's Deputy, and the scheme I have in mind to clarify that — this is Section 37, is to — is not to refer at all to a Governor's Deputy. The heading of 37 would say something like Temporary Delegation of Certain Functions of the Governor. And then it would provide as in 37 (1) not referring to a deputy at all, but saying that **the Governor may in the case of a temporary absence or in disposition, the Governor may appoint a deputy — or delegates the**

Deputy Governor, or if the Deputy Governor is not available any other person in the Cayman Islands who is a Caymanian —

HON. D. KURT TIBBETTS: Mr. Chair —

THE CHAIRMAN: — to perform on his or her behalf such functions as may be specified.

HON. D. KURT TIBBETTS: Mr. Chair, there seems to be — not seems to be, there is some concern among several of us the way this is worded in that there is no specific mention of where that person must come from. It is accepted and has been accepted that that person is usually a civil servant; but the fact that this says nothing about it and what you just said clearly states someone from — a Caymanian from within the Cayman Islands, that leaves some room for concern. Is it specifically done like that so that the Governor would have the ability to appoint someone outside of the civil service? So how — where do we know that it will be from within?

THE CHAIRMAN: It says **the Deputy Governor or if the Deputy Governor is not available any other person in the Cayman Islands who is a Caymanian.**

HON. D. KURT TIBBETTS: That's what it says.

THE CHAIRMAN: That's what it says.

HON. D. KURT TIBBETTS: It doesn't say anything about civilian servant.

THE CHAIRMAN: No.

HON. D. KURT TIBBETTS: And that's what I am asking.

THE CHAIRMAN: You can specify that if you want.

HON. D. KURT TIBBETTS: That's what I'm suggesting.

THE CHAIRMAN: **Is not available any other public officer in the Cayman Islands who is a Caymanian.**

HON. D. KURT TIBBETTS: I just want to make sure that everybody else is happy with that, but that is what we would prefer.

HON. W. MCKEEVA BUSH: Mr. Chairman, on 35 that's why I was asking when you're saying in 35 (1) that being a Caymanian was that a

civil servant. It's not specifically stated there, but we understand that to be what it will be. But if you're going to change it to —

HON. D. KURT TIBBETTS: If you do one you do both.

HON. W. MCKEEVA BUSH: You do both.

HON. D. KURT TIBBETTS: Yes, I agree with that.

THE CHAIRMAN: Well —

HON. D. KURT TIBBETTS: Otherwise, I don't think officer should be mentioned.

THE CHAIRMAN: Yes, let's just think for a moment. If you — in the case — I mean I can see it's easier in 37 because this is a temporary matter. But let's just deal with 37 first. We could substitute **any other public officer** for **any other person** there. This is in Section 37 (1), four lines from the end. Okay?

Now, when it comes to the substantive office of Deputy Governor under 35 — under 35 — **there shall be a Deputy Governor who shall be such person being a Caymanian as Her Majesty ...** okay? We could substitute there **shall be such public officer being a Caymanian**, therefore that would limit the field to people who are —

HON. D. KURT TIBBETTS: You're back to —

THE CHAIRMAN: — public —

HON. D. KURT TIBBETTS: You're back to 35 now or 37?

THE CHAIRMAN: Yeah, 35.

HON. D. KURT TIBBETTS: Yeah.

THE CHAIRMAN: Now, you could do that.

HON. D. KURT TIBBETTS: See —

THE CHAIRMAN: But it would limit the field.

HON. D. KURT TIBBETTS: Yeah. Might I sir, if you don't mind?

Where it is most important, I believe, I don't think regardless of character, qualifications or anything else that the civil service in this Cayman Islands would readily accept anyone from outside of that civil service who has not been a civil servant to simply walk in and be the

person responsible for them. That is, as you would say, being totally candid.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: That is the view that I believe that the civil service would hold, and I don't think that I have any fear of any contradiction of that. Hence the reason why I spoke the way I spoke.

Now, certainly others can express their views, but I believe that that's the way the thought would be and that's the way that we should be thinking. And I believe if we don't do that, that we're going to get some repercussions whenever a draft is prepared.

THE CHAIRMAN: Governor?

GOVERNOR STUART JACK: Just — could I just ask the Leader of Government Business a question of clarification?

I fully take his point and I understand his point absolutely, but do you mean by that somebody who is currently — I mean, at the point at which that person is selected they would have to be holding a civil service position, because there could be people who have had a long civil service experience who may be — have moved out of the civil service not long before.

HON. D. KURT TIBBETTS: But —

GOVERNOR STUART JACK: Or who may hold another job in the public service, for example, one of the statutory boards. I mean I'm just talking theoretically, I'm not talking about any individual at hand.

HON. D. KURT TIBBETTS: No, I understand that. I understand that.

GOVERNOR STUART JACK: Do you want to define it so narrowly to only someone who's currently in the civil service?

HON. D. KURT TIBBETTS: I hear your question. The view — and I understand what His Excellency is asking.

Mr. Chair, the view would have been under normal circumstances anyone who has enjoyed a long tenure in the civil service would naturally have been retired. It is the — as I understand it, Her Majesty's government doesn't send us a Governor beyond retirement age. They time it and that's where they get their little chosen from and they get their last little run with us. And likewise in the civil service here you retire at age 60.

Now, in certain instances, but not in — not in regularity — at any senior position do you have people being hired back as — as a

contracted officer. So anyone who has had a long tenure here I don't believe would be someone under 60 who you would wish to appoint as a Deputy Governor.

The Governor also mentioned people who are in statutory authorities. Now, I hadn't thought about that and I'm going to be honest about that, I haven't really thought about that at length, and I'm not so sure ... I think the argument there would simply be civil servant or public officer because a public officer would that not be from the — from one of the authorities would that not be included?

GOVERNOR STUART JACK: I mean the hypothetical situation that I was thinking of, which could be a very real situation, is someone who has spent enough time in the civil service and then had actually moved to a senior position at one of the public authorities.

HON. D. KURT TIBBETTS: Yeah.

GOVERNOR STUART JACK: Would you want to deprive yourself of those sort of people —

HON. D. KURT TIBBETTS: So I am asking.

GOVERNOR STUART JACK: — as potential candidates?

HON. D. KURT TIBBETTS: Just one second. I don't want to lose my train of thought, Mr. Chairman. But I — obviously you want to say something. You can go ahead, sir.

THE CHAIRMAN: One way of dealing with this would be to write into 35 (1) first line **there shall be a Deputy Governor who shall be such person who is or has served as a public officer and is a Caymanian as Her Majesty** blah, blah, blah. So, that would require the person either to be a serving or former public officer.

HON. D. KURT TIBBETTS: I don't want to hold things up, but I need to think a little bit.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: I looked at the definition of “public officer”. I just want to make sure. That's on page 82.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: And I'm wanting to ensure would that include persons employed by statutory authorities which are government owned?

THE CHAIRMAN: Well, it all hinges on the definition of "public service" because the public officer is someone who holds a public office. The public office is an office of emolument

HON. D. KURT TIBBETTS: Right. Well I don't see — I don't see a definition for public service.

THE CHAIRMAN: Well, it is down there.

HON. D. KURT TIBBETTS: Public service?

HON. W. MCKEEVA BUSH: Yeah.

THE CHAIRMAN: Service of the Crown in a civil capacity in respect of the government of the Cayman Islands.

HON. D. KURT TIBBETTS: Okay, so is the public authority — is an employee of a public authority included in that?

THE CHAIRMAN: I don't think so.

HON. D. KURT TIBBETTS: It doesn't seem so.

THE CHAIRMAN: Which is why I suggested is a — a person who is or has — is serving or has served as a public officer or in a public office.

The point is, as I understand it, you could have somebody who is at the moment serving in a statutory board but has civil service background. And your point was —

HON. D. KURT TIBBETTS: "Public official" is the correct term and that would include that.

THE CHAIRMAN: Well, public official isn't defined in this draft at the moment.

HON. D. KURT TIBBETTS: It's in this section here.

THE CHAIRMAN: Which one?

HON. D. KURT TIBBETTS: No.... what page that is, bro? What page is that? Section 29. If you look at that, Mr. Chair, Section 29, top of page 32: **Public official includes a public or governmental body including**

any statutory body or company or association which Cayman Islands has an interest and which performs a public function or duty.

THE CHAIRMAN: Yeah. Well, there's a definition for the purposes only of the Bill of Rights.

HON. D. KURT TIBBETTS: That would not try and stand?

THE CHAIRMAN: Pardon me?

HON. D. KURT TIBBETTS: That would not try and stand?

THE CHAIRMAN: No, unless we set it.

I mean what I would suggest on this point is if your concern is that any person appointed deputy Governor having responsibility for the public service — the civil service in effect — must have some background in the public service to be credible and accepted by the public service, then that could be expressly solved by saying in 35 (1) **that such a person to be qualified to be appointed as deputy government such a person must not only be a Caymanian but must also be a serving or former public officer.** I don't specify a particular time, but you may want to write that in. You know, one can write in all sorts of — one could write in that the person must have had ten years experience in the public service if you wanted to do that. But every qualification like that that you make narrows the field.

HON. D. KURT TIBBETTS: And I understand that.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: And I have to be very honest with you, it is meant to narrow the field. Now, I don't mean to narrow it to a ridiculous point, but I'm saying that we need to have some language in there which limits these appointments to public officers. But I — in retrospect I'm not so sure that we would want to exclude what is termed a “public official” in the Bill of Rights section, so somehow or the other we'd like to get that included in it, but I'm not so sure that we want to talk about ten years of service and that kind of stuff.

You see, Mr. Chair, as it works now, when it comes to what we now have as the Chief Secretary, who, in effect, once a new constitution is in place, would be replaced by the post of Deputy Governor, the Chief Secretary is usually, as experience has shown us, someone who has come up in the ranks. And you have a Deputy Chief Secretary and you usually keep moving up in the ranks to — to a chief officer at some level, then on to Deputy Chief Secretary, then on to Chief Secretary.

That's the norm. In other words, whoever is appointed the deputy is usually someone who is taken from the position of Chief Secretary. I know that's — I'm not suggesting that be defined in the Constitution, I'm just saying to you that that is the expectation because it means that that person has a full grasp of the workings of the public service, plus that person must command a respect of the public service to the point of view that everybody's content.

And I'm just wanting to make sure that somehow or the other in any new draft of the Constitution it would reflect enough to not cause any fears from within the civil service. I just make generally the point to say that's what we think needs to be achieved.

THE CHAIRMAN: Good. Okay. Well, look, we have — you know, we have no problem with the concept of making sure that any candidate has some civil service or public service background.

HON. W. MCKEEVA BUSH: Has some tenure.

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: Has some tenure in the service.

THE CHAIRMAN: Yeah, which is why — which is why I suggested writing in **shall be such person who is serving or has served in a public office**. That was my suggestion.

But you want to take time to think about it. I would suggest that we leave you to think about it and you may come back with a different form of words. That's fine, we'll consider that, and I'm sure.

HON. W. MCKEEVA BUSH: Mr. Chairman, so where we was saying earlier that such person being a public officer who is a Caymanian, you're not using that language? That's what you're saying?

THE CHAIRMAN: Well, there are two places. There are two places. The certified one which is the office of the Deputy Governor, substantive Deputy Governor.

HON. W. MCKEEVA BUSH: Um-hm.

THE CHAIRMAN: Now, there I'm suggesting in the first line to insert after **such person** a phrase such as **such person who is serving or has served in a public office and is a Caymanian**. You see what I mean? That's my suggestion there.

And in the second — the other place is 37 (1) over the page, page 35. And this is the place where... it's line one, two, three, four, five, six seven, line seven **the Deputy Governor (or if the Deputy Governor is**

not available any other public officer in the Cayman Islands who is a Caymanian). That's a change I've already made.

HON. ALDEN M. MCLAUGHLIN, JR.: But —

THE CHAIRMAN: And that would fit — that would fit with the third place where this comes up, which is at the foot of page 34, Acting Governor. **If the office of Deputy Governor is vacant or the Deputy Governor is absent from the Cayman Islands or is for any other reason unable to perform his functions such public officer being a Caymanian.** So, in those two cases it is a serving public officer who must be appointed.

In the case of 35 (1) the Deputy Governor, I was simply suggesting who is or has been to widen the field a bit. Now, if you're saying no, what we really want is someone who is at the time of appointment a serving public officer, well, that's an alternative. I'm not sure we'll have an objection to that, but it does mean narrowing the field. It might be, you see, that someone has been a public serving officer, done many, many years, gone away and done something else for a couple of years, but would still be an excellent Deputy Governor, knows the civil service inside out and is brought back to do that job. Do you see what I mean? That's the purpose of saying **is serving or has served.**

HON. W. MCKEEVA BUSH: Once if it is, I guess it would be, agreeable with somebody that they're going to be accepted by the public service — civil service as it is, that we have to be careful with.

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: And it was my concern this morning when I first raised this matter when we were first doing this and saying Caymanian, I was really scared that the Governor might appoint Benson, but I don't see that being likely now.

THE CHAIRMAN: Well, shall we — shall we leave you to think a little bit further than that and come back to discuss it?

I want to try and — I want to try and get into the next chapter ... I want to try to get into the next chapter, but before doing so come back to 33 and 34, Sections 33 and 34 which we were talking about earlier.

I think actually that there are two points there: one is the one about your wish that the Governor should be required to consult the Cabinet on special responsibility matters; and the other is to your opposition to Section 34 (2) (a) **that the Governor may act against the advice of the Cabinet if he thought it right to do so in the interest of good governance.**

Now, I have had a confabulation with my delegation. On the second of those points, I hear what you say, but I have no authority to agree to delete that. We might come back tomorrow if we have time to have a discussion on it, but I have to reserve our position for the time being.

On the second —

HON. ALDEN M. MCLAUGHLIN, JR.: Sir, before you do that.

THE CHAIRMAN: Yeah, go ahead.

HON. ALDEN M. MCLAUGHLIN, JR.: I accept you want to take time to consider it, but we'd like you to take onboard for consideration an alternative.

THE CHAIRMAN: Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: In the event that you don't agree the whole thing should go. This is 34 (2) (a) over on page 34 of the draft.

We'd like to suggest that we include the following phrase: **If having taken the advice of the Attorney General it would be inconsistent with the terms of the Constitution.**

THE CHAIRMAN: Is this an additional paragraph?

HON. ALDEN M. MCLAUGHLIN, JR.: No, sir, this is a replacement paragraph.

THE CHAIRMAN: Oh, in place of (a)? Let me just write that down. **If having taken the advice of the Attorney General it would be inconsistent with this Constitution.**

HON. ALDEN M. MCLAUGHLIN, JR.: Now, there is — there is a broader point which goes back to — right to the start, what we said right at the start of the section about how it's expressed, how it's drafted. We are, as I understand, getting away from this concept of the Cabinet giving advice to the Governor in relation to matters for which Cabinet has responsibility in relation to the formulation of policy or decision making. So that this — these sections would need to be redrafted, because in this instance Cabinet would not be giving the Governor advice.

THE CHAIRMAN: Well, hold on a minute. I think there's a misunderstanding here because what we're talking about in 33, and then 34 as a consequence, right up front it says **the Governor shall consult with Cabinet in the exercise of all functions conferred on him or her**

— so that's conferred on the Governor — **by this Constitution or any other law.** Okay?

We're not talking about cases where functions are conferred on a minister or functions are conferred on ministers collectively in the Cabinet by any law. The only thing we're talking about here is functions conferred on the Governor. And if you take the constitution, for example, the Draft Constitution, there are various functions conferred on the Governor, such as the ones we talked about before the break - how to expose of Crown land, power to constitute offices which... and any special responsibilities. Those are the most obvious ones. There are also powers to make appointments, various appointments, and to remove people from offices and exercise their preliminary control and so forth. And we're not talking about anything else in there.

There are a number of various pieces of legislation, the Governor is given various powers - a diminishing number, I would imagine, in the current circumstances with ministers being given more powers that might in earlier times have been conferred on the Governor. But anyway there will be plenty of laws where the Governor is given power.

Now, unless the Constitution or the law in question requires the Governor to act after consulting somebody else in the Cabinet, or to act in his discretion or his own judgment, then the Governor must go to the Cabinet for advice. These are the only cases we're talking about.

And I think there's a misunderstanding here. I think you're imagining that all of the, you know — everything, even stuff which is for the Cabinet or for the minister as a law is for the Governor. That's not the case. So I do not agree that all of this has to be radically redrafted. I think we're in big trouble if that's what you're suggesting.

HON. ALDEN M. MCLAUGHLIN, JR.: I certainly don't want to be in trouble — in fact, that's what I'm trying to get away from — but I must say I'm lost now.

If Section 45 (3) is the basis on which we are proceeding, that is, **the Cabinet shall have responsibility for the formulation of policy** —

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: — **including directing and implementation of policy insofar as it relates to every aspect of government except those matters for which the Governor has special responsibility, and the Cabinet shall be collectively responsible to the Legislative Assembly for such powers and implementation,** that seems to me necessarily to change the whole way this is — these issues are expressed in the Constitution, because it does not involve the concept anymore of Cabinet advising the Governor so that it is the Governor who is making the decisions in relations — in

relation to matters outside his special responsibilities. It is the Cabinet who is making those decisions.

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: The Governor is part of Cabinet, but it's no longer the case of the other members giving advice to the Governor.

THE CHAIRMAN: No. Alden, we're not — we are at one. I mean all I was trying to say before was don't be alarmed because, you see, Section 33 is about the exercise of functions of the Governor. So it doesn't even come into play except where there's a power or a function or a duty conferred on the Governor. It does not come into play you see. You see?

So, you have to say somewhere in the Constitution how the functions conferred on the Governor by this Constitution or any other law are to be exercised. Sometimes it says in his discretion. Sometimes it says after consulting the Premier or some other person. If it doesn't say any of those things the general rule is he goes to — he must consult with Cabinet.

Now, this is not saying — this is not saying — that all decisions of the Cabinet are Governor's decisions. It's not saying that. And you're right, the new provision is very important because it's saying unlike the old world in the new world the Governor has certain express functions. We set out in what circumstances the Governor must consult the Cabinet on them, on those functions, the functions conferred on the Governor. And the general rule is that the Governor must consult and act in accordance with the advice of Cabinet. There may be exceptions and this is what we're arguing about and it principally revolves around the special responsibilities of the Governor. And then it is the Cabinet which formulates the general policy of the government except for the special responsibility areas. That's the scheme.

HON. ALDEN M. MCLAUGHLIN, JR.: Okay. I'm very grateful for that because I think we were all on this end proceeding on the premise that Sections 33 and 34 governed the whole —

THE CHAIRMAN: No.

HON. ALDEN M. MCLAUGHLIN, JR.: The whole operation. But if it is discretely dealt with, or is dealing with that discrete area then I think we're okay.

THE CHAIRMAN: Yes. The key words are at the top of 33 (1) **in the exercise of all functions conferred on him or her by this**

Constitution or any other law. If it's not a function conferred on the Governor Section 33 doesn't come into play. Okay?

PROFESSOR JEFFREY JOWELL: May I add something, Chair, to that? I think that's understood now that the words **and the formulation of policy under Section 33 (1)** are deleted that makes it much clearer.

There are still however some reserve here about the notion of interests of good governance which doesn't appear in other constitutions. And again here I refer to Gibraltar Section 50 which seems a bit clearer. And then 34 (2) (b) **if in his or her judgment such advice would affect any of his responsibilities** surely the word "adversely" affect is correct there. It should be the word "adversely" that should be added there.

THE CHAIRMAN: Well, I have to think about that. And my concern principally is not so much — I mean I think I can — I know what you're saying. You know, any sensible human being would not bother if it was not adversely affected, but there may be a knock-on consequence for other constitutions. There word "adversely" is not in the BVI.

PROFESSOR JEFFREY JOWELL: No, no, that is not. But what is in the Falklands Constitution is (3), which we haven't raised yet which is just worth raising at this point, where it says **wherever the Governor — Governors acts otherwise in accordance with the advice given to him or her by a member of the Cabinet, any member of the Cabinet may require that they be recorded in the minutes.**

The last line, **the grounds of any advice which he may have given on the question** could possibly be substituted for the words of Falklands 67 (3) or (4) **the reasons for his decision and any legal advice upon which it is based.** Is it not clearer rather than saying **the grounds of any advice or opinion** simply **the reasons for his or her decision and any legal advice on which it was based?**

THE CHAIRMAN: Any member of the Cabinet may require ... may require that there are recorded in the minutes the grounds of any — sorry, I'm a bit lost now, sorry.

PROFESSOR JEFFREY JOWELL: Subsection (3) of 34.

THE CHAIRMAN: Yeah.

PROFESSOR JEFFREY JOWELL: Of course allows the Governor to act contrary to the advice of Cabinet. But (3) says that when the Governor acts against the advice given to him by the Cabinet he should simply set out the grounds. The reasons for his decision is what is asked for and any legal advice upon which it is based.

The way it is drafted at the moment, **the Governor must set out the grounds of any advice or opinion which he may have given on the question —**

THE CHAIRMAN: No, it's **any member of the Cabinet**, Jeffrey, the way it's drafted at the moment.

PROFESSOR JEFFREY JOWELL: **Any member of the Cabinet**, yes, **may require that there be recorded in the minutes the grounds of advice or opinion.**

THE CHAIRMAN: Which he or she.

PROFESSOR JEFFREY JOWELL: That is which the Cabinet has given. But wouldn't it be preferable to say that the Governor has to set out his reasons for going against the advice of Cabinet?

THE CHAIRMAN: Yes. Well, in principle I don't have a problem with that. I think — can we just — can you just do some work on the drafting?

PROFESSOR JEFFREY JOWELL: Right, okay. I'm sorry to have forced that on you in the middle of these discussions.

THE CHAIRMAN: I think in the interest of time we should come back to this briefly tomorrow, this whole thing, because I'm concerned that it's already 20 past 12. I'm going to touch, by the way, on your other point about special responsibilities when we come to that in the next chapter, okay?

So, with that shall we — shall we move on to Executive?

Right. Executive Authority. Any comment on that one?

HON. ALDEN M. MCLAUGHLIN, JR.: Yes, sir. Section 44 (2).

THE CHAIRMAN: Section 44. Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: I should say we have no problem with section 44 (1) which says **executive authority of the Cayman Islands is vested with Her Majesty**. Subsection (2) reads **subject to this Constitution the executive authority of the Cayman Islands shall be exercised on behalf of Her Majesty by the Governor either directly or through officers subordinate to him or her.**

We had suggested, based on what is contained in the new Gibraltar Constitution, that that section ought to substitute “government of the Cayman Islands” for “Governor” so that it would read: **Subject to this Constitution executive authority of the Cayman Islands shall be**

exercised on behalf of Her Majesty by the government of the Cayman Islands either directly or through officers subordinate .. well, maybe you don't need the rest of it, **by the government of the Cayman Islands.**

This follows what's been done in Gibraltar, and I think would more accurately represent this new construct that we are creating.

Government is made up of both the Governor and the Cabinet, so there is no — there is no issue about — about the function or who is discharging the function. Both Cabinet and the Governor are exercising executive authority in these Islands, and we believe that this subsection ought to be adjusted to reflect that reality. As I said earlier, there is no issue about in whom executive authority is vested; it's vested in Her Majesty, so this is — this is about the exercise of that authority.

The section which is also section 44 (1) in the Gibraltar Constitution reads: **The executive authority of Gibraltar shall vest in Her Majesty and save as otherwise provided in this Constitution that authority may be exercised by the government of Gibraltar either directly or through public officers as prescribed by the Constitution or by any other law.**

And then Section 45 of that Constitution goes on to say in similar terms to those that I articulated: **There shall be for Gibraltar a council of ministers which shall consist of a chief minister and such number of other ministers as may subject to (2) be prescribed by the chief minister and such council of ministers together with Her Majesty who's represented in Gibraltar shall constitute the government of Gibraltar.**

So the issue is about the exercise of the authority, not about in whom the authority is vested. There's no issue with that.

THE CHAIRMAN: Yes. Well, I understand and — I understand this point. I must say, I mean I recall, with vividness, discussions with the Gibraltar chaps about these two provisions in their new Constitution which I think are very unorthodox and rather ugly but I was overruled in opposing them.

I mean, in essence, the way it's drafted at the moment — and which you would like to move away from — reflects the constitutional position in the UK as well, as all of the Overseas Territories, that executive government is performed in — on behalf of the Crown, in the name of the Crown. That's what it is. So, that's why your Constitution and other Overseas Territories Constitutions say that it is vested with Her Majesty and is exercised on her behalf by the Governor or a representative and persons subordinate to the Governor. Then it goes on to say without prejudice to other persons or authorities being given executive functions, which would include the ministers, Cabinet, you know, Commissioner of Police, DPP, Attorney — all the other people.

I mean, I don't think that in substance there's any difference really between us because — this is why in the end kicking in screaming I didn't resign my office over what happened in the Gibraltar Constitution. And, in effect, of course, we would entirely agree that the Governor is together with the Cabinet, the government of the territory. The two form the government and then they're served by the public service. And it's just a matter of how this is expressed.

You can tell that being a bit of an old-fashioned type I am much happier with the traditional formula, but I'm a bit of a stick in the mud sometimes on things like that.

So, what I would implore you to do is to don't twist my arm today on it. Let me think about it. If there is a formula — not as ugly and curious as the Gibraltar one — which gives you something of what you want I'm — I might be tempted, but let me think about it. Let me think about it. I know what you're saying and I know exactly the issue.

PROFESSOR JEFFREY JOWELL: Could I, sir, without pressing you on this point just highlight two other arguments in favour of some change as you may see deemed fit?

THE CHAIRMAN: Yeah.

PROFESSOR JEFFREY JOWELL: And the one is again one of clarity and accessibility to this Constitution. Who exercises the executive function? One expects in a country where there is representative governments, re-elections for the Cabinet as selected by the legislature, to exercise that function, as indeed it does because they are responsible for all these policy matters. So, in terms of, say, children looking at the new Constitution and learning who does what, if it is said the executive function lies with the Governor, yet the Cabinet is responsible for policy, it doesn't fit. It doesn't actually reflect what goes on in practice.

THE CHAIRMAN: I think that's a strong argument.

PROFESSOR JEFFREY JOWELL: And the other argument is a symbolic one, namely if in practice, as you correctly say, the executive authority is shared, then, so it is vested in the Governor, but the Cabinet — it implies some kind of subordination which doesn't again reflect 45 — 45 (3).

THE CHAIRMAN: Okay. Well, I'm not promising this, but what I — the sort of thing that I might — we might end up with would be in — something like in 44 (2) **subject to this Constitution the executive authority of the Cayman Islands shall be exercised on behalf of Her Majesty by the government, consisting of the Governor as Her Majesty's representative and the Cabinet, either directly or through**

— what's the formula? — **public officers as prescribed by law**, something like that. Would that help you?

HON. ALDEN M. MCLAUGHLIN, JR.: We're satisfied with that, sir.

THE CHAIRMAN: I think it would have the advantage as well of making clear, which is sometimes argued to the contrary, that the Governor and the government are somehow — the Governor and government are somehow separate, and I think that's an extremely bad thing. I'm very glad to hear that what we do have a clear consensus on is that the Governor and the Cabinet under any new Constitution should work as part of the same team and not in opposition to one another. There should be cooperation rather than confrontation.

So, that would be my personal suggestion, and I don't think it would do any harm. If you're content with that, with some great reluctance I would concede it. You have no idea how much pain it causes me.

[laughter]

HON. ALDEN M. MCLAUGHLIN, JR.: But at least it's not as ugly as the Gibraltar.

THE CHAIRMAN: Exactly. Exactly. Because you're so charming by comparison. We'll work on the consequential language.

Yes, Mr. Thompson? Sorry.

[inaudible comment – microphone not turned on]

THE CHAIRMAN: Yeah, we'll — we'll — I mean basically (3) nothing in this section **subject to persons or authorities other than the government from — other than the government from exercising functions as are or may be conferred by any other law**. So, statutory authorities and so forth, so they're okay. So instead of “Governor” in (3) we're saying “government”.

In (3) there's a consequential amendment if we do the change I've suggested in (2) which is to substitute “government” for “Governor”, okay? So in (2) (b) on the top line on page 38 **on behalf of Her Majesty the government consisting of the Governor as Her Majesty's representative and the Cabinet ... and the Cabinet either directly or through public officers ... either directly or through public officers**. Full stop.

Right. Section 45. Section 45, The Cabinet.

Now, the question —

HON. ALDEN M. MCLAUGHLIN, JR.: 45 is fine, sir.

THE CHAIRMAN: 45 is fine. Good.

HON. W. MCKEEVA BUSH: Mr. Chairman?

THE CHAIRMAN: McKeeva.

[inaudible comment by the Leader of the Opposition – microphone not turned on]

HON. W. MCKEEVA BUSH: On Section 45 (2) tell me how this works.

THE CHAIRMAN: Section 45 (2).

[inaudible comment by the Leader of the Opposition – microphone not turned on]

THE CHAIRMAN: Yes. Yes. Well, the idea here is it has to be read with Section 60 later on.

HON. W. MCKEEVA BUSH: Yes.

THE CHAIRMAN: Is it 60? Yeah. Yes, 60 (2). There are two ways you could deal with it. There are two ways you could deal with it. There are two ways you could deal with this. If it's sought desirable in the future for the number of ministers to be increased because of the increase of work involved in government, one could not allow it in the Constitution, but there would be a constitutional amendment because the number of ministers is specified.

However, in the interest of flexibility, one — the alternative is to write in a provision like this which allows the number of ministers to be increased by law, not just by anybody, but by law passed by the legislature. And 45(2) is saying that can happen provided — and this is the important thing on which we would insist and do insist and I hope there's no disagreement there — is that there must be — continue to be a proper ratio relationship between the number of ministers and the number of elected members of the House so that — so that there is some government backbench as well as a formal opposition, that's the idea of it.

So, the ratio that was settled on — and I think we settled on it at the first round — was two-fifths, a maximum of two-fifths. And so, let's say that in years to come the government of the day decides it wants to increase the number of ministers from seven to eight, and in order to achieve that, that would go over the two-fifths ratio so it introduces a law to the legislature, a bill saying 'We want to introduce — we want to

increase the number of ministers to eight' and in order to allow that to happen and fit with the Constitution the number of members — the number of elected members of the House must increase proportionately so there's at least two-fifths. The number of ministers is no more than two-fifths than the total number of the elected members of the Legislative Assembly. That's how it would work. And then it's up to the legislature whether to pass that or not. If it did pass it, it wouldn't be able to take effect until after the next election because of course you've got to fill that — you've got to have an election to deal with the additional member or members of the Assembly that would be needed to accommodate this extra minister. That's how it's envisaged to work.

HON. W. MCKEEVA BUSH: Section 45 (2) if government to increase membership Cabinet.

THE CHAIRMAN: Section 45(2) requires — says that the number of ministers referred to in (1) may be increased by a law made under Section 60 (2). Not the government would make law. The legislature would have to pass a law.

HON. W. MCKEEVA BUSH: Yeah, but the government [inaudible – microphone not turned on].

THE CHAIRMAN: Yeah, but the point is — okay, it could use its majority to drive it through, but the fact that it must be done by law means it has to be debated publicly as a bill and ... yeah. It's not an executive decision it can just take privately like that.

HON. W. MCKEEVA BUSH: And then what effect does 60 (2) have to do with that?

THE CHAIRMAN: Well, 60 — under 60 (2) that sets out that **a law may increase the number of elected members of the Legislative Assembly but no such law shall come into force until there's been an electoral constituency boundaries order made by the Governor following the procedure prescribed and nor can it come into force until the dissolution of the Legislative Assembly next following enactment of such law.** So the two have to be done together. They cannot come to the House with a bill saying 'We want to increase the number of ministers without also increasing the number of elected members'. So the two have to go together.

HON. W. MCKEEVA BUSH: And that wouldn't happen the passage of the law and not installed as ministers until after the next election?

THE CHAIRMAN: No, that's correct.

HON. W. MCKEEVA BUSH: So midway down, in the middle of a government four-year term they see the need for a minister and they pass the law, but they can't do it until —

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: — another two years?

THE CHAIRMAN: Exactly.

HON. V. ARDEN MCLEAN: Not necessarily. It could be done through the process of increasing the memberships of the legislature in the midterm and increasing the ministers.

THE CHAIRMAN: No.

HON. W. MCKEEVA BUSH: No.

THE CHAIRMAN: Not as written here.

HON. W. MCKEEVA BUSH: Section 2(b) says until the dissolution of the Assembly next following the enactment —

HON. V. ARDEN MCLEAN: Well, it shouldn't be.

THE CHAIRMAN: That's correct. That's correct.

HON. W. MCKEEVA BUSH: So, if the government wants to elect new ministers they can't [inaudible – microphone not turned on] saying do so and pass the law but you can't do so [inaudible – microphone not turned on] after the next election.

THE CHAIRMAN: That's right.

HON. W. MCKEEVA BUSH: So, what the Constitution is doing is giving government some power but still waiting until the public says so by general election.

THE CHAIRMAN: Yes. It's giving the legislature power.

HON. W. MCKEEVA BUSH: I still say government, sir.

THE CHAIRMAN: I know what you mean, but formally —

HON. W. MCKEEVA BUSH: That's because I'm the Opposition, sir. I have no power, not even to get questions answered, but I wouldn't raise that here today. Anyway.

THE CHAIRMAN: But anyway, you're right. The legislature — this is — this is a provision for flexibility, because without these provisions you'd have to come — a government that wanted to increase the number of ministers and the number of members of the House would have to come and agree with the UK in amendment to the Constitution. That's the alternative way of doing this.

HON. W. MCKEEVA BUSH: Yes, that's the old way.

THE CHAIRMAN: It's the old way. It's the old way.

HON. W. MCKEEVA BUSH: Which we don't know yet, the people might still prefer.

MR. CLINE A. GLIDDEN, JR.: I have a question just concerning 45 (1) (a) and (b) about the two-fifths. Is there anywhere in the Constitution where we refer to the Premier as a minister strictly because before, under the old language we would have chief ministers and we would assume that that person would be included. But if we take the example that says six other ministers, currently six is two-fifths of 15, and so for the purposes now you could technically have six ministers along with the Premier, with 15 members in the Legislative Assembly. And I'm wondering whether that is the intention or whether the Premier is intended to be considered one of the ministers.

THE CHAIRMAN: Yes, Premier is one of the ministers as — you know, as soon as you look at 45 (1) (b) it says six other ministers.

MR. CLINE A. GLIDDEN, JR.: Right.

THE CHAIRMAN: Clearly the Premier is a minister.

MR. CLINE A. GLIDDEN, JR.: It says other ministers.

THE CHAIRMAN: Yes.

MR. CLINE A. GLIDDEN, JR.: But technically we're referring to that person as minister is the Premier. So I'm saying where in the Constitution are we saying that that person is considered as a minister?

THE CHAIRMAN: Well, right here. Right here. And then, you see, there's a heading — there's a heading to Section 50 which says

appointment of the Premier and other ministers. You see what I mean?

Now, we're going to have to come back to these numbers tomorrow when we look at the Covering Order, the draft Covering Order because...

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, there is an outstanding point which you have noted here in 45, and that's the question of whether or not the Deputy Governor and the Attorney General —

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: — should be voting or non-voting.

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: Our position remains firmly the same, is that as they are not elected they ought not to be voting. They are there to give advice and guidance and to speak to their respective responsibilities. Cabinet is a policy-making body, and as such it ought to be — the only people who ought to be able to vote are those who have been democratically elected.

HON. W. MCKEEVA BUSH: Then what happens, Mr. Chairman, if collective responsibility, as the Cabinet and as under the Westminster system we would be expected to follow, if members present in Cabinet [inaudible – microphone not turned on] that's one thing that always bugged me [inaudible - microphone not turned on] official members voting and not voting. Under Cabinet, as you know Cabinet, who's in Cabinet has elective responsibilities —

A MEMBER: Put your mike on.

HON. W. MCKEEVA BUSH: Who's in Cabinet has collective responsibility. How do you — do you still hold them collective, responsible? Do you still take them down to the Assembly and they vote —

THE CHAIRMAN: No.

HON. W. MCKEEVA BUSH: — in the Assembly on matters? Are they, in Cabinet, collectively responsible or not? It was one of the things that always bothered me with official members. Sometime they — sometime in — presently, official members don't vote on certain matters, one being constitution. They don't cast a vote. But the collective responsibility was always —

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: — something that bothered me.

THE CHAIRMAN: Well, on this draft the Deputy Governor and the Attorney General would be members. We think that's right. I think you think that's right, and the Government now accepts that that's acceptable, which is — which I'm very pleased about.

Then there's a separate question whether as members they should have the right to vote or not; and in the interest of compromise we wrote into 47 (6) on page 39 **the Deputy Governor and the Attorney General shall not be entitled to vote in the Cabinet**. So, this is partly to reflect democracy in a modern constitution that those who are elected members are the only ones who should have the right to vote. But — but over the page, back over the page, page 38 Section 45 (3) it is the whole Cabinet that is collectively responsible to the Legislative Assembly, not just the elected members of it. That I think is also right.

And in the Legislative Assembly, when we come to look at it, we, in this draft, the Deputy Governor and the AG don't have a vote either. So the concept here is that these are ex-officio members having the full authority of being members and the expertise they bring into discussions, but they don't have a vote in deciding. The voting is essentially a political matter for the elected members, and that is a more democratic setup than giving officials a vote.

And the answer to your question, I think, is if an ex-officio member forming part of the Cabinet which has collective responsibility is unable to live with that collective responsibility, then he or she can resign and may be forced to resign. You have to go with what is decided. And, for example, if the Attorney General gave advice that a service of action is unlawful and the Cabinet decided nonetheless to do it —

HON. D. KURT TIBBETTS: Voted or not, same thing would happen.

THE CHAIRMAN: Exactly. So, he could then examine his conscience and if he could not live with that outcome he would resign. I mean, this happens, you know.

So I hope that we can find a consensus around this — this setup which I would maintain is more democratic than the existing situation, and not — but not giving these ex-officio members a right to vote but giving them full membership so that they don't feel that they're simply in the room by invitation.

HON. SAMUEL W. BULGIN: And, Mr. Chair, to reinforce the point you make, it is only in the Legislative Assembly that this would have been of any importance, the issue of collective responsibility, because in Cabinet

there's really no vote as such. No vote takes place in Cabinet. The only public show of support one way or the other would be in the Legislative Assembly. And if there's no vote by the AG or the Governor — Deputy Governor, then there's no issue of any public party way with the decision of elected members. So, there's really no inherent danger in terms of —

HON. W. MCKEEVA BUSH: And, Mr. Chairman —

HON. SAMUEL W. BULGIN: Sorry.

HON. W. MCKEEVA BUSH: — my concern was only on collective responsibility.

THE CHAIRMAN: Okay.

HON. W. MCKEEVA BUSH: And I know that there are times when the official members would rather not vote. So, maybe it best suits them if they're going to be there. But I just wanted that cleared up in my mind about what happened with collective responsibility.

THE CHAIRMAN: Okay, thank you.
Section 46. All right.

HON. W. MCKEEVA BUSH: I'm not saying all right. I'm not saying either Mr. Chairman if 45 (2) I agree with because we have made — put forward our position.

THE CHAIRMAN: Are you saying that you still prefer the constitutional amendment if the number of ministers are going to be increased?

HON. W. MCKEEVA BUSH: Well, not to draw out and get back into all of the things we said last year, because all of that is on record and that record will stand.

THE CHAIRMAN: Okay.

THE CHAIRMAN: Shall we tackle 47 before lunch or just have a first look at it or are you ...

I mean, the issue here I have noted as outstanding is the issue of chairmanship of the Cabinet; and in accordance with the policy of which you're well aware — British government policy as it is at the moment — I drafted this so that the Governor shall continue to be — to preside over meetings of Cabinet. I can't do anything else in this draft. I don't know whether you're — what your current view is on this point, whether this is one you're still agitated to change.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, we have spent a long time considering this point and you know our original position was that the Premier should chair Cabinet. But in the spirit of compromise, and in an effort to get a document that all of us can get behind, we are — assuming we can get agreement, broad agreement on the other issues. We are prepared to concede this point and go along with the draft as you have set it out.

THE CHAIRMAN: Thank you. Thank you very much. I think that's wise in any case because my — my experience — my experience with other Territories wanting to make the same change and not succeeding persuaded me that you wouldn't succeed either. So, I think it's...

With that shall we call a halt for lunch?

HON. W. MCKEEVA BUSH: Yes, Mr. Chairman because I was just going to call to your attention to explain the House. But let's take the break.

THE CHAIRMAN: Who's that?

HON. W. MCKEEVA BUSH: Let's take a break, Mr. Chairman.

THE CHAIRMAN: Yes, we'll take a break. Yes. Okay. One hour. I think we deserve an hour.

RECESS

RESUMED

THE CHAIRMAN: Right. Ladies and gentlemen, shall we proceed? We have a lot to do.

There is just one point on Section 47 which we were looking at before lunch, and it was graciously conceded that the Governor should continue to preside at meetings of the Cabinet.

And then the question arises: What if the Governor is absent? And (2) says **in the absence of the Governor the Cabinet shall be chaired by the Premier, or in the absence of the Premier the Deputy Premier**. Now as the footnote indicates, my intention is that by virtue of the provision in Section 121 (1) which says that where there's a reference to an office by the name of that office, it includes reference to person acting in that office. So the result is in the absence of the Governor, the Acting Governor presides, and in the absence of them both then the Premier resides. That's the intention. But it could on the plain reading by a member of the public be thought that when the substantive Governor is absent then the Premier chairs. So it might be sensible to make it clear in this text in (2) by saying **in the absence of the**

Governor and the Acting Governor from any meeting, the Cabinet shall be chaired, et cetera.

HON. D. KURT TIBBETTS: Mr. Chairman, what obtains in other jurisdictions?

THE CHAIRMAN: Well, I think the — in other Overseas Territories the — this is the formula is like this.

HON. D. KURT TIBBETTS: Sorry?

THE CHAIRMAN: The formula is like it's expressed here.

HON. D. KURT TIBBETTS: Including the BVI?

THE CHAIRMAN: Yeah. Yeah.

HON. D. KURT TIBBETTS: Okay.

THE CHAIRMAN: But I have to say there was a question about that. There was a question in the BVI about that very issue.

HON. D. KURT TIBBETTS: Yeah, there was a question.

THE CHAIRMAN: About who presides in the absence of the substantive Governor. And it is accepted that the Acting Governor presides, but it is a slightly circuitous route you have to go through to get to the — what I believe is the legally correct result. But it's the Acting Governor who presides. So, I'm just simply suggesting that it might be sensible to specify here on the face of this section that in the absence of both the Governor and the Acting Governor —

HON. D. KURT TIBBETTS: Yes, sir. Just to talk it through to make sure that we know what is possible and what is not possible. Without trying to put you in any funny circumstances, what would be the view if it were the desire to limit it to the Governor himself?

THE CHAIRMAN: What would be our view? I think our view would be that the Acting Governor should be next in line.

HON. D. KURT TIBBETTS: See, the reason why I ask you the question is, in reality, while with the Queen's English it provides for in the absence of the Governor for the Premier or his or her deputy to preside, at no point in time are you not going to have an Acting Governor.

THE CHAIRMAN: No, it should be a very unusual situation and one that should be avoided. There should always be —

HON. D. KURT TIBBETTS: I understand that.

THE CHAIRMAN: — available the Governor or the Acting Governor.

HON. D. KURT TIBBETTS: That is why I was raising the point, because while we thought — while we — while we thought that that was a fair compromise when we look at it, in reality it's almost semantics because it still means that while in the Constitution that exists, there is no provision for anyone else but the Governor to preside. When I say no provision I mean if it's not the Governor it's certainly not an elected member who would preside over Cabinet. The new constitution while the wording is different really ends up the same.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: You agree with that?

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, but, sir, save in these circumstances I mean the way that I — the way that I see it possible for the Premier to act as — the Governor is there either in his — either substantive post holder or the Acting Governor, but for one reason or another he is — he is unable to be present to chair Cabinet. I can see those instances happening. I mean, Cabinet needs to go on, there's important business but the Governor is in Cayman Brac, as an example.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: And in those circumstances the Premier would be able to chair Cabinet. It is just when — I mean, you're right. There really should be very few occasions when we don't have a Governor or Acting Governor. I do not see it possible to argue that whoever is acting as Governor who will have all of the responsibilities and authority of the office of Governor that he or she should be excluded in those circumstances. But I can see the possibilities of the Premier chairing Cabinet in circumstances where the Governor is unable for one reason or another to — or the Acting Governor for that matter to be present. So, I don't — I don't think it's just semantics, I think there's real possibility for the Premier.

THE CHAIRMAN: No, there's definitely possibility. The only question is whether it's clear enough that the order is Governor, if Governor is not there.

HON. ALDEN M. MCLAUGHLIN, JR.: I'm with you.

THE CHAIRMAN: — Acting Governor, if the Acting Governor is not there the Premier, if the Premier is not there the Acting Premier. That's the order. So all bases should be covered.

HON. ALDEN M. MCLAUGHLIN, JR.: That's fine.

THE CHAIRMAN: And the only question is whether there is any doubt in the language at the moment that the Acting Governor comes into play. I mean I think it's a matter of correct interpretation when you — when you look at Section 121 (4), then the Acting Governor does come into play. So my only thought is that if it's clearer on the face of this section that it — the Governor includes Acting Governor or any person performing the functions of Governor, would it be better to specify it here. But if you prefer to leave it because it's — it's — you think it's clear enough already, then, fine, let's leave it.

But I think we all understand that these references to Governor in 47 (1) and (2) carry with them references to Acting Governor. I mean in the absence of the Governor it's the Acting Governor. Right?

So leave it...

Right. Shall we go on then? Shall we go on?

Section 48. No problem.

Section 49.

HON. D. KURT TIBBETTS: Mr. Chairman, there was a point brought up which I think we need to make clear throughout the Constitution. Where it is referred to in this Constitution the Sister Islands —

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: — that is, preferably, the electoral district of Cayman Brac and Little Cayman.

THE CHAIRMAN: Sister Islands —

HON. D. KURT TIBBETTS: Hold on one second. Hold on one second. I had it in my notes, but... it says Sister Islands here but I thought everybody wanted it to be Cayman Brac and Little Cayman and not Sister Islands.

THE CHAIRMAN: I only put — I only refer to the Sister Islands throughout because in your draft in September —

HON. D. KURT TIBBETTS: I recognise that.

THE CHAIRMAN: — it says Sister Islands. So in the interpretation section on page 82 I've included a definition **Sister Islands means the Islands of Cayman Brac and Little Cayman**. On the other hand, if you prefer, if you're saying to me now you prefer references —

HON. D. KURT TIBBETTS: Take out the definition and wherever it says Sister Islands, Cayman Brac and Little Cayman.

HON. W. MCKEEVA BUSH: But by law now — I think it has been changed by law to say Cayman Brac and Little Cayman.

HON. D. KURT TIBBETTS: So all we're saying is —

HON. W. MCKEEVA BUSH: Not Sister Islands.

HON. D. KURT TIBBETTS: So all we're saying is instead of saying Sister Islands say Cayman Brac and Little Cayman. That's all I'm saying.

MR. MICHAEL BRADLEY: Was the change not — was the change not from Lesser Islands to Sister Islands?

HON. W. MCKEEVA BUSH: Yes.

MR. MICHAEL BRADLEY: It wasn't from Cayman Brac and Little Cayman to Sister Islands, it was from Lesser —

HON. EDNA M. MOYLE: Lesser from Sister, from Sister to Cayman Brac and Little Cayman. The last change was from Sister Islands to Cayman Brac and Little Cayman. It's in legislation [inaudible].

HON. D. KURT TIBBETTS: The point is it wouldn't — it doesn't matter in substance to you all. We are —

THE CHAIRMAN: No. Whichever you prefer.

HON. D. KURT TIBBETTS: So all we're saying is wherever it says Sister Islands say Cayman Brac and Little Cayman. That's all we're saying.

THE CHAIRMAN: So 48 (3) will say —

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman —

THE CHAIRMAN: — representing — yep.

HON. ALDEN M. MCLAUGHLIN, JR.: No, Mr. chairman. Mr. Chairman, this clause has given us cause for reconsideration, and at the last discussion that we had we concluded that the simplest and fairest way to deal with the attendance of persons at meetings is to amend this provision so that the right to attend a Cabinet meeting in these circumstances should apply to any district or electoral constituency — depending on which one we wind up with — that is not represented in Cabinet.

HON. W. MCKEEVA BUSH: But don't that — I mean don't Cabinet have the right now to invite persons to attend?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, yes, but inviting is one thing, the right to attend is another. And — so, essentially what this would afford is representatives who do not have representation in Cabinet have the right once every three months to come to Cabinet and say what they wish to say about whatever the matter is.

In the present construct it would mean if your district had representation in Cabinet you need not come. But if we move to electoral — single-member constituencies it would be a different situation. So there would be less — or I should say a smaller percentage of the constituencies would be represented in Cabinet, or the likelihood of that is greater.

MR. MICHAEL BRADLEY: But, Mr. Chairman, carrying this to its logical conclusion, in fact, could mean that every member, every elected member of the LA would be entitled to attend every Cabinet meeting.

HON. ALDEN M. MCLAUGHLIN, JR.: It's not every Cabinet meeting, sir.

MR. MICHAEL BRADLEY: Every Cabinet meeting — yes, for the purpose of making representations.

HON. ALDEN M. MCLAUGHLIN, JR.: It's once every three months, sir.

MR. MICHAEL BRADLEY: Or at least. Or at least. It's an alternative. It's not once every three months. It's whenever they want for the purpose of making representation. So they could all say 'Every week I want to make representations on behalf of my district'.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, we don't want that to happen.

MR. MICHAEL BRADLEY: I think it would be terribly unyielding.

HON. ALDEN M. MCLAUGHLIN, JR.: No, we don't want that to happen, sir.

HON. D. KURT TIBBETTS: Do you want to say once every three months then?

HON. ALDEN M. MCLAUGHLIN, JR.: We don't want that to happen.

HON. D. KURT TIBBETTS: So you want to say once every three months?

HON. ALDEN M. MCLAUGHLIN, JR.: Right.

MR. MICHAEL BRADLEY: At least.

GOVERNOR STUART JACK: I'm not against this proposal. I just want to point out one practical implication. My simple mathematics suggest to me that every representative who is not in Cabinet would be entitled to come once every three months, and that would actually mean that every week we would have at least one. And if Cabinet is prepared to dedicate the time to that, well

HON. ALDEN M. MCLAUGHLIN, JR.: Very valuable point, Mr. Chairman. We've talked about that and I'm glad the Governor reminded us of that. What we — we thought about the practicalities of all of this and what we are contemplating is that there would be one Cabinet meeting every three months.

HON. D. KURT TIBBETTS: Specifically for that purpose.

HON. ALDEN M. MCLAUGHLIN, JR.: Specifically for that purpose. And all representatives who are not represented in Cabinet could then come and state their grievances, make their cases as the case may be. All at one meeting rather than — cause we just couldn't function on the basis of every week we had somebody to deal with things.

MR. MICHAEL BRADLEY: Well, it needs redrafting.

THE CHAIRMAN: Yeah, have you got a text for that because it needs to be —

HON. ALDEN M. MCLAUGHLIN, JR.: We haven't attempted to redraft it.

THE CHAIRMAN: It needs to be carefully worded.

HON. D. KURT TIBBETTS: Just to clarify, Mr. Chair. The point I made earlier on about the Sister Islands, Cayman Brac and Little Cayman is a separate point.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: And that still obtains, sir.

THE CHAIRMAN: Okay. Still obtains. Right.

HON. ALDEN M. MCLAUGHLIN, JR.: But we will produce a draft of this, sir.

THE CHAIRMAN: Okay. Fine.

Cabinet Secretary. In here — in (4) of 49 on page 40 there's a typo. You see at the beginning it says **the secretary to the Cabinet**. It should read **the Cabinet Secretary shall also** ... I just thought I'd give you that correction.

HON. W. MCKEEVA BUSH: Mr. Chairman?

THE CHAIRMAN: Yes, McKeeva.

HON. W. MCKEEVA BUSH: Mr. Chairman, on (4) just a matter of how it's worded there. It says **the secretary to the Cabinet** but everywhere else it says **Cabinet Secretary**.

THE CHAIRMAN: Yes, we should change it to Cabinet Secretary.

HON. W. MCKEEVA BUSH: Yeah.

THE CHAIRMAN: Yeah, that's right.
Section 50.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, there is — there's something we wanted to raise.

Since the beginning of constitutional talk in these Islands — at least as long as I can remember — there's always been this concern which we heard again this time but with less — with less emphasis but nonetheless still there, the concern about the Premier and the office of the Premier and his perceived powers and so forth. As I say in most cases it's perceived. It's even been characterised that this would be usurping powers of the Governor and so on and so forth. All sorts of things.

So we wondered whether it might be helpful and possible in the same way that we have the Governor's — the office of the Governor and

the Governor's functions and so forth set out, if we could encapsulate somewhere what the authorities, scope of authority of the Premier is and what his functions are insofar as they are those things outside the functions and so forth of Cabinet and other ministerial functions whether that might somehow provide some reassurance that this isn't, you know — this isn't a Prime Minister, that ...

THE CHAIRMAN: Well, the only thing I could think of saying would be something like — something like **the Premier shall have such functions as are prescribed by this Constitution and any other law and shall perform those functions in accordance with this Constitution and any other law** if you want to say that. That would be the equivalent to the section on the Governor's functions. I'm not sure it would take you very far in — but I mean it at least would be a statement that they're finite. The Premier cannot sort of arrogate to himself or herself functions which are not conferred.

HON. ALDEN M. MCLAUGHLIN, JR.: I'm mindful that we've just sprung this upon you so maybe you can add that to your —

THE CHAIRMAN: We'll think about that.

HON. ALDEN M. MCLAUGHLIN, JR.: — bag of things you need to think about.

THE CHAIRMAN: I mean, you see the other point is that under section — Section 54 the Governor — this is where **the Governor acting in accordance with the advice of the Premier allocates responsibilities to ministers including the Premier**. If the Premier decides that he or she should have certain ministries or departments as well as simply being Premier, then he advises the Governor to allocate to him responsibility for tourism or the economy or fisheries or whatever.

So, I mean that would be — they would be functions conferred by virtue of the Constitution but not specifically prescribed at the moment. I mean, anyway let us — would you like us to think about that.

HON. W. MCKEEVA BUSH: Mr. Chairman, one question. What [inaudible - microphone not turned on].

THE CHAIRMAN: None.

HON. W. MCKEEVA BUSH: That's just nomenclatures?

THE CHAIRMAN: Yes. I don't think there's any difference — substantive difference — between a leading minister, let us put it that way, the leading minister called Prime Minister, Premier, Leader of

Government, Chief Minister, in Scotland First Minister. I mean, there are various things. They're all the same. It's just a matter of a rose by any other name smelling as sweet.

HON. ALDEN M. MCLAUGHLIN, JR.: In fact, in the case of Gibraltar, the Prime Minister it seems — at least on my reading of it — actually has more power and autonomy than Premiers in the other BOT constitutions so...

THE CHAIRMAN: I think that's right. So it's a matter of choice which title for this office you think would be most appropriate. I don't think — I think we would have a problem with Prime Minister because I think our ministers might not like that. They might think it inappropriate. But I think ... above that red line I suspect that there are all sorts of things that you could choose, and you will have seen in some Territories we've gone with Chief Minister and others Premier and so on and so forth. So ...

HON. W. MCKEEVA BUSH: You know the key here, obviously using these examples of these other Territories that had constitutional advancement for many, many years, and with that they've had the benefit of moving from one thing to the next up the ranks. But we're modernising now, so ...

Mr. Chairman, I want to look at subsection (4).

THE CHAIRMAN: Of 50?

HON. W. MCKEEVA BUSH: Yes, sir.

THE CHAIRMAN: Yeah. This is listed as an outstanding point. Please go ahead. Please go ahead. Yes, McKeeva?

HON. W. MCKEEVA BUSH: Mr. Chairman, I've sat here, last time and these last two days, listening to why we need to do certain things in the Constitution because it's democratically right to do so. And not too long ago, I can't remember which one it was, but one of them talked about democracy. I guess that was the vote of the AG and the Deputy Governor, why they shouldn't vote because it's not democratically right for them to do so.

The most fundamental right in democracy is that of a person to choose whom they want to elect them and whether they want that person to do so over and over until they say, themselves say, this person is no longer the person.

And so, Mr. Chairman, I find repugnant of democracy this cockamamie section where they're proposing to cut the members' choice

to two terms to their whomsoever they would choose for Premier term limits as it is.

Now, this has come about by people so-called coming here and telling you and me and everybody else that they have the support of the public because the public said so in polls and all these sort of things. And I don't believe that there's any truth to that whatsoever, that's people personal choice, and not the wider majority of the Cayman Island public.

And I guess one thing about the referenda is that we will be able to test it there and then. But this is not something that I will support. And, Mr. Chairman, I know that when we were the government and these talks was going on, all these discussions you heard was 'because McKeeva Bush wanted the power'. Well, I can tell you that the shoe is on the other foot today and that at this point in time in my life that won't be so.

Mr. Chairman, I hear some groaning. I don't know whether they're in pain but anyway...

HON. V. ARDEN MCLEAN: I wouldn't groaning at you.

HON. W. MCKEEVA BUSH: No, the other person behind you.

I just find that we can't on the one hand talk about democracy and people's right and here we are taking away their rights. And we can't say that's not what we're doing because that is exactly what's happening.

If a representative is a good person and the party so choose for that person to lead them, then that should be their choice after the people have elected them. If the people don't want them in a general election then they will not choose them. And after they get to the point where the party has won, it should be that party's choice. It shouldn't be for us to come and say amongst 15 of us at this time that this is what we want to do.

So, as I said, when we talk about democracy I find that this is untenable as far as I'm concerned. Thank you, sir.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman?

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: Could I just say this? I know the member from the Chamber of Commerce wants to speak, but I'd just like to say this if it would help.

This is the first point so far that I think I've understood the Opposition to fundamentally disagree with the draft, and if — if a concession on this point will ensure that we all are able to back the document which comes out of these talks, then it is certainly something that the Government would consider doing.

THE CHAIRMAN: Okay.

HON. W. MCKEEVA BUSH: Oh, Mr. Chairman, that came so quick.

[laughter]

HON. W. MCKEEVA BUSH: It reminded me, Mr. Chairman — and I'll take it but it came so quick. It reminded me one time in Cabinet that Mr. Jefferson and both my good friend the former Financial Secretary came in and said 'The Budget got to be cut and we will take a million dollars from our Budget'. That came kind of quick. It meant that they had already racked it up that much.

But I certainly am glad that the Minister of Education will consider what I said. I think they understand democracy quite well and they were doing that to — they only suggested that in the past to please some of their backers and supporters, I understand that. But they got to agree with democracy if they're going to agree with democracy.

HON. D. KURT TIBBETTS: Mr. Chair, just to — sorry, go ahead, Arden.

HON. V. ARDEN MCLEAN: But it means all of us are leaving here supporting this, even the preachers and ..

[laughter]

HON. W. MCKEEVA BUSH: Supporting what?

HON. V. ARDEN MCLEAN: Supporting this document in their pulpit to their parishioners.

HON. W. MCKEEVA BUSH: Which one?

HON. V. ARDEN MCLEAN: That this is the document at the end of the day that they expect the country to vote in the affirmative for.

HON. W. MCKEEVA BUSH: Mr. Chairman, I think that's — maybe he's having a prayer, but I would doubt that that will be answered.

[laughter]

HON. D. KURT TIBBETTS: Mr. Chair, just to be absolutely clear.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: Just so that we don't have any misconceptions.

What we're saying is can we hold that specific issue? We'll see where we end up with everything else and it may be one or two more like that.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: And at the end of the day we'll look at them together with all the rest.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: I just want to make sure that we understand clearly about that.

THE CHAIRMAN: I understand and I think that's extremely helpful.

HON. W. MCKEEVA BUSH: I think, sir, that that's a little bit different from what the Minister of Education said, but I'll leave the two of them to decide which way they're going to go with it. But I think that's a little different from what the Minister of Education was saying.

THE CHAIRMAN: Mr. Thompson.

HON. W. MCKEEVA BUSH: You're lucky if that hold up in the court of law.

THE CHAIRMAN: Order. Order.

MR. EDDIE THOMPSON: The position of the Chamber of Commerce is — our membership survey has indicated that they were in support of a term limit policy. However, it is also something that in light of the fact that we're invited for our input, we do not feel it necessary to be a deal breaker where we would object to anything if the greater government could agree unilaterally to. So, that being said I want it for the record that the survey did come back stating that the membership was in favour of term limits.

HON. W. MCKEEVA BUSH: So how you gonna break that now?

MR. EDDIE THOMPSON: My only question is: Is the voting public now going to be voting for a Premier or are they going to be voting for members for the House?

THE CHAIRMAN: Members of the House.

MR. EDDIE THOMPSON: Correct. So I only point that out to say that the Premier then is elected from within and not by the people.

HON. W. MCKEEVA BUSH: The Premier? But the Premier elected the people, they elected the party and that's why the party system is good because you know who gonna be Premier.

HON. V. ARDEN MCLEAN: Yes, I agree with that wholeheartedly.

THE CHAIRMAN: Right. Can we move on? Can we move on? On that happy note.

HON. V. ARDEN MCLEAN: Mr. Chairman?

THE CHAIRMAN: Arden.

HON. V. ARDEN MCLEAN: I do have to leave, but before I leave — and I didn't consult with my colleagues — one of the contentions that I believe we have under 50 is that **the Governor shall cause a ballot to be held among the elected members of the Legislative Assembly to determine a Premier.**

HON. W. MCKEEVA BUSH: But that's in the event that they don't have a majority.

HON. V. ARDEN MCLEAN: But that is done now. I see no need for the Governor to have **shall cause it to be dealt with** —

HON. W. MCKEEVA BUSH: Well, who gonna determine it?

HON. V. ARDEN MCLEAN: The legislature.

THE CHAIRMAN: It's only if no political party gains a majority or if no recommendation is made by a party. Oh, I see. Are you simply saying that as a matter of drafting it should not be the Governor that shall cause a —

HON. V. ARDEN MCLEAN: That's right. It should be the legislature.

THE CHAIRMAN: Yeah. **For the ballot to be held among the elected members of the Legislative Assembly.**

Speaker. I think the Speaker. I think the Speaker rather than the Governor here would be more appropriate. Right? You have to elect a Speaker first. And actually that is — I think that's provided for — that's provided for later on. Let's just check.

At the first sitting of the Legislative Assembly — this is 65 — **after a general election the elected members of the Assembly shall by a majority elect a Speaker.** So that is the first business. Then if there is a need for an election of a Premier that the Speaker can organise that. I think that works.

Okay. So we substitute in 50 (3) —

HON. D. KURT TIBBETTS: Second to last line, Mr. Chair, where it says Governor, that Governor will remain.

THE CHAIRMAN: That Governor will remain, yes. The Speaker can't appoint the Premier.

All right. Okay.

So — well, thank you for a most interesting discussion of (4). And for what it's worth, I always thought it was a curious provision and something which is alien to our system in the UK where of course we have no term limits and —

Right. Can we rattle on then?

HON. W. MCKEEVA BUSH: Before you move on, sir. Still in (2) of 40 you're saying that the Speaker should cause a ballot to be held?

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: And the Governor shall appoint?

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: Okay.

THE CHAIRMAN: Okay, 51?

52?

53?

HON. D. KURT TIBBETTS: Mr. Chairman, there's just — I'm trying to catch UP — I know you're doing them while we're going, but is there any — is there any provision — this might have to do with 50. Is there any provision regarding a Deputy Premier?

THE CHAIRMAN: Yes. It is Section 45 (1) (b).

HON. D. KURT TIBBETTS: 45.

THE CHAIRMAN: Back on page 38. **There shall be a Cabinet which will consist of six other ministers, one of which should be Deputy Premier** —

HON. D. KURT TIBBETTS: All right. Good enough.

THE CHAIRMAN: — acting in accordance with the advice of Premier —

HON. D. KURT TIBBETTS: Yes, sir.

THE CHAIRMAN: Okay.

So, 51?

52?

I hope these are all right.

53?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chair, 53 (1) it says **if the Premier is unable due to illness ... his or her absence to perform the functions, the Governor may authorise the Deputy Premier to perform these functions.** Should that not read shall?

THE CHAIRMAN: Well, you see it goes on in paragraph 2 — (2) to deal with the situation. **In exercising his powers under this section the Governor shall act in accordance with the advice of the Premier unless in the Governor's judgment it is impractical to take the Premier's advice —**

HON. ALDEN M. MCLAUGHLIN, JR.: That's fine, sir. Yeah.

THE CHAIRMAN: So you've got to have a fallback in case the Premier is incapacitated.

HON. ALDEN M. MCLAUGHLIN, JR.: The Deputy Premier might be giving trouble as well and the Premier might not want to give him responsibility. That's more likely.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: Mr. Chairman?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: But there is I believe a counter to that argument.

If you have a Premier and you have a Deputy Premier and the Premier becomes incapacitated for some reason or the other, without the — without the benefit of any other advice, isn't it a fair assumption that because you don't know anything else it should be the Deputy Premier?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: That's what I'm saying. What his point is, is that if he couldn't function it shouldn't have the latitude and I'm saying no. That's all I'm saying.

HON. ALDEN M. MCLAUGHLIN, JR.: I see. Yeah.

HON. D. KURT TIBBETTS: Are you with me, Mr. Chair?

THE CHAIRMAN: Yeah, I'm just reading down the section.

HON. D. KURT TIBBETTS: That's how it should be shall.

THE CHAIRMAN: I think it would probably work actually with “shall”. But I'm not sure, though, what we do with (2). I think we could delete (2) couldn't we? I mean, I think the...

MR. MICHAEL BRADLEY: Just for clarification, Mr. Chairman, the authorisation for the Deputy Premier to perform the functions doesn't make an acting Premier.

HON. D. KURT TIBBETTS: Sorry? Sorry?

MR. MICHAEL BRADLEY: I'm just inquiring from our chairperson whether the authorisation from the Governor for the Deputy Premier to perform the functions of the Premier, that doesn't make the Deputy Premier Acting Governor — Acting Premier.

HON. ALDEN M. MCLAUGHLIN, JR.: Right. It's a different thing.

MR. MICHAEL BRADLEY: It puts him in the same position as the Governor's Deputy.

THE CHAIRMAN: I think —

HON. D. KURT TIBBETTS: Which is confusing as it is so we're trying to avoid that too. Right?

THE CHAIRMAN: I think the reason for the drafting —

HON. D. KURT TIBBETTS: Michael Bradley was playing the advocate of the devil.

THE CHAIRMAN: I think the reason for the drafting as it is, if I recall history, is that there may be a question, a genuine question whether the Premier is due to illness, for example, unable to perform the functions of his or her office. And if it says — it goes on to say **the Governor shall authorise** who forms the view that the Premier is unable? Because it's an obligation on the Governor, so presumably the Governor forms that view.

So get around that problem — you get around that problem, we go into (2) which says that the first rule is that the **Governor act in accordance and advice of the Premier**. The Premier says 'In my view I'm unable to perform my function because I'm too ill' or 'I'm going to be away, so therefore, I advise you formally to authorise the deputy to take my place' and the Governor has no choice but to do it then.

HON. D. KURT TIBBETTS: Right.

THE CHAIRMAN: Fallback rule: **Unless in the Governor's judgment is it impracticable to obtain the Premier's advice owing to his or her infirmative body or mind or absence, in which case he or she shall exercise the power acting in his or her discretion**. So, that's the fallback, that the Premier is unreachable or cannot — is not in a position to give any advice because he's in a coma or something of that sort. So, in that case then the Governor must act —

HON. D. KURT TIBBETTS: But —

THE CHAIRMAN: That's the way it's drafted. I mean, that's the reason for that.

HON. D. KURT TIBBETTS: I hear you and I understand that. But, Mr. Chair, all I'm saying is — and the reason why I'm holding on is because nobody is giving me a reason to let go. All I'm saying is that fine, I hear what you said. But is it right the fact that the Premier is not in the position for whatever reason to give the Governor advice as to who should act for the Premier, that should give the latitude if there is a Deputy Premier existing that the Governor can choose whoever he wishes.

THE CHAIRMAN: Ah, how I think — I think you hit on a very good point here.

HON. D. KURT TIBBETTS: That's the point I'm making.

THE CHAIRMAN: The words at the end of (2) **shall** —

HON. D. KURT TIBBETTS: It gives him the latitude.

THE CHAIRMAN: Yeah, exactly.

HON. D. KURT TIBBETTS: It gives him latitude.

THE CHAIRMAN: So it should actually say —

HON. D. KURT TIBBETTS: So, if he doesn't like the Deputy Premier he can say, you know what, 'Go climb a tree'.

THE CHAIRMAN: Yeah, that's not the intention. I think it should say **owing to his infirmative body or mind or absent, in which case he or she shall — shall exercise their power without further ado** or something — not without further ado, but is not acting in his discretion shall exercise — shall exercise the power which is the one in — it should actually start **In exercising his or her powers under (1)**. That's the first thing that needs to be done. Yep. **The Governor shall act in accordance and advice of the Premier unless** et cetera, et cetera. And then it ends up **in which case he or she shall exercise the power forthwith**, something like that.

HON. D. KURT TIBBETTS: Now **in exercising the power forthwith** what does that mean?

THE CHAIRMAN: Well, the power — the power is to authorise the Deputy Governor.

HON. D. KURT TIBBETTS: The Deputy Premier you mean?

THE CHAIRMAN: The Deputy Premier.

HON. D. KURT TIBBETTS: To authorise the Deputy Premier to perform the functions.

THE CHAIRMAN: Yep.

HON. D. KURT TIBBETTS: Once it means that then that's fine.

THE CHAIRMAN: Yeah, because it's the power referred to in (1).

HON. D. KURT TIBBETTS: I understand that.

THE CHAIRMAN: Shall exercise the power — what?
AG?

HON. SAMUEL W. BULGIN: I'm just thinking that maybe what you need is a more positive wording, something that says that **in the absence of the Premier — the role shall be — the duty shall be performed by the Deputy Premier unless the Governor is advised otherwise by the Premier.** So it automatically devolves to the Deputy in the absence of the Premier unless the Premier advises the Governor otherwise.

HON. D. KURT TIBBETTS: Saying the same thing but less pen.

HON. ALDEN M. MCLAUGHLIN, JR.: Brilliant, AG.

THE CHAIRMAN: If the Premier is unable due to illness or is in absence of the Cayman Islands to perform the functions of his or her office, those functions shall be performed by the Deputy Premier unless the Governor is advised otherwise by the Premier. Okay?

HON. D. KURT TIBBETTS: So all you have to do is to keep number one as it is, sir. Look at it.

THE CHAIRMAN: Yep.

HON. D. KURT TIBBETTS: Keep number one as it is and say if the Governor shall authorise the Deputy Premier to perform these functions unless otherwise thing and thing by the Premier. That doesn't say the same thing, Sam?

THE CHAIRMAN: Well, the Leader of Government Business asked you whether his formula was the same.

HON. D. KURT TIBBETTS: Forgive me. I was saying, so in (1) **if the Premier is unable due to illness or his or her absence from the Cayman Islands to perform the functions of his or her office, the Governor shall authorise the Deputy Premier to perform these functions unless otherwise advised by the Premier.**

HON. SAMUEL W. BULGIN: What I'm saying there is not quite the same. [inaudible - microphone not turned on]

HON. D. KURT TIBBETTS: Oh. But I'm saying the same thing. I'm saying that the Governor will automatically do it unless the Premier tells him otherwise, which is the same thing as the Premier would contact him to tell him otherwise. But I'm not going to argue with that because I am not a lawyer. Let's not waste time on that.

Mr. Chairman?

GOVERNOR STUART JACK: Sorry, could I just make... a question about formalities which may or may not be important.

HON. D. KURT TIBBETTS: Googly or leg break or off break, which one?

GOVERNOR STUART JACK: In the constructive spirit.

HON. D. KURT TIBBETTS: Okay. A straight yorker. Go ahead, sir.

GOVERNOR STUART JACK: I believe in speedballing.

Just in case these formalities are considered by somebody of some legal significance because I don't know, the difference between what the Leader of Government Business was proposing was just to adapt the language that's already here, and the simpler, more practical solution as I understand it that the Attorney General is suggesting is that in the case of the Attorney General's suggestion those powers would automatically transfer to the Deputy Premier without any formality.

HON. D. KURT TIBBETTS: Right.

GOVERNOR STUART JACK: My interpretation of the current language as you suggest means the Governor will still have to sign some kind of instrument. Now, I don't know whether that signature on a piece of paper makes any difference or not.

HON. D. KURT TIBBETTS: Okay.

MR. MICHAEL BRADLEY: And for further clarification, Mr. Chairman, does the Leader of Government Business mean clearly that if the Premier advises otherwise he must advise that some other minister be appointed? If you just say in the absence he can advise the appointment to somebody else, you do mean another minister?

HON. D. KURT TIBBETTS: Yes, sir.

MR. MICHAEL BRADLEY: Right.

HON. D. KURT TIBBETTS: Yes, sir.

MR. MICHAEL BRADLEY: Just to clarify.

HON. D. KURT TIBBETTS: Mr. Chairman? Mr. Chairman? We all understand the point, sir. I'm leaving it up to your good selves. Okay.

THE CHAIRMAN: We'll take care of the drafting. But I think we've got the picture.

Right. So the dreaded (2) would be deleted. Are there any other points? The other subsections would be renumbered. And we whiz on to

the important Section 54 where there are references to the Sister Islands in (2) which should be changed.

HON. ALDEN M. MCLAUGHLIN, JR.: Before we get to Section 54 (2).

THE CHAIRMAN: Right.

HON. ALDEN M. MCLAUGHLIN, JR.: Can we get another quick look at (1), sir?

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: It says **the Governor acting in accordance with the advice of the Premier may by directions in writing charge any minister with responsibility.**

THE CHAIRMAN: Yes. I think it should be “shall” actually.

HON. ALDEN M. MCLAUGHLIN, JR.: Thank you. That's what we think too.

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: Thank you, sir.

HON. D. KURT TIBBETTS: Mr. Chair, I'm going to be very honest with you. Now that we've had the benefit of a few discussions between yesterday and today we are much warmer because we really wondered whether the conspiracy theory was around and was just hoping that we wouldn't look at this document. But I didn't say what I just said, neither will I say anymore, sir.

THE CHAIRMAN: Understood.

HON. D. KURT TIBBETTS: Thank you, sir.

HON. W. MCKEEVA BUSH: Mr. Chairman, (1) (b), before you get to (2), that line — and conspiracy or none — do you — certain that we want to say in the Constitution **where a minister shall be charged with responsibility for and shall be styled minister of finance.** I'm dealing with the word “minister of finance” because many — finance means many things in our — our economy, and other times — in other places there have been minister of budget affairs and minister of budget and so on which deals with finance. And then there have been minister of international business and minister of finances and so on. And — are we certain that we want to say that there, minister of finance, because it

could be another name? I mean, I understand what you're getting at, that you're going to have —

HON. D. KURT TIBBETTS: I hear what you're saying. I hear what you're saying. I'm just thinking. Me that is.

[inaudible comment by Attorney General – microphone not turned on]

HON. SAMUEL W. BULGIN: I think — unless I'm advised otherwise, what is contemplated here is that, **but in addition to any other responsibility which a minister may be charged there shall also be one who carries additional responsibility of minister of finance.** In other words, he can be charged with other responsibilities in addition to finance.

MR. MICHAEL BRADLEY: And, Mr. Chairman, it's not unknown, at least in other jurisdictions, for the Premier to assign to himself the responsibility of finance. In those circumstances you wouldn't want —

HON. D. KURT TIBBETTS: No, we don't want that here.

HON. ALDEN M. MCLAUGHLIN, JR.: But Mr. Chairman, I concur with what the Attorney General just said. I think the critical bit is that the Constitution requires that there is a minister charged with responsibility.

HON. W. MCKEEVA BUSH: Yes, a ministry.

HON. ALDEN M. MCLAUGHLIN, JR.: For finance. Not what the person is called.

HON. W. MCKEEVA BUSH: Called. Right. And that's the point I'm making.

HON. ALDEN M. MCLAUGHLIN, JR.: It's a good point.

HON. D. KURT TIBBETTS: If that's the case and we agree, all we have to do is delete **and shall be styled.**

HON. ALDEN M. MCLAUGHLIN, JR.: Well, not just that. We have to write in the responsibility charged.

HON. D. KURT TIBBETTS: But you see it says minister shall be charged with finance.

MR. ROLSTON M. ANGLIN: Full stop.

HON. W. MCKEEVA BUSH: Full stop.

THE CHAIRMAN: In (2) I'll change the references to the Sister Islands to Cayman Brac and Little Cayman.

Anything else in this section?

Section 55. Special Responsibilities of the Governor.

Now... any points on this section?

HON. W. MCKEEVA BUSH: Section?

THE CHAIRMAN: 55.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, if we can just have a moment to confer on a note we got from the Financial Secretary. We need to —

THE CHAIRMAN: Yeah. Shall we have a ten-minute break? Ten-minute break.

RECESS

RESUMED

THE CHAIRMAN: Right. Shall we press on? Right. Sections 55, 56, 57, 58 are agreed.

59.

60.

61.

62.

63.

64.

We're on 55.

HON. W. MCKEEVA BUSH: Mr. Chairman, you moved too fast. And I just — I just wanted to have mention that the document or paper from the Financial Secretary, and was just informed about what will take place, but I wanted to have it on record that we do have a paper from the Financial Secretary.

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: And leave it at that.

THE CHAIRMAN: Yes, that's fine. I intend to come back to that point tomorrow when we're dealing with the —

HON. W. MCKEEVA BUSH: As I said, I was just informed about it.

THE CHAIRMAN: — Covering Order. We will do some drafting on that point, which we will circulate for everyone to look at tomorrow.

Section 55.

Now, I wanted to make a point here which I hope might be helpful in the context of what we discussed this morning about the Governor's powers in relation to the Cabinet. And you see, when we get to Section 55 (2) — when we get to Section 55 (2) it says **subject to this Constitution the Governor shall in respect of external affairs and the administration of the courts as far as practicable act in consultation with the Premier**. Now, I don't know whether you were going to make a point about that, but there is obviously a relation here with your request this morning that the Governor should as far as possible consult the Cabinet about matters within the Governor's special responsibilities.

And I think it's just worth taking a few minutes to analyse what these various special responsibilities are under the draft as it is at the moment.

The first is Defence. This is in 55 (1). First is Defence. Let's just put that aside for the moment.

The second is External Affairs subject to subsections (4) and (5). Now, in this draft for the first time there would be in considerable detail provision for delegation in the field of external affairs to a minister. And there would be, I would submit, a substantial sharing of responsibility in the field of external affairs between the Governor and ministers. That would be a step forward on the current position as occurred in the constitution of the BVI, something very significant.

The next one is Internal Security including the police without prejudice to Section 58. That is a cross-reference to the new National Security Council which I know we have to discuss the details of, and we're coming to that soon.

So, on that subject there is to be a new institutional structure in relationship, and a sharing of responsibility between the Governor and the National Security Council.

Just finishing my review (d) is Public Service Appointments and so on. In no circumstances should the Governor consult the Cabinet about public service appointments, and I don't expect you to press for that because public service appointments are — you're taking the floor already.

HON. ALDEN M. MCLAUGHLIN, JR.: No. Well, I understand the sensitivity of this point, but that provision doesn't recognise reality, particularly in relation to senior civil servants such as your permanent secretary and so forth.

I remember the last Governor just after I took office invited me in to talk about his intention to appoint a particular senior civil servant as permanent secretary to the ministry for which I have constitutional responsibility. He simply asked what my views were. But whether I had any difficulty working with this person, he wasn't for a minute saying I didn't have any right not to or any right to say 'No, you can't appoint him, you should appoint somebody else'. And I think that is an eminent and sensible way to go about these things. And to entirely preclude consultation on matters such as that I think is, as I say, to ignore reality and to ask for trouble.

THE CHAIRMAN: Well, the provisions later on about the public service, Section 110 made clear that as far as the Constitution is concerned public service appointments are for the Governor in his discretion subject to delegations made under the Public Service Management Law.

Of course, it does not preclude any Governor from consulting a minister if they wish to do so. All I am saying — Alden, all I am saying here is that there is no — I can tell you this frankly. There is no way British ministers will agree to a provision in the Constitution requiring the Governor to consult the Cabinet about public service appointments. It will have to continue to be an informal, voluntary matter, along the lines that the previous Governor consulted you. That's the way it would have to be I'm afraid.

HON. ALDEN M. MCLAUGHLIN, JR.: See, I have no difficulty with that and I also see issues, you know, particularly with the public service if that is — if it is clear that ministers have a real role in determining their future.

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: But what I am keen to avoid are provisions which cause Governors to feel that they can't —

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: — have a word with the minister about a proposed — I mean this is a major matter.

THE CHAIRMAN: Yes. We're not —

HON. ALDEN M. MCLAUGHLIN, JR.: If the minister has —

THE CHAIRMAN: We're not writing that in.

HON. ALDEN M. MCLAUGHLIN, JR.: Right.

THE CHAIRMAN: We're not in any way precluding the Governor from doing that. We're just saying that this is his — one of his special responsibilities and there must not be — I hate to be dictatorial on this — I really am — but I know that there cannot be a requirement for the Governor to consult —

HON. D. KURT TIBBETTS: We understand that.

THE CHAIRMAN: So it has to be — but equally there will not be any prohibition against the Governor from doing that.

HON. D. KURT TIBBETTS: Yes, sir. That's fine.

THE CHAIRMAN: So, then the last one is (e) The Administration of the Courts Subject to the Functions of the Judicial and Legal Services Commission.

Now, (2) then envisaged that on points (b) and (d) External Affairs and Administration of the Courts **the Governor must in respect of external affairs and administration of the courts as far as practicable act in consultation with the Premier.** We would have no objection if you thought it more appropriate that that reference to **in accordance — in consultation with the Premier** said **in consultation with the Cabinet** on those two matters.

Now, that takes care of two of them, two of the subjects. I've already said that (d) the public service one we could not agree to saying anything similar for. And (c) internal security including the police is a matter we would say for the Governor with the National Security Council, the terms of which we've yet to settle. That leaves one subject which is defence.

And defence is not mentioned as one in (2) for the very reason of its sensitivity. I don't know, as a matter of practice, how often a Governor in any territory, apart from the Falkland Islands, in recent years actually has to decide matters of defence. You know, true matters. But I'm open to being educated about that. I don't know. Governor, would you think this is a ...

HON. D. KURT TIBBETTS: But, Mr. Chair, I'd like to know where you're going, which direction you're going first before you seek comments.

THE CHAIRMAN: Well —

HON. D. KURT TIBBETTS: You don't know when this has ever arisen. Fine. If it were to arise what's the position?

THE CHAIRMAN: Yes, well because I'm a cautious soul you will see that I did not put in this draft a reference to defence in (2), because every time I think of defence I think of — I think of, you know, matters of potential sensitivity and armed forces and things like that. I mean, we're talking about — now, you could come back to me and say by virtue of the very sensitivity and importance of that matter, you know, we need to know about it.

HON. D. KURT TIBBETTS: I understand. I understand.

Mr. Chairman, I — this is — I speak personally, and I understand the ramifications. And I would not expect that if an occasion were to arise when this came into play, if there were tactical or strategic matters which required for as far as possible people not to know, but about it actually existing, then, certainly, there must be some provision for the government to know that it exists. It is very possible that something may be looming and it is not something that intelligence has spilled far enough for the government of the day to know anything about it.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: I don't think that it should be expected that something of that nature should be going on, and His Excellency is on the phone or by some other way of communication to London and by — and to a warship or to something else and nobody knows about it until the first bomb hits. That sounds a bit farfetched, but it is no more farfetched than what obtains now. We could easily brush it off, Mr. Chair, and say well we don't have to worry about that at any point in time and so let's not argue about it. Well, I'm not arguing about it. I'm respecting your caution. I still raise the point that to know is what I believe should happen, and there should be some type of obligation to let us know. As I said, I'm not expecting that it should be that every single gory detail is spewed out, but there should be something which says we must know. I don't know how others feel about it, but I think we should talk about it and not just make it pass.

THE CHAIRMAN: Yeah. Well, I think what I was hoping to — where I was hoping to reach on your general request that in the area of special responsibilities the Governor should routinely consult the Cabinet, is that as far as public service special responsibilities that's out of the game.

HON. D. KURT TIBBETTS: That's fine.

THE CHAIRMAN: As far as internal security and police is concerned, that will be dealt with in the context of the National Security Council.

Now, as far as external affairs and administration of the courts — that's to say, you know, not the business of the courts but the infrastructure of the courts and the administration — those could be dealt with as far as possible in consultation with the Cabinet rather than in consultation with the Premier. Okay? And that could be written in.

So that just leaves defence. And I don't know what the answer to this is except that we're some of the way there in terms of the paragraph we'd amended this morning in Section 33 to say **that the Governor shall keep the Cabinet informed concerning the general conduct for all matters which he or she is responsible**. So that was designed to meet your point about the need to be informed.

HON. D. KURT TIBBETTS: Yes, sir.

THE CHAIRMAN: It being understood that there may be some highly sensitive matters which he will be unable to tell you about, but general conduct of all matters you will be informed.

Now as far as consultation on the defence matters is concerned, you know, just as a matter of the drafting, whether one could put that into Section 55 (2) along with external affairs and administration of the courts I'm not sure. I would need advice on whether that was safe —

HON. D. KURT TIBBETTS: I understand your caution and I hear that. We're quite willing for you to check it out.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: But what I think would be almost a travesty is if the Constitution is worded in such a way that defence hangs by itself clearly saying because nothing is said that nothing has to be said, if you understand —

THE CHAIRMAN: Yep.

HON. D. KURT TIBBETTS: — what I'm saying. And the way you're speaking you mentioned just about everything else being covered, and all I'm saying if we leave that one hanging out by itself then it tells its own tale. But we will leave it for you to check it to see.

MR. ROLSTON M. ANGLIN: Mr. Chairman?

THE CHAIRMAN: Yeah.

MR. ROLSTON M. ANGLIN: Mr. Chairman, just quickly on the point because I want to make sure I understand what you're looking to do.

From what you read in section I think it was 33 that rewording would allow, though, for the Governor to at least inform Cabinet even matters on defence.

THE CHAIRMAN: Yeah.

MR. ROLSTON M. ANGLIN: I mean, the point — the reason I raise that point is I think the Honourable Leader of Government Business made the reference to nothing said. I want to make sure that that's not the case, that on the defence that we have a complete prohibition that nothing can be said. So we're saying that he can inform the Cabinet —

THE CHAIRMAN: Yeah.

MR. ROLSTON M. ANGLIN: — on sensitive matters that would relate to the defence of the Islands.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: But we're also saying in the section that we're discussing now, which specifies defence that the way it's worded nothing is said about defence with regards any consultation. So if reference is made to all of the other subsections and defence is left out, then it doesn't create any obligation to inform us about anything at all since it's specific in this subsection.

I know the general clarification in 33, which is a general thing, but all I'm saying is... Mr. Chair, you're with me?

THE CHAIRMAN: I'm with you to the extent that there would be a question mark in someone's mind reading it I suppose is if they analysed it carefully that the Governor is — okay, in another section the Governor is obliged to inform the Cabinet about the general conduct of all of these matters.

HON. D. KURT TIBBETTS: Right.

THE CHAIRMAN: But as far as consulting the Cabinet is concerned that it would be confined to external affairs, administration of the courts as drafted now bearing in mind that internal security and the police that's for the National Security Council; bearing in mind that the public service special responsibility is also not a matter that should be specified as one for consultation.

HON. D. KURT TIBBETTS: Right.

THE CHAIRMAN: So, actually, the uninformed reader would say ‘Well what about defence and the public service one’.

HON. D. KURT TIBBETTS: Right.

THE CHAIRMAN: Public service one the answer is to be found later on where it points to public service for the Governor and under the Public Service Management Law and all of that.

So, I take your point that then defence — well, what about defence?

HON. D. KURT TIBBETTS: Yeah. Let me ask you this, Mr. Chair. Are you satisfied then that because of Section 33 that if defence was left without any reference at all that Section 33 —

THE CHAIRMAN: By its own, yeah.

HON. D. KURT TIBBETTS: — would cause for His Excellency to have an obligation to inform the Cabinet —

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: — on matters of defence?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Which is what I think Mr. Anglin was wanting to ensure.

MR. ROLSTON M. ANGLIN: Right.

THE CHAIRMAN: Yeah. The general conduct of the Governor's functions in relation to any of those matters, general conduct, those words are very important because there may be sensitive details that can't be transmitted. But general conduct.

HON. D. KURT TIBBETTS: See — not to belabour or not to attempt to belabour but just so that Mr. Anglin can understand — 33 is a general section, but then when we come to this other section where it starts to specify some of his special responsibilities, and where it refers to defence, while we've sorted out all the others and accept how the functions would relate to the constitutional arrangement, it says — in other words it's silent about defence.

MR. ROLSTON M. ANGLIN: Would it be — Mr. Chairman, would it be out of order then that at a minimum — just as we've said in this (2)

subject to this Constitution the Governor shall in respect of external affairs and administration of courts as far as is practicable act in consultation, would it be out of order that at a minimum we have another subsection added that replaces the word “consultation” with “advise” and replaces the other two subjects with defence to ensure that if there's a matter relating to defence it relates to the Island, that the Cabinet would at least be advised of what is happening?

I can see some difficulties with defence in terms of consultation in that, first, we don't have an armed forces and we do not have technical expertise as it relates to matters of defence. And so if a matter has arisen that Her Majesty's or Royal Navy for example is about to take action that directly relates to Cayman, they would be the people that technically would have to make the call in terms of what to do because they are the technical experts. They're not the police or anything else. This is a very confined and restricted area.

And so, I can accept that we, the Cayman Islands, would not have the capacity as a Cabinet to necessarily add any value to a consultative process. But certainly I would hope that it would be seen fit that in a broad sense that any matters of defence that relate to the Cayman Islands that we would be informed. And I throw the words “relate to the Cayman Islands” in because certainly there could be issues that the Governor is advised of regionally that may not have any direct impact on the Cayman Islands for which the HMG would not want the information to go any further than His Excellency.

HON. D. KURT TIBBETTS: Right. That's the same point that we're saying. What you're seeking is exactly what we're talking about.

MR. ROLSTON M. ANGLIN: It's adding the subsection for advice.

HON. D. KURT TIBBETTS: However we do it to make sure —

MR. ROLSTON M. ANGLIN: My recommendation is that we put a subsection in to avoid any sort of ambiguity or things left hanging out there.

HON. D. KURT TIBBETTS: So, Mr. Chair, you're going to think about that?

THE CHAIRMAN: We'll think about that.
Good. Okay.

HON. SAMUEL W. BULGIN: I just — to the uninitiated (2) **subject to this constitution the Governor shall in respect of external affairs** —

HON. D. KURT TIBBETTS: Which one is it, Sam? Sorry.

HON. SAMUEL W. BULGIN: Subsection (2), 55 (2), External Affairs and Administration of the Courts. Those words cause me some disquiet in a sense that it's open to sort of fluid interpretation.

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: And, Mr. Chairman, while you're at it I would like to find out what — how — in what respect is he going to consult with the court matters. And I see you've said administration, but how far it reaches is my concern.

GOVERNOR STUART JACK: I'm glad that the Attorney General and the Leader of the Opposition have raised this because I wanted to raise the question. I didn't understand the implications of that because given the very important principle of the independence of the judiciary, in practice all that a Governor at the moment does normally in respect of the courts is appoint the judges. And that is a matter which we are — there is proposals in this draft to treat it in a rather different way, a way which I personally welcome. So it's not clear to me what this actually means in practice.

THE CHAIRMAN: Right. Well, there's a simple answer to that. If in doubt leave it out. If in doubt leave it out. I mean, I can't remember now why the administration of the courts was put in amongst the Governor's special responsibilities. I thought for a moment that it was —

HON. D. KURT TIBBETTS: Is that in relationship, Mr. Chair, to the fact that [inaudible – microphone not turned on]

THE CHAIRMAN: No. No. I think it came from 2002. It came into the 2003 Draft after that. But actually — and I thought for a moment that it was carrying on in the current Constitution, but I just checked and it is not.

So if it is not the case and if — I mean what you have — what you have to do is to find somebody who puts to Cabinet — speaks in Cabinet and in the Legislative Assembly about the funding for the courts, the buildings, the infrastructure of the court system — now, is that done by the AG at the moment? And you're content —

HON. W. MCKEEVA BUSH: And also, Mr. Chairman, that Finance Committee has the ability to call in the clerk of courts —

THE CHAIRMAN: Yes. Yes.

HON. W. MCKEEVA BUSH: — and the court administrator and they come in and explain what they're doing.

THE CHAIRMAN: Right. Well, let's delete —

GOVERNOR STUART JACK: Sorry, there is one other aspect of this which potentially could be encompassed — although I expect the language is without this particular intent — which is the actual staff of the courts. Not the judges themselves, but the court staff under the courts administrator are treated as civil servants and come under all the protections and rules and regulations that apply to civil servants. But that is covered elsewhere. That doesn't need a special provision just for them I thought.

THE CHAIRMAN: No. No. No.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I have to say that this gives me a bit of — a considerable bit of unease to leave these things out. In fact, I'm uneasy about leaving out the matter of internal security as well from any of these things.

Assuming we get a real National Security Council and not some purely ceremonial-type preacher as is the case in your present draft, we will be I think a lot better off as a country and people will be a lot happier and content about decisions that are made in relation to policy and the police administration generally. Similarly is the case in relation to matter involving the judiciary. That's fine.

But particularly given recent experiences it is I believe unwise to have constitutional provisions that prevent or do not require nor provide a mechanism by which Cabinet is at least told on a regular basis, or can understand what is transpiring in relation to matters involving the judiciary. That is less so in relation to internal security because you'd have at least two ministers on a National Security Council, so the Premier should keep his Cabinet advised about what is transpiring, so less concerned about that one.

But in matters involving the judiciary, there is no representation from the elected government, and that is correct I'm not suggesting there should be under the Judicial and Legal Services Commission. But at a minimum somebody ought to be telling Cabinet on a fairly regular basis about issues which are affecting the judiciary. I'm not suggesting that Cabinet ought to get involved in the administration of the courts or deal with independence issues or anything like that. But if they're excluded from the requirement to consult or inform — for the Governor to consult or inform Cabinet about these matters, I think we're going to be in problems again. So that when Cabinet finds out about it, it's — you know it's because it's a huge money issue at stake. That's just not acceptable I don't believe.

THE CHAIRMAN: Jeffery?

PROFESSOR JEFFREY JOWELL: Would it not be possible — I just throw this out as a suggestion — in Section 33 where all the consultation provisions are — and let's keep everything there about consultation — to introduce a general duty of consultation which there is — with no exceptions except the ones that are along the lines of those that are already set out in Section 33 (1), namely insofar as it's unreasonably impractical to do so, matters not materially significant, and then add a few others such as in respect of defence and national security Her Majesty's service may sustain material prejudice which is in the BVI constitution. That kind of thing which I think would be sufficient in situations of real sensitivity. Confidentially in terms of appointments to the civil service might be another which would cover everything. So, there's a general duty to consult which seems only right. But of course in certain circumstances in any of the functions as the Constitution may provide otherwise, there is a limitation clause.

HON. SAMUEL W. BULGIN: I just want the ministers to know that I don't think we're at cross-purposes here. The point I'm making, I am not in any way advocating any veto on matters being discussed with the Cabinet. The point is that the words "administration of the courts" mean different things to different people and that is where the problem comes in.

HON. ALDEN M. MCLAUGHLIN, JR.: Right. That's the problem.

THE CHAIRMAN: I mean —

HON. W. MCKEEVA BUSH: But, Mr. Chairman, on any point that the Cabinet might require, they have the ability also to call the court administrator and — or the clerk of courts to Cabinet.

HON. ALDEN M. MCLAUGHLIN, JR.: We know about the issue but often we don't know what to ask.

HON. D. KURT TIBBETTS: What we're arguing about is being informed.

HON. ALDEN M. MCLAUGHLIN, JR.: Informed about policy issues that are affecting the judiciary.

HON. W. MCKEEVA BUSH: But unnah want too much and we can't get it. How you gonna get it?

MR. ROLSTON M. ANGLIN: Mr. Chairman, can I ask you one question on this. Obviously everyone has different feelings about their experiences. I take a slightly different view because I have no idea who is going to be elected in this country 12 years from now and what their motives are and how they're going to operate. And so I always operate from that sort of basis.

HON. ALDEN M. MCLAUGHLIN, JR.: You don't know who is going to be Governor either.

MR. ROLSTON M. ANGLIN: And so at the end of the day, whilst the minister is wondering who is going to be Governor, at the end of the day there's less penchant for a Governor wanting to take an innocent Caymanian and victimise them I think than a lot of our own.

And so, the reality is when we come to this whole issue of the administration of the courts, are we — I want to understand exactly what the Government is seeking to have done. Is there not another way to do it? In other words, we have an Attorney General who sits in the Cabinet that broadly has those types of responsibilities. Obviously there's a Chief Justice and the Chief Justice is responsible for the judiciary.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah, I think, Mr. Chair, that's what's causing the problem is the use of the language 'administration of the courts'. The Governor — the Government isn't worried about that except that we want to make sure that the courts are being properly administered.

What we want is an obligation on the part of the Governor to inform/advise — whatever the language is that we can settle on — the Cabinet on a regular basis about important policy issues that are affecting the administration of justice, if I may put it that way, rather than administration of courts. So that — because often we can't call in the clerk of the courts because we don't know that there is an issue. It's — so it's at that level. And none of us are claiming that we should have the right to tell the Chief Justice what to do and who to appoint or how to run his courts and interfere with the cases or anything like that. And we don't have to cast about very far to understand the kind of issues that we're talking about. We're dealing with some of them now.

THE CHAIRMAN: Well, there are a number of questions here. The first one is whether the — there should be listed amongst the Governor special responsibilities, subject of the administration of the courts. That's the first one.

HON. W. MCKEEVA BUSH: Mr. Chairman, we're in a bad position.

THE CHAIRMAN: And I propose deleting that. I propose deleting it because the administration in terms of — what I understand by it is what in fact in the current circumstances the Attorney General does, he comes along and deals with in the Cabinet and the Legislative Assembly questions to do with the funding of the court system; the need for buildings and so on; all the infrastructure to let the courts do their work. Now, if —

[inaudible comment by the Leader of Government Business - microphone not turned on.]

THE CHAIRMAN: Well, both of those. But the question is whether that should be the Governor's special responsibility.

Now, the Governor has himself said that he doesn't have it at the moment and doesn't see why he should.

HON. D. KURT TIBBETTS: He doesn't have what?

THE CHAIRMAN: The responsibility — special responsibility for these things.

HON. D. KURT TIBBETTS: Does not have?

THE CHAIRMAN: Does not have.

HON. D. KURT TIBBETTS: Have what?

THE CHAIRMAN: Responsibility for the administration of the courts. Does not have it. He does not have it. So this would be a new thing.

Now, if we delete — if we delete — let me finish this off.

HON. D. KURT TIBBETTS: I'm not trying to [inaudible - microphone not turned on] but I'm sorry I can't let [inaudible - microphone not turned on] you say that the Governor says this is not [inaudible - microphone not turned on] responsibility. There's a difference in what we're speaking.

I understand the independence of the judiciary. I understand that. But there are certain matters which end up not only [inaudible - microphone not turned on]

THE CHAIRMAN: Yes. That's something.

HON. D. KURT TIBBETTS: And those are the matters that we're talking about.

THE CHAIRMAN: Well, I know you're talking about those, but I'm talking about something else first and I'm coming to the thing you're talking about. I know exactly the thing you're talking. I know exactly what you're talking about.

The thing I'm — I'm trying to deal with one thing at a time. The thing I'm trying to deal with first — the thing I'm trying to deal with first — has nothing to do with appointment or disciplining or setting up tribunals for judges. I'm not talking about that at the moment. I'm talking about something which in this draft is defined as “administration of the courts” which I always understood meant the sort of things that in the UK the ministry of justice deals with. They don't have any judicial powers, they don't appoint judges, but they are responsible for making sure that the courts operate properly, have enough money, have the right buildings, have the right computers and all the stuff they need. That's all this is talking about.

HON. D. KURT TIBBETTS: Everything around the way.

THE CHAIRMAN: If we delete —

HON. D. KURT TIBBETTS: If we delete “administration of the courts” then what are you suggesting?

THE CHAIRMAN: Then the consequence of that would be that that subject — that subject — could be assigned to a minister. The subject I've just described, the administration — judicial administration. You've got it at the moment. You've got it at the moment. You've got it at the moment. And it can either be a ministerial responsibility or it can be an Attorney General responsibility, and at the moment it's an Attorney General responsibility as I understand it. So can I just finish because I really want to try and deal with this in a systematic fashion?

So that point — question: Should that be listed amongst the Governor's special responsibilities or not? I suggest no because it can then be left either for a minister or for the AG, and it will be for a future Governor to on the advice of the Premier to assign that subject to a minister or to leave it with the AG.

Now, I'm arguing but I should be here for arguing for a long list of Governor's special responsibility. I don't know why I'm doing this, but I'm trying to give you stuff that —

Now to come to the second point, the point you're talking about, Kurt, and Alden was talking about, relates to the Governor's powers in relation to appointment of senior judges and possible removal of senior judges. That's what you're talking about isn't it?

HON. ALDEN M. MCLAUGHLIN, JR.: That would be hived off to Judicial and Legal Services Commission.

THE CHAIRMAN: Exactly.

HON. ALDEN M. MCLAUGHLIN, JR.: Right. We know.

THE CHAIRMAN: Exactly. Exactly.

HON. ALDEN M. MCLAUGHLIN, JR.: Right.

THE CHAIRMAN: So, under this new construction we would be getting away from the situation where the Governor, and the Governor alone, is lumbered with that responsibility. Now, the Governor would continue to have a role but he's advised on that by the Judicial and Legal Services Commission. So, by trying to take these things in sequence, I'm trying to get rid of what I think is the minor problem, and then to say on the major problem which bugs you so much the new constitution will help because it will not be a matter solely within the Governor's lap and in fact will largely be divulged to this new commission.

As far as — I mean the other underlying point I think you're making is that you're suffering in your view from a lack of information about things you think you ought to know about because your voters, your constituents expect you to know and answer questions they put to you. I entirely understand that. But I would submit that, okay, we can keep all that in mind. But when we see how this draft constitution as it comes out will change things in terms of shared responsibility — more shared responsibility on external affairs, internal security and police, judicial appointment is dealt with in a completely different way — then you may be sure that in the brave new world under this new constitution things will be different.

There will always be cases where — there will always, even under any new constitution where the Governor has information, knows things that you don't know and you'd like him to tell you. Equally there will be things that you know that the Governor wishes you'd tell him. I don't think any constitution can force you to speak to each other. All it is, is to set up a structure whereby you meet regularly. You meet regularly. One can provide for the cases where the Governor must consult and the Governor must follow your advice. And one can say encouraging things and obligatory things about keeping each other informed about things, which I think should be done. And the draft does this and we've amended it this morning to make it — make the obligation to inform stronger.

But I think — I'd really like to get to the end of the next chapter before we break today, and I'm a little bit worried.--

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I don't want to change anything you said. I accept all of that. I just want to add one thing to it.

The only thing we need over and above what you've so eloquently articulated is the requirement with the appropriate word or language being used which obliges the Governor when he acts or when he's dealing with matters within the province of the Judicial and Legal Services Commission — I'm talking about policy issues — to inform his Cabinet in relation to those matters except where there are, you know, very good reasons for not doing so because we — I agree with what you said. There will be times when there are some things that, you know, you don't want to tell, it would not be appropriate to talk to the Cabinet about.

THE CHAIRMAN: Well, can I — I hear what you're saying.

HON. ALDEN M. MCLAUGHLIN, JR.: Because otherwise, sir, the Judicial and Legal Services Commission — which has no political representation and should ought not to have any — is operating over here with the Governor, giving advice to the Governor, and the Governor is acting on that advice, but the Cabinet is still in the dark.

THE CHAIRMAN: Well, can we — can I as a practical suggestion — can I as a practical suggestion say that —

HON. W. MCKEEVA BUSH: Mister —

THE CHAIRMAN: No. Can I as a practical suggestion say that when we come to tomorrow to the Judicial and Legal Services Commission we can examine that question because it really does need to be looked at in the context there of what powers it has in relation to Governor and so on and so forth.

And do we agree that 55 (1) (e) should be deleted, thereby leaving administration of courts to be a ministerial responsibility or an AG responsibility according to the wish of the Premier in power at the time effectively?

HON. W. MCKEEVA BUSH: Mr. Chairman, well, I'll wait till tomorrow but there is political representation on the committee to — on the legal services commission.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: They're appointments —
[inaudible - microphone not turned on]

HON. W. MCKEEVA BUSH: Yeah, but I mean, take it to its logical end. No politician is appointing any member to that kind of committee unless they will know what is going on. So, what you're doing is you're appointing someone to that commission and you're not going to know what's — you're just going to appoint someone there? The purpose of having appointed that one is that he will at least inform you as best as possible. That's — and that's how it's done elsewhere, too. Check it out. So, you will have knowledge about what go on there. You mightn't have a say, and as far as I'm concerned you have too much of a say right now. But anyway tomorrow.

THE CHAIRMAN: Right. So we'll come back to that. We'll look at that tomorrow, McKeeva, and I hear what you say there.

Is there anything else —

HON. D. KURT TIBBETTS: So just quickly, Mr. Chair. In (2) then administration of the courts what are we going to do with that one?

THE CHAIRMAN: So (2) of 55 will read **subject to this Constitution the Governor shall in respect of external affairs as far as is practicable act in consultation with the Cabinet.**

HON. D. KURT TIBBETTS: Okay.

THE CHAIRMAN: And I've undertaken to think over defence. Okay?

HON. D. KURT TIBBETTS: Okay.

THE CHAIRMAN: And then are you content with the detailed provisions on external affairs in this section?

HON. ALDEN M. MCLAUGHLIN, JR.: Before we get there, sir, there is (4).

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: While we acknowledge that this is certainly an improvement on the current position because there's no constitutional provision at all, I just wonder whether or not the Governor in this context extends to Her Majesty's government.

THE CHAIRMAN: No. No. No. I mean, the treaty-making power as you know remains with the UK government except to the extent that it's delegated to the Cayman Islands government, which can be delegated to the Governor and then on to — the possibility could then — it could then be delegated under (5) to a minister in these areas.

And a key term of any such delegation is in (6) (a) **that for the conclusion of any treaty there should be separate authority required from or on behalf of the Secretary of State**. All this flows from the fact that the UK, while the Cayman Islands remains an Overseas Territory, remains responsible for the external affairs, and if necessary can enter into treaties without the agreement of the Cayman Islands. That follows.

Now, what we cannot do in this Constitution is say anything about anything limiting the UK government's treaty-making powers because it is not a constitution which regulates the government of the United Kingdom in any matter. It's how this Territory is to be governed.

So, this (4) picks up your draft of September which referred to the Governor's entering into international agreements — which by definition could only be on behalf of the Cayman Islands — and limits the Governor's power to do so without first obtaining agreement to the Cabinet, to which we added at the end unless **otherwise instructed by a Secretary of State**. And the reason for that is — coming full circle I hope from where I began — is that the British government having the final say on treaty making, even in relation to the Cayman Islands, must have — must have reserved to him or her the power to require a Governor to enter into a treaty obligation even if the Cabinet disagrees. So it's a reserve power.

Now, if you're saying to me 'What we want and insist upon is that no treaty shall be entered into which extends to the Cayman Islands without the agreement of the Cabinet', if you're saying that to me, no can do.

HON. ALDEN M. MCLAUGHLIN, JR.: No, sir, what — not even I would be so presumptuous, sir. But what we are striving for is at least consultation about how this proposed treaty might affect the interest of these Islands.

THE CHAIRMAN: Okay. Now, then — do you remember I sent to you —

HON. ALDEN M. MCLAUGHLIN, JR.: A side letter.

THE CHAIRMAN: A draft letter.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah.

THE CHAIRMAN: Now, have you got it there? Have you got the draft entrustment letter?

HON. ALDEN M. MCLAUGHLIN, JR.: I think we do somewhere here, sir, yeah.

THE CHAIRMAN: Because there's a very important sentence I'd like to draw to your attention to in there.

HON. ALDEN M. MCLAUGHLIN, JR.: We've got it, sir.

THE CHAIRMAN: Okay. If you look at paragraph 2 — paragraph 3 goes into entrustments but paragraph 2 is more general than that and it reads like this:

It was decided during the negotiations that certain external affairs matters will be delegated to the government of the Cayman Islands while recognising that the United Kingdom government will in general continue to be responsible for the external affairs of the Cayman Islands.

Here we come:

However, in carrying out their responsibility the United Kingdom government will whenever practicable seek the fullest consultation with the government of the Cayman Islands and will at all times have special regard to the interests of the Cayman Islands.

Now that sentence is extremely important because it goes across the board. It goes across the board. And I genuinely think that is about as far as we can reasonably go in terms of bowing to your quite understandable wish to be consulted as far as possible, whenever practicable, fullest consultation and an undertaking that the UK government will at all times have special regard to the interests of the Cayman Islands. I think this does as much as we can do.

And it is a side letter, I perfectly accept that, but it is a political — if you go with this, as was done with the BVI, if you go with this, get a letter from the foreign minister, the FCO minister to you and reply saying 'we accept that', that is a political agreement of very great importance.

And, you know, we lawyers we live in a world of judicial review coming out of every tree and legitimate expectations and all those other ghastly ghosts that come to haunt us. I think you'd be doing very well if you got a sentence like this in an exchange of letters.

HON. ALDEN M. MCLAUGHLIN, JR.: I like the sentence very much. I'd just like us to include it in the Constitution similar language.

THE CHAIRMAN: Well, I don't think you can — I don't think you can do that. What would — what this Constitution is about is not a treaty between the Cayman Islands and the UK. In a sense it reflects an arrangement between us, but what it is setting out are the respective powers of the Governor who, as we know, is not a UK government — he may be appointed by the Queen, who is the Queen of both of us and instructed by the British government, but the Governor also, as you acknowledged this morning, being a part of the Cayman Islands government. So, the Governor through whom many of the UK interests

are advanced or safeguarded on the one hand, and elected ministers electing government on the other; and then the powers of the legislative and so forth; and the role of the Governor in relation to assenting to bills and that sort of thing, that is what it is about.

What is quite inappropriate to put into the Constitution — being an internal legal document of the highest order for the Cayman Islands — is promises of the British government. Promises of the British government in relation to the Cayman Islands are put properly in an exchange of letters.

HON. ALDEN M. MCLAUGHLIN, JR.: I suppose where we differ — I buy all of that, but we're not talking from our standpoint about a promise of the UK government which changes as the electorate changes its view.

THE CHAIRMAN: No.

HON. ALDEN M. MCLAUGHLIN, JR.: What we're seeking — this is essentially an agreement between the United Kingdom government and the people of the Cayman Islands as to which will regulate the relationship between us. And therefore I see this as quite the appropriate document in which to include an undertaking, if that's the case, a provision which says that when the UK, regardless of which government is in power, proposes to enter into a treaty or a convention with another country which would have effect, a material effect on the Cayman Islands, that there is a duty on the part of the administering country, which is the UK, to consult with its territory. I fail to see where — or how that could be inappropriate to be included in a document of this nature.

THE CHAIRMAN: Well, there are no rights or duties imposed in this draft constitution from the United Kingdom government. There are none. I mean this is why we sometimes have to have separate documents to deal with that. That's why we have to have — if you want to have entrustments to enter — to negotiate and enter into treaties in the name of the Cayman Islands, it has to be done by virtue of a letter. And I think — I strongly disagree with you when you say that a letter is worthless because —

HON. ALDEN M. MCLAUGHLIN, JR.: I didn't say —

THE CHAIRMAN: — unless they change their view it is out of the window. That is certainly not the case. There has been a standing letter of entrustment to Bermuda since 1968 which doesn't actually contain that language, but something similar, nothing like as strong as that, which is still operated in spite of several changes of British government

and is part of the constitutional arrangements with Bermuda. And, you know, the letter sent to the Premier of British Virgin Islands by Lord Treisman on which this draft is based will continue politically to bind the British government of whatever colour. And if the British government acted contrary to it, I think it's a justiciable document. It will be a public document, a public statement of policy containing assurances of very great value. And if the Labour government in the UK were thrown out in the next election and the Conservative minister decided he didn't like that letter, then we would have to come and explain why. You know, it's not something that would just be torn up like that.

All I'm saying is that we have a goodwill and good intention about that, but don't ask for too much is my advice. And, you know, we have to — at some points we have to come down to what is doable and what can be done in terms of mutual trust. Okay?

HON. ALDEN M. MCLAUGHLIN, JR.: All right, sir.

THE CHAIRMAN: I'm dying for another break, but I'm just determined to get a little bit further.

Is there anything on — anything on the next page?

HON. D. KURT TIBBETTS: Section 55(8) Mr. Chair?

THE CHAIRMAN: 55(8). Yeah.

HON. D. KURT TIBBETTS: After delegate, delegate and assign.

HON. ALDEN M. MCLAUGHLIN, JR.: Yes, Mr. Chairman, 55 (8). In the second line where it says that **the Governor may by directions in writing and by prior approval of the Secretary of State delegate such other matters relating to external affairs**, if we could just include “delegate or assign”. We've used both words in connection with most of the other —

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: — the other functions.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: Are we saying “or assign”?

THE CHAIRMAN: Or assign.

HON. D. KURT TIBBETTS: Or assign. Okay. Not “and”.

THE CHAIRMAN: I mean the difference as I understand it is that a delegation may be withdrawn, assignment is usually ... that's it, basically.

PROFESSOR JEFFREY JOWELL: Or the delegation is done on behalf of the Governor where as assignment is done more under the discretion of the person to whom the power has been assigned.

HON. W. MCKEEVA BUSH: Mr. Chairman, what you're saying here is that the Governor could assign responsibility for police matters to an elected member?

THE CHAIRMAN: Well, if the Secretary of State so approves. Now, I cannot imagine — it depends on what police matters.

You see, a lot of matters to do with the police are regulated by your legislation anyway. They're not — they're not — there's nothing left for the Governor because legislation deals with in your Police Law.

And what is — what we're talking about here is the residual executive responsibility of the Governor in any of these fields which is not dealt with in some other way in legislation. So, for example, in the field of internal security and the police there is of course quite a lot of legislation in that field. On a broad interpretation of that phrase you could say anything to do with criminal justice and the forces of law and order is within the special responsibility of the Governor who can do anything he likes on those things. It's not true. But most of the criminal justice field and a lot of the regulation of the police field is dealt with in your legislation which you have passed in your legislature.

So, what is left here is the unlegislated for, executive responsibility for these matters. That's all that's left because if legislation provides for a matter to be dealt with in a different way and not by the Governor then that's the law.

So to answer your question, McKeeva, for example, there may be matters in this field which the Governor, with the approval of the Secretary of State, decides could usefully be assigned to a minister or delegated to a minister.

HON. W. MCKEEVA BUSH: So all of this can be.

THE CHAIRMAN: But it might not. It might not. A Secretary of State might say 'No way. Never'. But this is only a power to do it.

HON. W. MCKEEVA BUSH: Yeah. The government would have to convince the —

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: — Governor that this is needed, and they could do so without the input of the people.

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: And this could be done with by way — in a government.

THE CHAIRMAN: Yes, this is only a power.

HON. W. MCKEEVA BUSH: Only a power?

THE CHAIRMAN: Only a power of the Governor, with the approval of the Secretary of State.

HON. W. MCKEEVA BUSH: That's what I'm saying, though.

THE CHAIRMAN: I can tell you — I can tell you — it would have to be considered most carefully.

HON. W. MCKEEVA BUSH: Yeah, but it would be considered in absence of the normal way that we would hear. I know in modernised we're trying to move out of the old way of getting constitutional provisions.

THE CHAIRMAN: Well, if you want me to delete this paragraph I'll gladly do so. Again, I'm not —

HON. W. MCKEEVA BUSH: I don't think the Government would want that but.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, we've been doing well so far.

THE CHAIRMAN: I'm trying to help you so much.

HON. ALDEN M. MCLAUGHLIN, JR.: I know you are, sir, and we want to keep Mr. Bush happy and onboard.

So, could we — I think the bit that is troubling them is that the reference to internal security. If we deleted those two words would that —

HON. D. KURT TIBBETTS: Three words. “And”.

THE CHAIRMAN: And internal security. Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah. Would that make Mr. Bush and his team a little bit happier?

THE CHAIRMAN: So just relate to external affairs, then? Yeah. There's a logic to that given what's gone before.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah. Mr. Bush?

HON. W. MCKEEVA BUSH: So we're dealing strictly then with external affairs?

THE CHAIRMAN: Yeah. Such other matters relating to external affairs other than everything that's gone before. Is that all right?

HON. W. MCKEEVA BUSH: All right. We'll see how it is when you write it in the next draft.

THE CHAIRMAN: Canny fellow.

HON. W. MCKEEVA BUSH: Pardon?

THE CHAIRMAN: You're a canny fellow.

All right. I hope there's nothing untoward on AG and DPP.

HON. ALDEN M. MCLAUGHLIN, JR.: Oh, yes, sir. I think we need a break before that.

THE CHAIRMAN: Yes, all right. Let's have a break.

RECESS

RESUMED

THE CHAIRMAN: Right. 56. We're at 56. I want to finish the next part after this one.

As I said this morning, I want to get to the end of part (4) before we break. Otherwise we're going to have to have a very compressed day tomorrow. I fear we might.

Now, I hope — I hope that we can — I hope that we can go quite rapidly through part (4), but we haven't quite reached it yet. But I intend to try to do as much as we can this evening to allow ourselves tomorrow to do what is left after part (4), together with the Covering Order on which there is some issues, and to allow time to come back to certain things that we've parked for the time being, starting at nine o'clock

tomorrow with a few points on the Bill of Rights. So, in terms of good order, I hope with your long-suffering, tolerant agreement we can plough on for a bit more this evening.

And section 56 and 57 on the AG and the DPP, is there any problem with these as they are, bearing in mind — bearing in mind — that questions and the appointment of these offices are dealt with later on which we will come to tomorrow?

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah, I think we can defer the discussion.

THE CHAIRMAN: Okay. So, well let's dive into the National Security Council. Let's dive on into the National Security Council, the last section in this part. Is there any difficulty about the proposed composition in (1)?

HON. ALDEN M. MCLAUGHLIN, JR.: Well, Mr. Chairman, we've had a look at how this office is — how this council is constituted in the other constitutions, BOT constitutions which now have National Security Council or the equivalent. And we not that you have — you have included in this draft the Deputy Governor as an added member.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: And we are suggesting that we include another minister for balance, as is the case in the BVI, so that we have the right balance between the elected government and the appointed members of the council.

Two would have been fine if you hadn't added another member there because you've changed the balance.

THE CHAIRMAN: Yes. I mean the reason for adding in the Deputy Governor is simply the practical one; that the Deputy Governor will from time to time have to act as Governor and should in our view be on this body, privy to discussions in this body. And I think if you can accept that I would accept that for balance two ministers plus the Premier would be fair enough.

Is that all right?

HON. ALDEN M. MCLAUGHLIN, JR.: Then we're okay with that.

THE CHAIRMAN: Okay. So then we have the Governor; the Premier; two other ministers; the Deputy Governor; the AG; and the Commissioner of Police.

MR. ROLSTON M. ANGLIN: Mr. Chairman?

[pause]

THE CHAIRMAN: Yeah. Sorry, go on.

MR. ROLSTON M. ANGLIN: Mr. Chairman, just a quick question, sir.

In regards to this whole issue, this obviously is one of those areas that is of grave concern to the entire community. This is not a singular type of issue when it comes to internal security. And certainly if we look at how a lot of other jurisdictions try to ensure that the membership of whoever the legislature is, is kept informed in some way on these important matters, we see that we do have somewhat of a gaping vacuum as it relates to Cayman. And certainly one of the real issues — because this isn't about politics, this about the internal security of the country. And so there is in our view the necessity in some way to try and come up with some mechanism to ensure that the Opposition — and it would be via the Leader of the Opposition — is kept informed in a broad sense as to the security matters that relate to the territory, because at the end of the day that is of vital, vital importance in our opinion to good governance.

HON. W. MCKEEVA BUSH: Seeing, Mr. Chairman, as we had made a proposal which you really haven't paid any attention to, I want to back up my colleague's statement on that matter. This is national and we, as I said, had made a different proposal but that didn't find any favour with you, so we would hope that you would take what we say now into some consideration.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman?

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: We have thought a little bit about that. Perhaps we could develop a provision which would oblige the Governor, as chairman of the National Security Council, to brief the Leader of the Opposition on a regular basis in relation to important matters that involve internal security as a means of providing this sort of liaising and information that both Rolston and Mr. Bush are asking for. The Government wouldn't have any difficulty with supporting that sort of proposition.

HON. W. MCKEEVA BUSH: Mr. Chairman, that's a step in the right direction. And all I would like to say is that moving forward in a modern constitution as much, as we can modernise it if the people allow certain — some of these things that are proposed, this one we're talking about a national security, and the Leader of the Opposition is here as part of the Constitution much more than an ordinary member of the House. It gives

it specifics and specific responsibility. And we don't have a deputy in here but we're going to ask that one be placed in that section. And if you are going to have such a body, then why not make the Leader of the Opposition part and parcel of it?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I think we concede that with the necessary adversarial nature of the political system that there could well be instances when that would create a whole range of issues and is bound to limit the frank exchange of information and dialogue within the National Security Council if you had an Opposition member present.

But I believe that the proposal which we have just made, which would allow or require the Governor — who I think we could accept would be objective — to be able to brief on a regular basis the Leader of the Opposition on matters relating to internal security would provide what they seem to want without creating a whole new set of issues and perhaps hindering the proper functioning of the National Security Council.

HON. W. MCKEEVA BUSH: Mr. Chairman, I don't buy that argument because while you're already saying that the Governor might come and give you some information so if you're going to be adversarial you would be — you would take issue there and then. And I just think if you going this route that you need to spread this and have responsibility on both sides of the political divide involved.

You have appointment by the Leader of Government and the Opposition Leader on some very powerful committees and responsible commissions in that you give them the ability to be on, for one, the Judicial and Legal Services Commission. And so, if adversarial politics is a scare, it should be a scare with those things as well.

So, as I said, simply because of — if this was simply a Cabinet committee, then that would be a different thing I concede. But this is a national matter that you're dealing with. It is security; it's not politics as such.

THE CHAIRMAN: One of the things that I know we're waiting for a draft on, which we must look at tomorrow, is the proposition, the proposal made earlier by the Government here that members of the House could be invited every three months to attend Cabinet. And —

HON. W. MCKEEVA BUSH: That would be another nightmare.

THE CHAIRMAN: And I was just thinking off the top of my head, although I might be shot down on all sides, that a possible compromise here would be to provide in this section for the National Security Council to invite the Leader of the Opposition to attend meetings of the council,

say, every three months, something like that, a regular slot whereby the Leader of the Opposition can attend. And that does not mean to say that the Leader of the Opposition is a member and attends every meeting, but is regularly invited.

Now, the value I would see in that — this is my own personal view and I've discussed it with no one, it's just kind of off the top of my head — is that such meetings could be usefully used in the national interest, in the wider interest for, for example, the Commissioner of Police to come and give briefings — which are of interest to all the members of the council, as well as the Leader of the Opposition — about trends and crime; what the police is doing to try to counter it - general sort of information that might otherwise have to be obtained through a more circuitous route of asking questions in the House, and if necessary, freedom of information, all that kind of thing.

So, unless it is seen as objectionable, in principle, or some other practical or political problem, is that one way of involving the Leader of the Opposition in the work of the National Security Council —

HON. D. KURT TIBBETTS: Mr. Chair.

THE CHAIRMAN: —without the leader being a full member?

HON. D. KURT TIBBETTS: Mr. Chair, before you go any further, would you allow us the benefit of — of your experience with the discussions that went on in other deliberations with new constitutions for Overseas Territories?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Because what is being proposed is similar, if not the same, to some of — to what contains in some of the —

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: — other constitutions. Might that be helpful if you were able to?

THE CHAIRMAN: Well, yes, my recollection — and my colleagues will chime in I'm sure if I've got it wrong — is that this was not an issue in the BVI or the Turks and Caicos as I can recall it. So, you will see in their new constitutions there is no provision for the Leader of the Opposition to be a member or to be invited.

HON. D. KURT TIBBETTS: It wasn't brought up?

THE CHAIRMAN: No, it wasn't really brought up.

By contrast in Montserrat, where we have not yet finished, they would — well, what is under discussion there or has been under discussion is that I think on the National Advisory Council, which is the equivalent to this, in which I think there's a general consensus that the Leader of the Opposition should in some way be involved — should in some way be involved. We haven't resolved yet precisely how, but you know, the argument that the Leader of the Opposition has just made is certainly one that was made in Montserrat.

Have I got that — is that your recollection too?

MR. MICHAEL BRADLEY: Except for the slight last that perhaps in the Turks and Caicos the composition to determine that fact the Leader of the Opposition boycotted the final meeting.

THE CHAIRMAN: Yes. Turks and Caicos. I mean the fact is that they — I can't remember them making an argument similar to McKeeva's argument. But actually what Michael is saying is that they didn't come to the final round of negotiations anyway, so even if they wanted to argue for it they weren't there. So they forfeited the chance to argue for it.

So as I say, the experience is mixed. We have not reached a conclusion with Montserrat.

I think we, for our part, did not see a fundamental problem of principle in the context of the equivalent body for Montserrat, with some involvement by the Leader of the Opposition provided Government was happy with that. And so, that sort of rather encouraged me off the top of my head to suggest the compromise in the way I did.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, if we could get an indication from the Opposition as to how they view your proposal we can obviously — obviously we'll take some time — we've made our proposal and we hear what they say about that.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: We'd like some time overnight to think about your proposal, but only if it is something that the Opposition would accept and support.

THE CHAIRMAN: Yes. I mean bearing in mind that it is partly inspired by your own generosity in relation to attendance at Cabinet. You know, your proposal which seems to me extremely generous and an open one, this would be a sort of equivalent to that. That's the idea.

HON. W. MCKEEVA BUSH: Except that I must reiterate that this is not a Cabinet committee.

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: It is a matter of the Constitution and it is a very important stipulation here in the document and in modernising and going forward. And if you want less — less adversarial politics, I would think it that you would try to have a situation where the Opposition is involved and informed to that degree, or you can then leave them under the almond tree to criticise and make noise about everything you're doing.

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: We haven't done that, sir. We have been a very responsible Opposition.

THE CHAIRMAN: Well, thank you. So, you're not ruling it out anyway.

Well, shall we leave it for a little bit of mature consideration and add it to this list of things we might have a look at tomorrow?

Going then to the Functions of the National Security Council. I — to save time, I anticipate that you will not find (3) acceptable as drafted, because earlier you referred to it as tiger or cat, or something like that, but I know exactly what you're referring to.

HON. ALDEN M. MCLAUGHLIN, JR.: I have to confess, sir, that when we started reading this we said wonderful, wonderful, wonderful. The structure was all there. And then we realised that it created a wonderful tiger but had pulled all the teeth out.

THE CHAIRMAN: Well, I'll tell you why. Subsection (3) makes clear that it is purely advisory as drafted at the moment.

THE CHAIRMAN: Unlike the one in the British Virgin Islands which is a real National Security Council.

THE CHAIRMAN: Exactly. Exactly. And I did this deliberately because — I did this deliberately because if there is going to be a concession made on the UK's side along the lines of the result in the BVI, then it's going to have to be made by our minister. I don't have authority to make it myself. And you all may have noticed from your research that in the Turks and Caicos it is a purely advisory body. In the new Turks and Caicos Islands constitution the Governor is not bound by the advice of the National Security Council, and therefore that was the precedent we were working on when talking to the BVI.

Now, the British minister, Lord Treisman, agreed something stronger for the BVI in the light of the picture as a whole, as the constitution emerged as a whole.

And that is the message I have to give you now, that I cannot strengthen this off my own bat. I think it will be one of those things we'll just have to mark up for a final round for the final — I don't want to say horse trading, but the final view taken on how the whole thing looks as a package. And I hope that, you know, we will arrive at a — at a package as a whole which would reassure my minister that she can make some concession here. So, I think we have to leave it at that for the time being.

HON. ALDEN M. MCLAUGHLIN, JR.: Okay. I just want to say why we feel — I mean for the record why we feel quite as strongly as we do —

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: — about the need for — for a National Security Council that can actually make policy decisions.

THE CHAIRMAN: I think — if I just interrupt you before you do, Alden. I think if and when, as I hope we will, get to London in a couple of weeks' time, I think you should do so again to the minister.

HON. ALDEN M. MCLAUGHLIN, JR.: I'll practice —

THE CHAIRMAN: It's an important argument and it needs to be made to her.

HON. ALDEN M. MCLAUGHLIN, JR.: I'll practice on you, sir.

THE CHAIRMAN: Yeah, okay. Go on.

HON. ALDEN M. MCLAUGHLIN, JR.: I think you'd be hard-pressed to find one person in this jurisdiction who will tell you that they are satisfied with the way the police service operates and is run. And this is not new, this is not unique. If we hark back to 2003, 2004, even before Ivan came — Ivan made things a whole lot worse — we've now had one, two, three, four commissioners of police in as many years. One for each year. Yeah. One for each year.

There is something fundamentally wrong about the — with the way the police service is — the oversight of the police service and the way the police service is run. And it goes to the heart of what's important to this jurisdiction to the feelings of — of safety and security among residents, to the perception of the country by visitors. And it seems that we go through periods where we — there is hope that things are going to turn around and then things fall apart again. And there's no question, I think in anybody's mind, that this relates to both structure and management and a lack of proper — of a means by which proper oversight by which police administration can occur.

And in this we're not talking about who the police arrest and how they run their investigations and that sort of thing. We're talking about the way the service is actually run.

This Government has voted almost \$50 million over and above what the police would normally expect to get in terms of operational and capital funding over the course of three, three and a half years. But if you ask the average person their perception of the police service they'll tell you it's as bad now as it's ever been. And something radical has to be done. If you talk to the police officers, morale is not as low as it was during Ivan but it is pretty low.

And we need a means, a mechanism, by which proper control and policy setting can be carried out in a sustained way, not just an initiative here and then that commissioner goes and then there's another initiative here. And whether this particular proposal is — meets with the minister's approval or not, or whether there's some other way to do it, one thing I don't think anyone around Cayman will argue with is that something, some fundamental change in the way we run the police service must take place.

THE CHAIRMAN: Fine. Okay.

HON. W. MCKEEVA BUSH: Trouble is determining how that will work, what needs to be done. And you'll find that it's a myriad of the things that stems all the way back, it's not just this administration, or the last one, or the one before that.

THE CHAIRMAN: Yeah. Yeah.

All right. Well, I — we must clearly mark that as something to come back.

HON. W. MCKEEVA BUSH: But that may be our own fault.

THE CHAIRMAN: Sorry.

HON. W. MCKEEVA BUSH: It might be our own fault.

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: Expectation [inaudible - microphone not turned on]

THE CHAIRMAN: Anyway, can we then move to — having put that one firmly on the outstanding points list which I perfectly well anticipated, can we try and rattle through as much of Part IV — well, all of Part IV beginning with Section 59, where the outstanding point here is the name of the Legislative Assembly. And I wondered whether you were happy

with retaining the historic name of the Legislative Assembly, or continue to want to make a leap into the future by calling it a Parliament.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, sir, I don't think the Government's view on this has changed. We were, we are, seeking to mark this significant advancement in terms of our constitutional status and standing by also a change of name of the Legislative Assembly, and I think that is still our view. It has never been — the point has never been a deal breaker with us, and I think we'd be interested to hear whether on reflection the Opposition feel that the move to Parliament is something that they could support.

HON. W. MCKEEVA BUSH: Mr. Chairman, I wouldn't — and we have not changed our views on this matter, because we cannot be called a Parliament, and I just don't think we can set it down in our constitutional document as such because we are not. We are not a Parliament. We are a representative body. And I know that there are views around the country where people feel that we must get away and more and more away. And I am concerned, as I think the public would be, about this Constitution pushing us further away than we want to be, but that is another story. I don't — this matter, no. I am not going to support that because we are not. We are not a Parliament. Parliament — the whole Parliament, the Parliament of the UK, we are not an independent country. And that's the only — a Parliament would be a sovereign body, and we are not a sovereign body. We are a representative body. That's what we are.

HON. D. KURT TIBBETTS: Mr. Chair —

HON. W. MCKEEVA BUSH: So —

HON. D. KURT TIBBETTS: — we have a park in here that we parked one issue up till now on. Let's park this one and see where we end up on everything else. Okay?

THE CHAIRMAN: All right.

All right. The next issue is Section 60, and here the point I would like to make is in section 61 (b). Now, this is the size of the Legislative Assembly.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, before we get there.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: This is a sort of structural point. Having looked carefully at this, we believe that Section 69, the contents of Section 69 should actually come before what is now 60.

THE CHAIRMAN: 69. That is...

HON. ALDEN M. MCLAUGHLIN, JR.: Or maybe before 59.

HON. D. KURT TIBBETTS: 69 would become 60, not 50.

HON. ALDEN M. MCLAUGHLIN, JR.: That is the power to make laws.

THE CHAIRMAN: Well, it's where it is at the moment because it's under a heading Powers of Legislature and Procedure of the Legislative Assembly, and the principal power of the legislature is the power to make laws. That's an explanation of why it's where it is. I mean, one needn't necessarily have that heading, I suppose. If — are you saying that it would — you would prefer it to go 59, that should be legislature.

HON. D. KURT TIBBETTS: Not 59, 60.

THE CHAIRMAN: 59 and then 60?

HON. D. KURT TIBBETTS: 59 that there shall be legislature remain.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: So 69 would become 60, and then every one after that would be numbered —

THE CHAIRMAN: Yes. So you want to slot it in between 59 and 60?

HON. D. KURT TIBBETTS: Yes, sir.

THE CHAIRMAN: Okay.

HON. W. MCKEEVA BUSH: But 69 (1), not 69 (2) is it? The referendum?

HON. ALDEN M. MCLAUGHLIN, JR.: No, he's right. Yeah, you wouldn't want that there.

HON. W. MCKEEVA BUSH: You're only talking about 69 (1), am I correct? Yes, 69 (2) is the matter of a general referendum.

HON. ALDEN M. MCLAUGHLIN, JR.: Yes, that should be moved somewhere else.

HON. W. MCKEEVA BUSH: Somewhere else.

HON. D. KURT TIBBETTS: But (2) refers to (1).

HON. ALDEN M. MCLAUGHLIN, JR.: But we just have to redraft it.

THE CHAIRMAN: So you would like to move Section 69 (1) to come after 59, and then 69 (2) is — should be put in a different place?

HON. D. KURT TIBBETTS: I don't know if it really matters at all, but — would it really matter?

THE CHAIRMAN: No.

HON. D. KURT TIBBETTS: You would want that to stand alone?

THE CHAIRMAN: No. I mean, I know that you've got so far unfilled — well, it's 70. 70 at the moment is people-initiated referendums with no text yet. But —

HON. W. MCKEEVA BUSH: Mr. Chairman, you have a section where you're intending for people-initiated referendums, and I think that the 69 (2) could be — you have referendums, which is general referendums, and this one — we could end up with nothing in Referendums but anyway.

THE CHAIRMAN: Yeah. I see the logic of that. Anyway, shall we look at that when we get to that page? But I don't see any problem with moving 69 (1).

HON. D. KURT TIBBETTS: And making it 59 (1).

THE CHAIRMAN: Making it 60.

HON. D. KURT TIBBETTS: 59 unless —

THE CHAIRMAN: 59 would be as it is.

HON. D. KURT TIBBETTS: You wouldn't want that to be (1) of 59? Yes. Yes. Then you wouldn't have to change any numbers.

HON. ALDEN M. MCLAUGHLIN, JR.: Not that that's a big deal.

HON. D. KURT TIBBETTS: By the ways, that's —

THE CHAIRMAN: Anyway, move it into that area. This is not the most important thing we've discussed today.

HON. W. MCKEEVA BUSH: No.

THE CHAIRMAN: Okay. Section 60. There's — the points of substance here, the first one which occurred to us when we were revising this draft is that to respect the two-fifths rule in the provision we discussed earlier about the number of ministers, if there are to be seven ministers, to respect the two-fifths rule one needs to have 18 elected members so my calculator told me. So I think we should write in here 18. Is that all right?

HON. W. MCKEEVA BUSH: Which one, sorry?

THE CHAIRMAN: Eighteen elected members.

HON. W. MCKEEVA BUSH: Eighteen?

THE CHAIRMAN: Eighteen elected instead of 17, yeah.

HON. W. MCKEEVA BUSH: Where are we doing all of this?

MR. ROLSTON M. ANGLIN: Mr. Chairman, I understand the two-fifths. What is confusing is an even number.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, there's an issue which we talked about ourselves of the, perhaps, less than satisfactory result of even numbers in a House. It's not — it wouldn't be unprecedented in Cayman, and it certainly isn't unprecedented elsewhere, but it does have some inherent risks.

What we concluded on our end is that there would be absolutely no stomach in the electorate for an increase in membership at this stage of the House for four members. I think even three is going to be met with some demurer, if not more, because people always talk about the additional cost. Most people don't have any real idea of how much work is involved in being a member of the House, even if you are not in Cabinet, and focus on the costs that go along with supporting that. So we did not feel, and we do not feel, that we could push for four more members without encountering real, real resistance on that basis. And so while we acknowledge what the — what Rolston and Mr. Bush have said, we just don't think that it would fly to go to 19 members.

HON. W. MCKEEVA BUSH: Nineteen? Oh, no. Don't leave it like that. We didn't suggest that, though.

HON. ALDEN M. MCLAUGHLIN, JR.: No, but 17 — I'm not suggesting, Mr. Bush, that you said 19.

HON. W. MCKEEVA BUSH: Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: We suggested 17. It can't work because of the two-fifths rule in relation to Cabinet. To get the two-fifth we go to 18, which creates the even numbers, so to go beyond that would be 19. That's all I'm saying is we don't feel that we can — that we would get any support.

HON. W. MCKEEVA BUSH: Unless you went to simple majority. Unless you move to simple majority.

HON. ALDEN M. MCLAUGHLIN, JR.: Hence our confusion that with all the attendant risks that we'll have to settle for 18 at this stage.

THE CHAIRMAN: It provides as well that later on in the voting rules in the event of tied votes the motion is lost. So, I mean, you know, it's addressed and the rule is there. There are plenty of places with even numbers which can work provided there is a rule.

MR. ROLSTON M. ANGLIN: What's the rule in a nine-nine election, sir?

HON. W. MCKEEVA BUSH: A new election.

THE CHAIRMAN: A nine-nine election? Well, that's exactly why we've got this provision we discussed earlier about now the Speaker — it used to be the government, but now the Speaker — having to organise an election to see who would be have purported a majority as Premier. That's why we got that there in case there is a tied situation.

HON. W. MCKEEVA BUSH: But, Mr. Chairman —

THE CHAIRMAN: You can have a tie at the moment, of course, because all you need is an independent stand, and then the parties can end up with the same numbers.

HON. W. MCKEEVA BUSH: Well, when we talk about the Speaker, though, I want to make that clear that all the Speaker do is to preside over a ballot.

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: She has no — or they have no other power to do anything else.

THE CHAIRMAN: No. Exactly.

HON. W. MCKEEVA BUSH: And having said that, sir, I know you that went down to (b) there, but where it says “Speaker”, I think we need to put in “Speaker” and a “Deputy”.

THE CHAIRMAN: Yes. There is provision for a Deputy Speaker.

HON. W. MCKEEVA BUSH: And a Deputy, 60 (1) (a). Well, you've got Speaker up there so I don't know why they say Speaker.

HON. EDNA M. MOYLE: Because they come from elected members.

THE CHAIRMAN: You don't need to specify the Deputy Speaker as being a member unless the Deputy Speaker is elected from outside the House. That's the idea. So.

[inaudible comment]

THE CHAIRMAN: Yes. Yes.

HON. W. MCKEEVA BUSH: And — yes, the membership. Okay.

THE CHAIRMAN: All right.

HON. W. MCKEEVA BUSH: All right.

THE CHAIRMAN: So we go with 18.

And then are you content that the Deputy Governor and Attorney General shall be members, although it will say later on without a vote?

HON. D. KURT TIBBETTS: Yes.

THE CHAIRMAN: Very good. Thank you.

And then the next section, subsection, the very last line should refer to section 90 at the end. I know we're going to have to come and look at that, but that's just telling you of a typo there.

Can we move on to 61 then? I hope there's nothing there.

62. There is a question — a couple of questions outstanding in 62 in (1) (c) and (d). And have you got a preference for —

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, there is a problem with section (b) which we are calling the “Clifford clause”.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: We have had very firm representation from the public service of their displeasure with this provision. They view it as inhibiting — or impinging upon their democratic right to stand for public office and feel very strongly that there is no basis and no precedent for any such provision. It doesn't appear in the constitutions of other BOTs, it is not a rule in the United Kingdom, and we have been unable to find any precedent for it.

HON. W. MCKEEVA BUSH: Except that we create one precedent.

HON. D. KURT TIBBETTS: Mr. Chairman, can you tell us its genesis?

THE CHAIRMAN: Its genesis is, as I understand it, in —

HON. D. KURT TIBBETTS: Is what, sir?

THE CHAIRMAN: Its genesis is in the Commission of Inquiry recommendation.

HON. D. KURT TIBBETTS: Oh. Okay.

THE CHAIRMAN: I put it in to see whether it would — to promote discussion about it. But if you are strongly opposed, and more importantly, if the public service is strongly opposed to it —

HON. D. KURT TIBBETTS: I just wanted you to clear the air for yourself.

THE CHAIRMAN: Okay. I will amend it immediately.

HON. W. MCKEEVA BUSH: No. Mr. Chairman, I see that I must complain that you often talk of the — to the Government like they the only one in here.

THE CHAIRMAN: Pardon?

HON. W. MCKEEVA BUSH: I said you often talk to the Government as if they the only one in these discussions. They are not. The Opposition is a very important part of this discussion.

And certainly, sir, that some — whether it's in this Constitution or whether it is in something else, but for the sake of good governance

regardless — and I haven't seen any proof of the civil service saying otherwise — regardless of what is brought here and to say what they have said, the fact remains that when a public officer can do as has been done and get on the bandwagon and perhaps become a politician even before they declare themselves a candidate, sir, that cannot be good governance. And whether it is in this document, or whether it is in something else; something need to be said; something need to be done; there need to be some parameters set for how they move from being a high public servant, one that is working with an elected minister or in a ministry, and then moves to become a candidate in the general election within months.

For a public servant to leave office in July/August and then run in the November elections I — regardless — and this is not about me. This is about the future and it is our constitution. This is not about McKeeva Bush. All the same I'm still elected. It is about good governance and what is right, not just legally, but morally. I don't think the learned judge was wrong in saying that something needs to be done.

Let me add to that, that all politicians, including the sitting ministers, ought to be wary of such situations.

HON. D. KURT TIBBETTS: Mr. Chairman, we note the Opposition's position on that but, certainly, we can't simply say that this is not one of them that really matters to us.

The real truth of the matter, sir, is that the civil servants also vote in this country, and our representation has come from the association, through their own official channels; it has not been fly by night or simply a whisper into the air. And it is difficult, extremely difficult, impossible for us to disregard such a large number of the electors in the country and the position that they take. They have, in their own way, articulated arguments which speak to disenfranchisement and things along those lines, in comparing themselves with other electors who are eligible to seek office. And regardless of any particular situation which may cause anyone to form an opinion about the matter, it is not something, as I said before, that we can disregard.

So, that spurs our position on it, sir, and I think that one too will have to be one that is parked for the last to look at with all of the rest, because we can't simply say that that's the position.

HON. W. MCKEEVA BUSH: Mr. Chairman, if the minister is finished, Mr. Chairman, I'm not saying that you have to make a decision here because that's your prerogative. However, the — they can't talk about disenfranchisement because this is not something that is stopping them from ever running.

What it's simply saying is that if you intend to run and you are a chief officer that you should know that within a year and you should not be in that ministry within that year to come out. I mean inside of that

year. You shouldn't expect to stay three months and then run because that's just not fair either to the wider public.

And while we must respect the civil service — and I don't know, I hear the Government saying that civil service came to them. I certainly haven't heard big pile of noise about it from them.

And certainly, I don't know of any meeting of the general membership of the civil service, so I am not going to accept that one or two top civil servants will get together and tell the Government how they feel and that is the general membership, because I have too had representation to say something needs to be done.

And we are not disenfranchising anybody because certainly I would not agree to that. What this simply says is that if you want to be employed in the civil service of the Cayman Islands is that there are parameters that you understand that you have to work in. And one of them is that if you want to get into the political fray, if you want to get into representing the people of this country, well you just can't have your cake and eat it too. You just can't sit down there and know everything and perhaps sabotage or do other things and then you have an upper hand over somebody else. You can't do that because that is not good democracy. That is not fair and that's why I say it's not good governance.

Again, I don't know what will be done, but I don't believe that the situation should be left as is.

THE CHAIRMAN: Michael?

MR. MICHAEL BRADLEY: Mr. Chairman, I have two points, one on perhaps a lesser level on the other, and that is earlier in this draft constitution there was proposed restriction on the number of terms of office that the Premier could have without a break. This is analogous to that. But the second, more important one in my opinion is that this drafting comes out of a clear recommendation made by a Commission of Inquiry. And I think that in proposing a draft that we have a duty to reflect the findings of a Commission of Inquiry in respect of any action that has been taken and due it has been given in other jurisdictions in findings of Commission of Inquiry, and that if this is going to be a very — I haven't spoken to the Leader on this side, but my view is that if there is going to be a lack of consensus on this one to keep it in, well, then I think — there's an argument to say that it has to go to a minister because it is the finding of a Commission of Inquiry.

MR. ROLSTON M. ANGLIN: Mr. Chairman, I certainly would agree with the comments of Mr. Bradley.

Already we know that in whatever sphere of life you live there are attendant obligations. Certainly in the private sector in the firm you're

working, if you want to seek political office you have to resign. I personally had to. That was my firm's rules.

Rules by organisations are rules by organisations; and at the end of the day you have to weigh the merit of the rules with what you want to achieve. I am surprised — surprised — that we would be having a discussion about free and fair elections because that's what this is about. This is about fair elections. And at the end of the day, whether or not someone has an upper hand, we know in a small community that there is simply a perception that a person who comes from senior rank and file from within the civil service is coming from a knowledgeable position and one that is "based on fact ."

And so, if we're going to offer the public and ensure that the public has the opportunity to exercise their votes responsibly, we have to — we have a duty. We have a duty to ensure that the mechanisms go along and run in that vain.

And, sir, at the end of the day I believe that Mr. Bradley has summed it up correctly, that certainly all of the facts ought to be put so that the minister on your end can make an informed decision. And certainly if the Government believes that the community perhaps doesn't believe that this should be the case, then perhaps this would be one of the questions that may go to a referendum as the Honourable Leader of the Opposition has said.

THE CHAIRMAN: Well, thank you.

I don't think we can take — I don't think we can take this subject further. And we'll have to park it for the time being and move on to the other parts outstanding in Section 62 (1) to do with bankruptcy and sentence of death.

HON. ALDEN M. MCLAUGHLIN, JR.: If we might add, sir. If we might add one more to it, and that is a query over whether in this day and age the reference to someone being "insane" is the appropriate sort of language for a constitution.

THE CHAIRMAN: Right. Can we deal with bankruptcy first? Do you prefer part of the Commonwealth or any country? Any part of the Commonwealth?

HON. D. KURT TIBBETTS: Sorry, sir. What's the option?

THE CHAIRMAN: The options are in (c) — 62 (1) (c) **that a person is disqualified to stand for election if declared bankrupt under any law enforced in any part of the Commonwealth or declared bankrupt in any country.** And we discussed a little bit last time whether it should be confined, as it is now, to Commonwealth, or whether it should go wider and refer to any country.

Okay, so we go —

MR. ROLSTON M. ANGLIN: Mr. Chairman, I don't have very clear recollection of exactly where we had gotten to on this, but I recall us having talked about the fact that differing countries have different rules that that could cause a person to be ruled bankrupt. And so, we do run a real risk that if someone gets seconded to a particular country, and for a reason outside their own control seconded from work, that we don't foresee right now that they be deemed bankrupt, but that country has less than what we would call “robust rules” and robust government system.

So, let's just say a Caymanian gets seconded from an accounting or a law firm and they go to a South American or an Asian or African country that isn't quite — that doesn't have quite the same standings and mechanisms that we would accept as being robust and within what we would accept. I mean, I accept the premise of what we're talking about. The difficulty is, is that obviously sometimes these unforeseen events do come to bite us. Now, obviously, one of the things that other countries do is that they try to establish and give their local House some decision-making power when it comes to these matters so that they can look at matters on an individual basis.

This might be one such instance where we could have promulgated in our Standing Orders the capacity to look at these matters as a rules committee.

And so, at the end of the day we could then be able to perhaps — again, I'm just thinking aloud as to how to try and deal with it. But whilst it's unforeseen now, the world is much smaller and Caymanians are going far and near for experience and differing reasons. I don't have an answer, but there is the potential, as far fetched as it may seem, for a person to — to be disadvantaged unfairly.

HON. D. KURT TIBBETTS: Mr. Chairman, in listening to Mr. Anglin's argument, it just seems to me — answering him in the same way as he's thinking aloud — that the kind of places that he's talking about there would be less chance of anybody being declared bankrupt, not more chance.

[laughter]

HON. D. KURT TIBBETTS: No, I'm not joking.

MR. ROLSTON M. ANGLIN: Mr. Chairman, unfortunately, in some of those countries —

HON. D. KURT TIBBETTS: I wasn't finished, sir, but go ahead.

MR. ROLSTON M. ANGLIN: Unfortunately in some of those — thanks for giving way, through you, Mr. Chairman, to the Honourable Leader of Government Business. But the reality is, in my mind, it's more risk. The reason I say that, in sophisticated countries, with sophisticated judicial and legal systems, you run much less of a risk of being railroaded than being in one of these less — or more — less sophisticated countries. And for whatever reason something like this happens, perhaps try to get you out of a country, we just don't know.

And all I'm saying is, is to simply say *carte blanche*, if you're being declared in any country around the world that then you can't stand for election, and that's a constitutional provision for which we now have to come back to the UK to try and deal with. It might be remote but it's a difficult situation that I think that perhaps we can come — I don't know if there's a way to come around it by having some local ability.

HON. D. KURT TIBBETTS: Mr. Chair, I do not believe that this is something that we would all want to have to spend lots of time on.

THE CHAIRMAN: No.

HON. D. KURT TIBBETTS: And the fact of the matter is that I think one of the reasons why people would jump to say “any country” is because you're automatically thinking that a person who has fallen into that position and has not been discharged is not a person that you would want to run the risk of being elected because of the person's financial position.

Now, if there is a question of fairness and not knowing what the rest of the world has in store for you, and you want to limit it to where we think we know what would obtain, namely the Commonwealth, then let's just leave it at the Commonwealth and forget about it.

HON. SAMUEL W. BULGIN: Mr. Chair, can I —

HON. D. KURT TIBBETTS: What I — what I am not so sure we want to delve into at this juncture is the local part and to do with Standing Orders and ... that don't — I don't like that.

HON. SAMUEL W. BULGIN: Mr. Chair, through you may I just ask Professor Jowell — may I just ... may I just ask Professor Jowell, I am more familiar with this provision in relation to legal practitioners. Usually where a legal practitioner is bankrupt in another jurisdiction he's not allowed to practice in some jurisdiction, but I think my exposure certainly is that it is confined to Commonwealth countries that have similar legal systems and a uniform set of rules and standards because there is a fear that you might have different countries using different concept of bankruptcy and insolvency.

Some countries, for example, calculate or designate a person to be insolvent or a business to be insolvent if you really just can't pay your — if your assets is less than your — sorry less than your liability. Some say that you become insolvent if you can't pay your debt when they fall due even though you have assets which has not been —

So usually legal practitioners tend to use countries that have sort of uniform set of rules and standards and so forth, so that's the basis for some people using Commonwealth countries as opposed to the world at large. Is that your experience?

PROFESSOR JEFFREY JOWELL: I think that's absolutely the reason. I defer on this matter to the expertise of the Attorney. I think it's correct. However, there are some other countries, for example within the European Union, United States and so on which I think would also accord with these standards by and large as I understand it. So, therefore to confine it to Commonwealth I was a little hazy here because I could not quite see how you would define those other places. That's all. But I take your point exactly.

MR. ROLSTON M. ANGLIN: Mr. Chairman, perhaps a medium ground that might be favourable would be Commonwealth countries and United States of America. Certainly given our proximity and relationships, that would be one country that a lot of Caymanians would perhaps live in and perhaps that might be one that the general public in this country might see as being a criteria for one being barred.

THE CHAIRMAN: If at last on this extraordinarily difficult point —

[laughter]

THE CHAIRMAN: — there is consensus on any part of the Commonwealth or the United States of America we have a deal. And it has a wonderful advantage of getting into the Constitution, a reference to that great country. It makes me very happy.

Right.

As far as (d) is concerned.

HON. D. KURT TIBBETTS: As far as?

THE CHAIRMAN: (d) as far as the reference to “certified insane”, I mean I think the answer here is probably going to lie in what terminology is now in the mental health legislation of the Cayman Islands. If you don't have the word — have the term “insane” anymore.

Whatever is the terminology, modern terminology in the Cayman Islands mental health legislation, could I suggest it be reflected here. So,

if somebody could look it up for us and let us know. If the AG — then we can just knock that one on the head tomorrow.

And then the third one is (e) where I left with you the choice — I left with you the choice either to continue to have as a disqualification a person being under sentence of death. It's your choice. I think —

HON. ALDEN M. MCLAUGHLIN, JR.: There might be some [inaudible – microphone not turned on] in this globalised age of Cayman being one that [inaudible - microphone not turned on]

THE CHAIRMAN: I mean —

[Inaudible comment from the Minister of Education - microphone not turned on]

THE CHAIRMAN: It should not? Well, that would accord with the position of the UK where being under sentence of death is not a situation of disqualification curiously. Shall we delete those words then?

HON. D. KURT TIBBETTS: So, sir, would it be serving or...

THE CHAIRMAN: **Is serving or has served a sentence of imprisonment** —

HON. D. KURT TIBBETTS: A sentence of imprisonment. Okay.

THE CHAIRMAN: — **imposed on him or her by a court in any country.**

Thank you very much.

So then we go to 63?

64? We would make a corresponding change in the third line of 64 (1) to delete “death or” —

HON. ALDEN M. MCLAUGHLIN, JR.: Sorry, Mr. Chairman. It's just a question we have 62 (1) (f).

THE CHAIRMAN: (f), yes.

HON. ALDEN M. MCLAUGHLIN, JR.: No, sorry 63.

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah, 63 (f), that very long, long sentence. Lord knows how we'll ever figure that out but...

We wonder whether or not it might not be better to refer that particular matter to the Committee on Standards and Public Life. This

whole issue about whether — whether a member of the House who has a contract with government whether they should be disqualified from service — or not disqualified, that they lose their seat essentially.

THE CHAIRMAN: They lose their seat.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah. But the question we have is whether or not that isn't a rather radical sort of way to deal with it. It's essentially summarily rather than being considered by the Committee on Standards and Public Life and people making a proper deliberation.

THE CHAIRMAN: But the way — it's in two parts you see. The general rule is that the seat of a member becomes vacant if they —

HON. ALDEN M. MCLAUGHLIN, JR.: Be established under the constitution.

THE CHAIRMAN: — if they become party to such contract, et cetera. But, the second part ... the second part allows the Assembly to exempt a member from losing his seat, so there is a mete let-out all together.

[inaudible comments]

THE CHAIRMAN: Well, the way it's drafted as it is at the moment respects the — respects the power of the Legislative Assembly to decide whether a member should lose their seat because of the circumstances. Now, I don't see any — and it's up to you whether the committee — Committee on Standards and Public Life has a role in this thing, and one could give it a role under ordinary legislation. But I would have thought that one should be slow to take away from the Assembly itself the power to make the decision. You could have — you know, I'm sure in the UK the House of Commons would not surrender that power, although it would want to have a report to it from a committee on standards and so forth, the equivalent to a committee on standards.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I understand all of that and I too am reluctant to hear that. But what gives me some unease about this provision is essentially the fate of an Opposition member could lie in the hands of the majority of the House. And I have been around politics long enough to know that you cannot always rely on good sense and reason and judgment and fairness to govern decisions of legislators, particularly if things are heated.

It is possible you could wind up with some very wrong decisions in this regard. That's what worries me about leaving it the way it is.

HON. W. MCKEEVA BUSH: But then to the adverse, you're submitting yourself to a committee that really has nothing to bind them. They are appointed a committee and they could be doing the same thing too. But — but —

THE CHAIRMAN: Of course the answer to all of that is that members don't enter into contracts with the government.

HON. W. MCKEEVA BUSH: But in a small community —

THE CHAIRMAN: You know that's the whole point. If they want to be protected they keep their nose clean.

HON. W. MCKEEVA BUSH: That is so true. But in a small community as we have that is sometimes not practicable. It's just not.

HON. D. KURT TIBBETTS: Well, there's an out. [inaudible - microphone not turned on]

HON. ALDEN M. MCLAUGHLIN, JR.: Well, I wish, Mr. Chairman, to thank the Leader of the Opposition for his vote of confidence in the Government and its fairness in relation to matters such as these.

HON. W. MCKEEVA BUSH: Any committee appointed by the government will have a government majority, and they would have that opportunity to do that same thing you mentioned about the House. It would be worse because the House would have rules and regulations and that committee would be a political committee.

MR. ROLSTON M. ANGLIN: Mr. Chairman, tenure of elected office just a quick question. Earlier you were barred from standing for elected membership if you were bankrupt. So if you get elected and go bankrupt midterm nothing happens to you?

HON. W. MCKEEVA BUSH: No, if you become bankrupt you've got to leave. You've got —

HON. W. MCKEEVA BUSH: Mr. Chairman, can I ask when you propose to stop, sir?

THE CHAIRMAN: When we get to the end of this part.

HON. W. MCKEEVA BUSH: By this part what do you mean?

[inaudible comments]

HON. W. MCKEEVA BUSH: Mr. Chairman?

THE CHAIRMAN: When we get to page 67.

HON. W. MCKEEVA BUSH: Mr. Chairman?

THE CHAIRMAN: I am trying to move it along.

HON. W. MCKEEVA BUSH: I'm happy to, but I certainly — I don't want to say that you got to do anything I ask you to do, but I don't think it's going to be fair on all of us to stay that long now.

HON. D. KURT TIBBETTS: Just quickly moving away — [inaudible - microphone not turned on]. But what still Mr. Anglin asked about —

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: — when we go back to 61 (c) **no person shall be qualified to be elected as a member of the Legislative Assembly who (c) has been adjudged or otherwise declared bankrupt under any law enforced** — [inaudible - microphone not turned on].

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: I would think that if you are an elected member and you are declared bankrupt midterm that you then automatically —

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: — lose your seat.

THE CHAIRMAN: This is provided for — this is provided for under Section 63 (g) **if any circumstances arise that if he or she were not a member of the Assembly that will cause him or her to be disqualified for election to it by virtue of any provision of Section 62 (1) other than paragraph (g).** So —

[inaudible comment.]

THE CHAIRMAN: Okay.

So rattling along as fast as we can, Section 64 (1) third line delete “death or”.

Question in the next line. Is it still — looking at the Attorney — is it still appropriate to say **convicted or reported guilty of an offence relating to elections**? “Or reported guilty” sounds very old fashioned

and strange formula. I don't think nowadays you can be reported guilty of an election offence, can you? You'd have to be convicted of an offence.

Shall we just delete it because it's archaic?

HON. D. KURT TIBBETTS: Delete what?

THE CHAIRMAN: The words "or reported guilty".

HON. D. KURT TIBBETTS: Where is that?

THE CHAIRMAN: 64(1) fourth line: **is convicted of an offence involving dishonesty or is convicted of an offence relating to elections.** And these words [**or reported guilty**] are very ancient and no longer act because there is no possibility of that anymore.

65?

HON. D. KURT TIBBETTS: Mr. Chairman?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: I am very conscious, sir, that we want to achieve as much as we can. I am very conscious, sir, that we wish to achieve as much as we can. But I certainly would not like for us to be staying here and not doing justice, and I think we're fast approaching that point, sir. But I leave it to your good judgment.

THE CHAIRMAN: All right. We'll stop today. The choice is yours. To be serious, the choice is yours. We can either break now, which I suspect you probably want to do, with the risk that tomorrow we will have to go on later than this.

Now, if we're all prepared — and I'm warning you this because I am determined to get through all of the work. Even if I'm the only person sitting in the room I will get to the end of this text, and if I'm the only person sitting in the room I shall tick off because I have only myself to agree with.

HON. D. KURT TIBBETTS: Mr. Chair, I respect what you're saying, but the truth of the matter is that both mornings we're starting a half an hour late.

THE CHAIRMAN: Yeah. We will start tomorrow at nine.

HON. D. KURT TIBBETTS: Let's start at nine.

THE CHAIRMAN: Prompt.

HON. D. KURT TIBBETTS: And let's say this — and I know me too, that goes for any one of us — nine o'clock whoever is here.

THE CHAIRMAN: Nine o'clock whoever is here. And if I am alone I shall agree with myself and start ticking off the —

Okay. So we start promptly at 9:00 with Section 66 and half an hour for lunch tomorrow.

HON. ALDEN M. MCLAUGHLIN, JR.: 65.

THE CHAIRMAN: Is it 65? Yeah.

Okay.

ADJOURNED

THURSDAY, 15 JANUARY, 2009

2008/9 CONSTITUTIONAL NEGOTIATIONS

HELD BETWEEN

CAYMAN ISLANDS DELEGATION AND

THE FOREIGN AND COMMONWEALTH OFFICE

THE CHAIRMAN: Good. All right. Ladies and gentlemen, it's nine o'clock. We promised ourselves we'd start on time, whoever was here. And I'm very glad to see Melanie from the Human Rights Committee. Thank you for taking the time out of your busy life to come back and have another look, I hope briefly, at two or three points we said we'd come back to first thing this morning.

And there have been circulated — and I hope everyone has got copies — of three papers: one is headed Government's Proposals for Amendments to Section 16 – Discrimination. And then there are two papers that we, the UK delegation, prepared and circulated: one is headed Section 17 – Protection of Children; and the other is headed Section 28 – Human Rights Commission.

And I'd just like, as swiftly as we can, to look at those three things. Can we just start with the shortest one, Section 28 – Human Rights Commission? And this reflects what I think we more or less agreed on Tuesday, which is that in Section 28 (6) would be deleted, and then there would be added to the list of powers of the commission three more: **(e) contribute to public education about human rights; (f) issue reports relating to human rights issues on its own initiative; and (g) undertake such other functions as may be conferred on it by law enacted on it by the legislature.**

Does that look acceptable to everybody? Thank you.

REVEREND NICHOLAS SYKES: Excuse me. In the absence of Pastor Al, I presume temporarily, I think we would like to continue with the CMA flag. A little bit of concern with (g) in that it is one of these open-ended things, and we would certainly prefer that if there were something specific that was in mind it should be represented there rather than confer some sort of open-ended element in — or put some other open-ended element into the Constitution.

THE CHAIRMAN: Well, I think that — I think this (g) is actually encapsulating what would be the case anyway. I don't think it was ever

intended that the list of powers in Section 28 would be exhaustive. And indeed (6) of the draft — which is originally a Cayman Islands draft of course — was very open-ended indeed, in fact, much more open-ended because it's more powers than necessary to the performance of its primary responsibility. But, you know, if you were thinking instead of adding some words such as **undertake such other functions relating to human rights protection as may be conferred**, something like that, to confine it down to the functions, or indeed one could tie it to (2) of 28: **the commission's primary responsibility shall be promoting, understanding, observance of human rights, such other functions — you could say such other functions for the purpose of fulfilling its primary responsibility under (2) as may be conferred on it by law.**

REVEREND NICHOLAS SYKES: Yes, sir. I think —

THE CHAIRMAN: Would that help?

REVEREND NICHOLAS SYKES: That would help a lot.

THE CHAIRMAN (MR. IAN HENDRY, FCO DELEGATION): Okay. Are you happy with that?

HON. ALDEN M. MCLAUGHLIN, JR.: Yes, sir, we're happy with that. I believe — because we've been through this so many times with the CMA, I believe that Reverend Sykes' concern is principally that the commission should not have the ability to act as a tribunal.

And I just wanted to direct his attention to the Section 28 (8) which sets out **the commission shall have no power to represent or provide representation to parties to litigation, act in a judicial capacity, or make binding determinations as to whether any right or freedom contained in the Bill of Rights or any international human rights treaty or instrument has been breached.** So that irrespective of — well, no, not irrespective — that conferring on the legislature the ability to identify other functions of the Constitution could not give the legislature the ability — to give it the power to hear matters, or to determine matters, or to act in any sort of extra — or carry out any sort of extra judicial, or quasi judicial function. So I think it'll be okay.

REVEREND NICHOLAS SYKES: Yeah. I do agree with your observation, but I do also think it would be right to put some sort of a context on (g) such as has been suggested by the Chairman.

HON. ALDEN M. MCLAUGHLIN, JR.: And we're happy with that.

THE CHAIRMAN: Okay. So we'll insert after **functions for the purpose of fulfilling its primary responsibility** under (2) and then carry on **as may be conferred on it by law enacted by the legislature**.

MS. MELANIE MCLAUGHLIN: Mr. Chairman, just one last query. I believe we raised on Tuesday that this section probably needed to be moved elsewhere.

THE CHAIRMAN: Yes.

MS. MELANIE MCLAUGHLIN: I don't know if that's still being taken on board.

THE CHAIRMAN: Well, I'm in the hands of the meeting really. I... I thought that by — this is, you know, Melanie, I thought this was quite nicely placed where it is, where fundamental rights are all dealt with in one place. But if there is a strong wish to move it... I think you suggested moving it right back to the Miscellaneous part —

MS. MELANIE MCLAUGHLIN: Yes, probably somewhere where it's currently set out in relation to the Office of the Complaints Commissioner and so on. Just as a matter of approach, it may seem odd to have that section remain in the Bill of Rights, since it's not actually a substantive right, so that was simply a suggestion, a recommendation.

THE CHAIRMAN: Yes. Well, I don't mind —

HON. D. KURT TIBBETTS: Just this section (g)?

THE CHAIRMAN: No —

MS. MELANIE MCLAUGHLIN: No, the — Section 28 which relates to the Human Rights Commission.

[inaudible comment by the Leader of Government Business – microphone not turned on]

MS. MELANIE MCLAUGHLIN: Yes, it's probably better placed near to 1(17).

THE CHAIRMAN: Yes.

MS. MELANIE MCLAUGHLIN: Which — under the Miscellaneous section on page 80 which sets out, similarly, a constitutional enshrinement of a complaints commissioner post and functions rather than in the Bill of Rights itself.

PROFESSOR JEFFREY JOWELL: Mr. Chairman, there's a section in the South African constitution, which I'm afraid I haven't got it in front of me at the moment — I just can't remember the precise term that's used — that deals with institutions that support a democracy; and in that section they have complaints commissioners, ombudsmen, Human Rights Commission, and other such bodies, auditor and others. And instead of calling it Miscellaneous, it might be more precise to have something along those lines as a title for that section.

THE CHAIRMAN: Very well. Well, we'll move it to Part VIII, think of re-titling perhaps to three of the sections of Part VIII, and then have a final part, Miscellaneous, which might be the last two or three sections.

Okay. Well, if everyone is happy with that we'll move it to the back.

The next one I'd like to look at is Section 17. Now, this is the task we undertook to amalgamate the Section 17 in the draft, which was based on the Cayman Islands government draft, and the Human Rights Committee's suggestion of an alternative draft.

And what — you'll see what it does is to... instead of having a simple catalogue of listed rights, it says that **the legislature shall enact laws to provide every child and young person under the age of 18 with such facilities as would aid his or her development, and to ensure that every child has the right...** and then there's the catalogue of rights which faithfully follows the text put forward by the Human Rights Committee.

And then in (2) on the second page of this paper we thought it best to reflect the notion that **a child's best interests are of paramount importance and every matter concerning the child**, to place that as an obligation on the legislature, because the legislature is obliged to enact the laws to do the things set out in (1).

[inaudible comment – microphone not turned on]

THE CHAIRMAN: Sorry?

[inaudible comment – microphone not turned on]

THE CHAIRMAN: This would be Section 17 in the Bill of Rights.

[inaudible comment – microphone not turned on]

THE CHAIRMAN: This would just replace Section 17. Are you happy with that one?

MS. MELANIE MCLAUGHLIN: We are.

THE CHAIRMAN: Very good. Splendid. My morale is soaring.

Now, Section 16. This is very easy.

Would you like to say something about it, Alden or Jeffrey? Yeah.

PROFESSOR JEFFREY JOWELL: Well, this, sir — the Government's proposals are explained here, the — and we discussed most of it two days ago.

As presently drafted, this section is a freestanding, non-discrimination clause, and therefore could cover a range of activities — now talking about the definition of discrimination to whom it applies — **from** — and we give a couple of examples in paragraph 1.

This kind of freestanding clause differs from one that which pertains under Article 14 of the European Convention of Human Rights, which is set out in paragraph 2 here, which piggybacks, as it were, the rights against — not to be discriminated against to the actual rights and freedoms set forth in the European Convention.

So, it is suggested, firstly — and this is contained in paragraph 5, the formulation is contained in paragraph 5 — that it should read **subject to the various sections, government shall not treat anyone in a discriminatory matter** in respect of the rights of this part of the Constitution, or, in respect of the rights in the Bill of Rights, however phrased.

The other difference between European Convention Article 14 and the existing formulation is that Article 14 provides no limitations clause to discrimination, so discrimination has to be defined and then it's simply applied. Whereas, again as we discussed, (3) following I think the Falklands' constitution now that provides different treatment will not be considered discriminatory if it can be objectively and reasonably justified. And so, it is a clause that it contains at the moment that isn't quite as precise as the one that we propose which is contained in paragraph 8, **that no law or decision** — the present formulation deals mainly with laws, but not so much decisions — **of any public official shall contravene this section if it has an objective and reasonable justification and is proportionate to its aim.** And then we've added here, simply to try and more faithfully mirror other limitation clauses, or one could perhaps say all in the interest — sorry, not all — in the **interest of public defence, public safety, public order, public morality or public health.** So, that is a limitation clause that is a little more succinct than the one at the moment in (3), a little more extensive, but mirrors the other limitations sections.

And we hope that would find favour with you, sir, and others.

REVEREND NICHOLAS SYKES: I believe it does find favour with us very much. Thank you.

THE CHAIRMAN: Thank you. Melanie?

MS. MELANIE MCLAUGHLIN: Thank you, Mr. Chairman.

Firstly, may I also thank the delegation for accommodating me to return this morning due to work pressures?

The Human Rights Committee does have an objection in relation to the proposal that may be articulated as follows. If it's helpful, we do not have any objections to proposals 2 and 3, but we do have some concerns in relation to... we don't have any objection in relation to the additional language at paragraph 6 and 7 in particular. The addition of "unjustifiable treatment", addition of those words, and the proposed amendment in relation to (3) are also fine.

THE CHAIRMAN: Right.

MS. MELANIE MCLAUGHLIN: However...

THE CHAIRMAN: Ah!

[laughter]

MS. MELANIE MCLAUGHLIN: The proposal currently seeks to restrict Section 16 to apply only in relation to the rights set out in the draft Bill of Rights. However, the proposal, in its effort to minimise the protection that will be offered to certain persons — namely homosexuals and transsexuals — the Government is essentially also watering down and giving less protection to everyone else in the community who is already covered by Section 16. Section 16 affects far more groups and types of persons than homosexuals and transsexuals. It also affects other vulnerable groups including the elderly, children, the disabled and women. And as currently drafted, we believe the proposal is too wide because it will adversely affect more than the intended concerns.

As we understand it, there was no objection by the Government, the Opposition or the NGOs to give a freestanding right of non-discrimination to any of the other persons that were covered by Section 16. And therefore we're concerned that it would be untenable and quite unfair that all of the other vulnerable groups that would be affected by Section 15 will now also have less protection.

We can give some practical examples.

What will essentially result if the proposal goes forward, to the extent there's not any right of healthcare, housing or education, the government will now also be allowed to discriminate against everyone else in relation to those areas. In that way, the government hospital could turn away some of these other people; the Department of Tourism could hire or refuse to hire a Caymanian because they have too much of an accent that tourists may find difficult to understand. Those may not

necessarily be as farfetched as it may sound, and I do think it's slightly less farfetched and a little more based in reality than our concern having the community overrun by transsexuals.

Essentially, the proposal will allow the government to discriminate against all sectors of the community in relation to matters that are not listed in the Bill of Rights — and that will necessarily include healthcare, housing and employment — and I don't think that that outcome can really be what the Government or the delegation actually intends. So to the extent that the government finds it prudent or necessary to constitutionally discriminate against any group, it should put forward a proposal that achieves this specific objective, without unfairly minimising the protection being given to all other people.

Since Section 16 as a freestanding right would impose an obligation on government not to discriminate on a wide range of grounds — including age, disability and gender — the Human Rights Committee found this was a useful affirmation of the principle of equality. And none of those groups or persons, apart from sexual orientation, generated any controversy or debate, and we think it would be remiss of us to lessen the protection to everyone else as a consequence.

HON. W. MCKEEVA BUSH: Mr. Chairman?

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: Just —

THE CHAIRMAN: McKeeva first.

PROFESSOR JEFFREY JOWELL: Sorry.

HON. W. MCKEEVA BUSH: Mr. Chairman, if what the — if what Ms. McLaughlin is saying is right in regards to the other areas, we certainly don't want to do anything in any way, shape or form that would detract from any benefit that they would get or could get. We certainly — I don't think that none of us want that to happen, and so we would want that to be looked at very carefully. While protecting ourselves against other areas that would interfere with beliefs and moral positions, we certainly don't want — we don't want — to affect those areas that she last spoke about.

MS. MELANIE MCLAUGHLIN: So, I think the proposal needs to be more specifically geared to the intended concerns rather than being so wide ranging and wide sweeping that it actually also catches everyone else in the community that we genuinely don't want to give less protection to.

THE CHAIRMAN: Jeffrey?

PROFESSOR JEFFREY JOWELL: With the greatest respect, that is not so.

At the moment, first of all, it is open to the legislature to introduce equality legislation to protect any group it so wishes in whatever area it so wishes, and so a number of countries have anti-discrimination laws in employment, in housing, in any area they may wish to place it. That's the first thing that could be said.

The second is that even now discrimination on any ground — on any ground — in public places, hospitals and so on, is vulnerable to attack through judicial review on the ground that it offends the rule of law. The basic fundamental of the rule of law is that which requires equal treatment, or that it offends the public law principle of an irrational decision.

If somebody were turned away by a hospital, on the grounds of their creed or their colour, or indeed sexual orientation or age or whatever it might be... there have been a number of cases in the United Kingdom where people above a certain age have not been allowed to have intensive care and a hospital's been justified on the ground that we simply haven't got the resources to give it to everybody. But the courts have held that such a decision is irrational. And we have irrationality under our good administration clause, specifically in the Constitution. It is there, as well as a common-law principle, on the grounds that it unjustifiably discriminates, which is an offence to the notion of irrationality. And various decisions have said that a basic axiom of irrationality is that people should be provided equal treatment.

So, it is not true that people would not be protected under our existing law, or any future law that the legislature may introduce, on the grounds of discrimination. And this is why the United Kingdom up till now has not felt it necessary to adopt the protocol of the European Convention that does provide a freestanding discrimination clause because it feels that it is already there in the law, and it has therefore been happy up till now to accept Article 14 alone.

HON. ALDEN M. MCLAUGHLIN, JR.: Thank you.

Mr. Chairman, if I might just add this. I think we have to examine the present context. Melanie spoke as though this provision was taking away some rights which are already recognised and sacrosanct in this country. To the extent that that is true, it is true without there being any constitutional guarantee of those rights.

What we are attempting to do for the first time is to give the rights which are set out in this part, Part I, a constitutional standing and protection. And this provision, Section 16, as we are proposing it, simply applies to those particular rights to say that in relation to those rights it is unlawful and unconstitutional to discriminate.

So, people who are relying on the common-law position which Professor Jowell just spoke about are in no worse position than they ever were. It is just that people who are relying on rights in the Constitution now have the additional benefit of this constitutional guarantee. So, it is not as though this — these proposals are making life worse for anybody in the Cayman Islands — they're making life much better — it is just that they don't go quite as far, and I understand that, as the Human Rights Committee would like them to go.

So, I hope that in the interest of us achieving consensus on a document which, overall, will improve the human rights environment in this jurisdiction, that even though it falls somewhat short of what the HRC would ideally like to see, that notwithstanding that they can find it possible to support the proposal on the basis that everybody else around the table seems to be able to do so.

THE CHAIRMAN: Thank you. Melanie?

MS. MELANIE MCLAUGHLIN: Mr. Chairman, by way of very brief response.

If we are going to be lessening the constitutional protection that is being offered to everyone, I think that certainly represents a step back from where we were having seen the first draft. In any event, I don't think that we ought to really be that concerned to the extent that we may be going farther than the UK position in relation to giving maximum protection to our people. It is within our right to do so; we ought to be striving to do so. And they have several other instances throughout these talks where we've made reference and added additional language which goes above and beyond the ECHR, again, all towards giving the maximum rights to the benefit of the people of the Cayman Islands. And I don't see any reason why this proposal cannot be amended or tailored so that it only gives less protection to the specific groups that appear to give some concern to the delegation while still preserving maximum rights for everyone else. I don't think that is an impossible dream. That should, again, for the record, be what we strive and attempt to do.

THE CHAIRMAN: Yes. Well, thank you.

I've been holding fire on this. But I think what I could say about it is this; that we appreciate — we have considered this very carefully and we appreciate the intent of this proposed compromise, and acknowledge the care with which it's been put together, so as to reflect the international obligations deriving from the European Convention, which is the one enforceable convention with the court against the United Kingdom that we have to deal with on a daily basis, we in the UK have to deal with on a daily basis.

And I think that this compromise is something which we will be prepared to recommend to our minister as a way forward. Now, she must

take the final decision about it in the light of everything else that may result from the negotiations as a whole. But I'm — you know, I have a good feeling about it. I think it's helpful.

I think the suggestion from the Human Rights Committee, you know, if one could draft it and if everybody went along with that as well, I can't see that we should have a fundamental objection to it, except in one respect; and that is there is a distasteful feature of it in that it would provide two tiers, and some groups would be, under the Constitution, better protected than other groups. And I think that will be extremely difficult for my colleagues and me to explain to our minister. I don't think she would understand it actually. I think she would find it very strange.

HON. W. MCKEEVA BUSH: One thing you could do, sir, is put the whole bill as a law [inaudible comment by the Leader of the Opposition – microphone not turned on]

THE CHAIRMAN: I think — I've always seen this — I don't know whether my view is shared, but I have always seen this, and I've already discussed this with our minister, and I think she understands what I am saying — as a first step in a Bill of Rights/human rights protection at the constitutional level of the Cayman Islands, which is extremely important to take. It's a very important step to take.

And if my minister is going to be persuaded that this rather unique — in regard to the Overseas Territories anyway —drafting of the whole Bill of Rights is to be acceptable, it is easier to accept it if one sees it as a first step of a process. Now, that's not to say that there's a sort of threat from our side that things must, you know, be changed, but of course nothing is set in concrete. No constitutions are set in concrete, they develop. And if over a period of years the community here gets used to a constitutional Bill of Rights which affords greater human rights protection than exists at the moment, and there is a wish to alter it, to update it, to strengthen it in this way or that, to add rights in, to make it more enforceable by the courts than this draft would provide, then of course the UK government would readily listen, would want to cooperate in trying to produce that sort of result.

After all, with the other territories who have had a fundamental chapter of human rights for years — some of them decades — we have been in the process of updating those provisions to reflect more modern standards and caselaw of the European Court and the comments of the monitoring committees under the International Covenants on Human Rights. So, it's not unusual to come back and have a look at these things after a few years in the light of experience.

And so, I think my recommendation would be is if there is almost complete consensus on a compromise of this kind, we should grasp it

and see whether we can reach agreement on it in a couple of weeks with our minister.

Of course, that's not to say if you have further reflections in the interim period and want to suggest adjusting the wording, that's fine. Of course you can do that and we can come back and take another look at it. But I think what I am keen to do is to go away from here this week with something that looks as if it would fly, as if it could — on this extremely sensitive part of a draft Bill of Rights could succeed in getting as wide as possible consensus.

[inaudible comment from the Leader of the Opposition – microphone not turned on]

THE CHAIRMAN: Sorry, McKeeva?

HON. W. MCKEEVA BUSH: Could we wait till we get to London to see what the minister [inaudible comment from the Leader of the Opposition – microphone not turned on]

THE CHAIRMAN: Well, I think we have to do that, yes, on everything. But I am trying to say to you I think that we having considered it in our delegation think we should advise her to accept this as a compromise which conforms with the UK's international obligations, and at the same time deals with serious concerns that there are in some quarters of this Territory. And if — above those two lines, you see, if it deals with those concerns, calms any fears and worries, and at the same time is in conformity with the UK's international obligations which apply to the Cayman Islands, then, I think we could well be in business and I would be positive about it in advising our minister.

So, I think — I think I'd like to leave it there because — unless anybody wants a last word on it. It's like a very delicate glass I don't want to break.

Okay?

MS. MELANIE MCLAUGHLIN: We've stated our position for the record. Thank you.

THE CHAIRMAN: Yes, I understand, Melanie, and thank you very much. Well, thank you very much, Melanie, again, for coming in and I know you're very busy.

I don't think there's anything else on the Bill of Rights that we said we would come back to. Or am I wrong?

HON. D. KURT TIBBETTS: Preamble.

THE CHAIRMAN: Oh, preamble. We can look at that. It's not part of the Bill of Rights, but let's do that now.

REVEREND NICHOLAS SYKES: Mr. Chairman, there was one thing in Section 20 that the Cayman Ministers' Association saw that might possibly lead to — subject to your assurance — a possible conflict of... and that occurs with 20 (3), is as in the current draft, where it says **to ensure the religious and moral education of his or her child in accordance with his or her own convictions**. And we were troubled that this could involve a possible conflict with Section 10 I think it is, where the school or body is given the right to instruct a child according to the religious basis of its own foundation.

THE CHAIRMAN: Yes, this is — I mean, this is —the interrelationship between the two sections is important, and that's why Section 20 starts out with the sentence, **This section is without prejudice to Section 10**. So, actually, nothing in this 20 can derogate from the rules in Section 10. That's the intention.

REVEREND NICHOLAS SYKES: Okay.

THE CHAIRMAN: So, if there is a conflict then Section 10 is ...

REVEREND NICHOLAS SYKES: Will prevail?

THE CHAIRMAN: Yeah. Okay?

REVEREND NICHOLAS SYKES: Thank you. Thank you, sir.

THE CHAIRMAN: Good.

Shall we then look at — sorry. McKeeva?

HON. W. MCKEEVA BUSH: Mr. Chairman, I've been thinking about this for a long time and inquire of yourself. The protection of the environment, would [inaudible – microphone not turned on] thinking of putting this in but in places where the government shall — the government I think now in fact thinking about building a dock and there would have to be some [inaudible – microphone not turned on]. What kind of ramifications will this hold in situations such as that? Where — will this mean you gotta go to court to try to get something done? I don't...

THE CHAIRMAN: I — well, subject to anything that Professor Jowell might say, I don't read Section 18 as anything — in that territory at all. This is more aspirational.

HON. W. MCKEEVA BUSH: The government — or the Constitution holds these aspirations?

THE CHAIRMAN: Well, in this particular case, it is more in the area of principles and aspirations than enforceable rights. But Professor Jowell might want to comment because this comes from their draft.

PROFESSOR JEFFREY JOWELL: Yes, I think that's correct. It's one of those rights, other sort of socioeconomic rights that have not been put into this Constitution, but this one has because the Government felt that it really enshrined the values of the Cayman Islands that the environment be protected, while allowing the promotion of the term under Section 18 (1) **justifiable, economic and social development**.

So, all this section really does — in a number of other constitutions these days it's becoming more common. It has very rarely led to litigation because within this section, as Mr. Bush will see it, it allows balance between economic development and having de-regard to the need to foster and protect the environment. So, there is a balance.

But what it does do is really direct the government's mind. You can't just go ahead and do things, you've got to — when you do things you've got to have regard to all these factors. So, if the government does not do that, sort of just goes ahead with development for its own sake and doesn't obviously think about the environmental consequences, then it would be vulnerable. But if it does engage in a balancing exercise, reasonably and justifiably, then it won't be vulnerable to attack in the courts.

But it really is a provision that is aspirational in the sense that it directs the way that the government reaches their decisions and the factors, the various factors that they have to take into account.

THE CHAIRMAN: All right. Thank you.

Right. Can we move to the gaps in the preamble? I see there's a paper headed Proposed Preamble Provisions, and I hope we can deal with this quite quickly because we've got a lot more work to do today.

So, religion... this would be the second bullet I presume. **Religion finds its expression in moral living and social justice.**

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, we just had a quick chat about that. This obviously is the Opposition's proposal, but I thought that it probably should read "a country" —

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: — "in which" because it seems to just —

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: — stick out —

THE CHAIRMAN: It's a grammatical —

HON. ALDEN M. MCLAUGHLIN, JR.: — otherwise.

THE CHAIRMAN: Because it all follows “affirm their intention to be”.

HON. D. KURT TIBBETTS: Exactly.

HON. ALDEN M. MCLAUGHLIN, JR.: Exactly.

THE CHAIRMAN: Is the Opposition happy with that? **A country in which religion finds its expression and moral living and social justice...**

Good. Happy Pastor Al?

[laughter]

THE CHAIRMAN: Second one: A country — this is one — the one some way down the page — **A country that honours the industriousness of the Caymanian women who during the absence of their seafaring husbands managed the affairs of their homes, businesses and communities and passed on our values and traditions.**

And then thirdly: **A country that honours the sacrifice of our seafaring men who left these shores to enhance the quality of life of our people, and in doing so established themselves amongst the finest within the global maritime community of that time and through their remittances, endeavours and experiences built the foundations of the Cayman Islands modern economy.**

Fine?

HON. W. MCKEEVA BUSH: Mr. Chairman [inaudible comment by the Leader of the Opposition – microphone not turned on] the fourth one [inaudible comment by the Leader of the Opposition – microphone not turned on] I wonder whether that should be further up [inaudible comment by the Leader of the Opposition – microphone not turned on]

THE CHAIRMAN: Which one, McKeeva, do you want to move up?

[inaudible comment by the Leader of the Opposition – microphone not turned on]

THE CHAIRMAN: Oh, the one — I see. Yes.

HON. W. MCKEEVA BUSH: [inaudible comment by the Leader of the Opposition – microphone not turned on] you will find the relationship with the United Kingdom and the Cayman Islands being tough because of the things that were given were taken to be something [inaudible comment by the Leader of the Opposition – microphone not turned on] I certainly would like to see this moved [inaudible comment by the Leader of the Opposition – microphone not turned on] if we're talking about a relationship [inaudible comment by the Leader of the Opposition – microphone not turned on] to continue to do that I would like the public [inaudible comment by the Leader of the Opposition – microphone not turned on]

THE CHAIRMAN: Well, I have no objection to that. I think it's —

HON. W. MCKEEVA BUSH: Unless it's the last...

THE CHAIRMAN: The last one? The first or the last?

HON. W. MCKEEVA BUSH: But you could ask the Government.

THE CHAIRMAN: Okay. Do you have a view, Alden?

HON. ALDEN M. MCLAUGHLIN, JR.: Sorry, sir. I wasn't listening. We were trying to draft something.

THE CHAIRMAN: Right. Well, what McKeeva was suggesting was moving — there's a bullet at the bottom of page 10: **A country with open, responsible and accountable government which includes the working partnership of the private sector in continuing beneficial ties to the United Kingdom.** He was suggesting that that should be given more prominence either by putting it up to the top of the list or to the bottom of the list. I can see the logic —

HON. W. MCKEEVA BUSH: No. I'm not talking about the bottom, sir, unless that is the intention [inaudible comment by the Leader of the Opposition – microphone not turned on] very last one.

THE CHAIRMAN: Oh, I see. I see. He would like it to be moved up to the top or nearer the top of the list, and I am saying I have no objection —

HON. ALDEN M. MCLAUGHLIN, JR.: Well, Mr. Chairman, I don't think the Government has any strong view about that. I just should — I just should point out that this, with the absence of the three that we are now proposing to put in, was simply lifted from Vision 2008 —

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: —I think by the Ministers' Association initially as their suggestion and we put it in. And so there might be some issue about whether or not we should switch around the order of things. But the Government is easy with it. It's really —

THE CHAIRMAN: Pastor Al?

PASTOR AL EBANKS: Mr. Chairman, there really is no issue for us. The point that we made in the last round of talks was just concern with tinkering with it at all. But the fact that we've added other things into it, it doesn't matter to us that any changes are made in terms of order. So...

THE CHAIRMAN: All right. Thank you very much. So we'll do that.

PASTOR AL EBANKS: Mr. Chairman, my colleague was just pointing out to me, our preference would be to leave a God-fearing country as first and maybe to have that second.

THE CHAIRMAN: That sounds very reasonable, in view of the supremacy of God over government.

[laughter]

THE CHAIRMAN: Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, just another proposal to amend bullet point 2 that we've just passed out.

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: It's been pointed out to the Government team that limiting the men we're talking about to seafaring husbands would be inaccurate because —

HON. D. KURT TIBBETTS: Sons and brothers.

HON. ALDEN M. MCLAUGHLIN, JR.: Yes, sons and brothers and all that sort of stuff. So, I'm going to propose this in an attempt to meet that concern: **A country that honours industriousness of Caymanian women who during the absence of the seafaring men of these Islands managed the affairs of their ...** and the rest of it.

THE CHAIRMAN: Of the seafaring men of these Islands?

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah.

THE CHAIRMAN: My female colleagues on my delegation are getting very jumpy, and one of them would like to say something. Have you anything to add, Susan?

MS. SUSAN DICKSON: Thank you, Mr. Chairman.

I just wondered — we were wondering about the word “industriousness” and the fact that the way it’s drafted is honouring the industriousness rather than honouring the women. And having discussed it with two of the ladies at the back of the room, we wondered whether it might be better to say **A country that honours and acknowledges the important contribution of Caymanian women...** and then carry on as you’ve proposed after that.

THE CHAIRMAN: What was it, Susan?

MS. SUSAN DICKSON: A country that honours —

HON. W. MCKEEVA BUSH: Sounds good.

MS. SUSAN DICKSON: — and acknowledges...

THE CHAIRMAN: Honours and acknowledges.

MS. SUSAN DICKSON: The important contribution of...

HON. W. MCKEEVA BUSH: We don’t want to say anything about the sailors?

A MEMBER: No.

[laughter]

THE CHAIRMAN: Important contribution.

Well done. Okay. Thank you very much.

With that, the preamble is done, and I formally declare that we return to the Speaker, which is Section 66. Section 66.

And as a reward for our good work I’m going to recommend a ten-minute break, on the understanding that we will get cracking absolutely in ten minutes, at ten o’clock. All right?

RECESS

RESUMED

THE CHAIRMAN: Right. Ladies and gentlemen, let's crack on. Right.

HON. W. MCKEEVA BUSH: Mr. Chairman —

THE CHAIRMAN: I think you had a point —

HON. W. MCKEEVA BUSH: Mr. Chairman, can you look at Section 61 and can you give me your opinion whether that is the same as the current provisions existing in the current Constitution? I just didn't understand most of it.

THE CHAIRMAN: Yes, I think it is. I think it reflects the current Constitution.

HON. W. MCKEEVA BUSH: All right.

THE CHAIRMAN: Good Section 66? Agreed.
Section 67? Agreed.
Section 68? Agreed.

HON. D. KURT TIBBETTS: Say that again, sir.

[laughter]

THE CHAIRMAN: No. There is a point in Section 65 which is outstanding, (1) (a). And I wonder — this is not a point which is a problem for the UK delegation. This is one I recall was a difference of opinion between the parties here as to whether the Speaker should be —

HON. D. KURT TIBBETTS: In or out or both.

THE CHAIRMAN: Yes. And to be perfectly honest, I can't remember which side takes which view, but you could remind me. Is there consensus about that —

HON. D. KURT TIBBETTS: Mr. Chairman, it had been our position from much earlier that the Speaker should come from outside the Legislative Assembly, but that the Deputy Speaker should be from within. And that was purely a matter of logistics with regards to Deputy.

The opposing view to that was that the number of persons qualified to be Speaker, and with the necessary skill sets was very limited, and that sitting members of the Legislative Assembly should not be excluded from being qualified to be the Speaker.

I think that was the two sides of the arguments that were put forward. I don't know where we are at this point in time, and I see the Opposition is wishing to speak, so I guess with your permission we could hear what's happening from them.

HON. W. MCKEEVA BUSH: Yes, Mr. Chairman. I really can't leave the Government to put my position forward.

But what — our position, let me reiterate it, we prefer that status quo remains, that is that the Speaker can be elected from inside the House or outside the House, and, Mr. Chairman, of course that the Deputy Speaker is from within the membership of the House. So, the status quo, in our position, would remain.

And just briefly to say that the reason for that is, is because we've already had difficulties in choosing and getting a Speaker from outside and the Government knows this to be a fact. And amongst a small population it's difficult to get people with the preferred knowledge, working knowledge of the legislature.

I just can't see it making sense to stipulate — tying ourselves down as a legislature, to be able only to choose from someone who is not a member of the Assembly. I say no more because our position is already stated, just to reiterate it.

HON. D. KURT TIBBETTS: Mr. Chairman?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: I would be curious, if you would just allow, if they have any comments, the NGOs as to what their position is; and just to say to you that this is the third issue that we are prepared to just put into the parking lot, to see where we end up with everything else and I think we anticipated that this would be the case. But for the benefit of all of us —

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: — perhaps it would be good to hear what the NGOs might have as their comments on it.

THE CHAIRMAN: Sure. Would any of the NGO representatives like to express a view on this point?

Mr. Thompson.

MR. EDDIE THOMPSON: Thank you.

The chamber's position, or the membership has expressed their preference to the Speaker coming outside of the House as has been the case in the past accusations of impartiality. So that's the chamber

membership's position, and we would hold to that, although, you know, not forcibly obviously.

THE CHAIRMAN: Thank you.
Pastor Al?

PASTOR AL EBANKS: Again, just from a public perception — and I'm not necessarily saying that this is the CMA position because it's not an issue of which we have spoken — I think that there would be, based on discussions that I've had within the community, I think the broader community would prefer to see a Speaker from outside of the House. However, having said that, again, I think it's also fair that those who are the elected members of the country understand better the functioning of the Legislative Assembly. And I don't know whether the criticism is a fair or unfair one.

HON. W. MCKEEVA BUSH: That part of your sermon is very good.

[laughter]

PASTOR AL EBANKS: So, that's the only comment that I would make, sir.

THE CHAIRMAN: Okay.
Pastor Clarke?

PASTOR ERIC CLARKE: Similarly, for us, we did not discuss this in depth, and our view really is that those who are in it would know and we would take a cue from them, too.

THE CHAIRMAN: All right.

HON. W. MCKEEVA BUSH: And, Mr. Chairman, I should say so again. That has to be — I mean on the basis, I hope, on which the UK will accept recommendations; that those of us that have been in the system for years.

Firstly, we had the Governor who was presiding officer, and that just wasn't good, it wasn't democracy - the Governor was the Governor and the Governor was the president of the executive council, and we had to — we had to change that situation.

And we — over the years, no one can tell me that the situation that we have now has not been a good one. I mean, for whatever reasons, the current situation where the Government made declaration and opposed in the past the current situation, but when they themselves, when they found they had to do, they had to do the same thing. They put someone from inside, but that's what they found most feasible at that time. And

so, I do not criticise them on that matter to that extent. But it has — I would hope that the UK would leave it to take the advice of those that are in the system, and I would hope that the Government would see, as they have must found out by now, that it is a good thing to be able to either choose from inside or outside.

THE CHAIRMAN: I think the merit of that argument actually, from a purely objective and practical point of view is that the field of possible candidates is widened, and it could be extremely difficult if no person from outside was willing to serve. That's only a practical point. I'm not making any other one.

So I — and I notice — I've noted the comments of the Leader of Government Business on this matter, and the helpful comments of the NGOs, too. So I think we're probably moving towards a consensus on this.

HON. D. KURT TIBBETTS: Mr. Chair, just so that it can be clear — and it just so happened I chose the term “parking lot”, but I'm not suggesting that these issues have to wait for a third round.

THE CHAIRMAN: No.

HON. D. KURT TIBBETTS: I'm suggesting we go through everything.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: And then whatever issues of this nature are left we can try to tidy those up.

THE CHAIRMAN: All right.

HON. D. KURT TIBBETTS: Thank you.

THE CHAIRMAN: That's very helpful. Thank you.

Good. I have a small question on (2) (e) of this Section 65, which is really just a curiosity.

At the moment it says **on the passing by the votes of 10 of the elected members of the Assembly of a motion expressing no confidence in the Speaker, the Speaker would be removed**, and the same applies to Deputy Speaker. And I wondered why it was 10 whereas the number for a motion of no confidence is, I think, 11. I don't know why they are different, and I don't think anything turns on this. But of course if we are looking at increasing the number of elected members to 18, we may need just to think about these numbers. If it's 18, then 10 is a simple majority, which is fine. I mean, this is not an issue that we are concerned about in particular, but it — I just draw your attention to

think about. Increase the membership to 18 as we discussed yesterday, then 10 is a simple majority.

HON. V. ARDEN MCLEAN: The removal of ministers. No confidence in ministers is 9 currently.

THE CHAIRMAN: Oh, is it 9?

HON. V. ARDEN MCLEAN: It's nine currently.

HON. ALDEN M. MCCLAUGHLIN, JR.: Nine or 15.

HON. V. ARDEN MCLEAN: Nine or 15. That was bastardised many years ago.

THE CHAIRMAN: Right.

HON. V. ARDEN MCLEAN: It should be 10. The Speaker was — went on the basis of the usual two-thirds majority.

THE CHAIRMAN: Well, the draft at Section 51 (1) specifies 11 for a vote of no confidence.

HON. V. ARDEN MCLEAN: Yeah, but that's because we're increasing the membership, and two-fifths, two-fifths.

THE CHAIRMAN: Seventeen. All right, I see. Okay.

HON. V. ARDEN MCLEAN: Yeah. Two-fifths would be 11.

THE CHAIRMAN: Governor?

GOVERNOR STUART JACK: Just a thought on my part that in the case of the Speaker you want to ensure that the Speaker is seen as being independent and not beholden to one party or another; and the closer you get to the possibly of deposing the Speaker by simple majority, the more that comes — I would have thought would come into question. So, you probably want a reasonable size majority to depose the Speaker.

HON. D. KURT TIBBETTS: Mr. Chairman? Mr. Chairman, just to say, if we all are going to proceed on the basis that the Legislative Assembly may make laws to add to the membership the numbers of the Legislative Assembly, and there will be a constitutional provision citing 18 elected members —

THE CHAIRMAN: Um-hm.

HON. D. KURT TIBBETTS: — and also for the Speaker, I think both 51 (1) and this section needs to be revisited.

THE CHAIRMAN: Yep.

HON. D. KURT TIBBETTS: You did say 51 (1)?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, if that is the case, which I think it is, then perhaps we need to express it in a formula rather than an actual number.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Exactly.

THE CHAIRMAN: In both cases, then? In 51 (1) and in Section 65, two-thirds of the elected members. Yes?

HON. D. KURT TIBBETTS: Are we all in agreement for both positions for two-thirds? We need to make sure of that. A two-thirds majority to be able to move a no-confidence motion.

THE CHAIRMAN: Right. I've put two-thirds in both places, two-thirds of the elected membership.

HON. D. KURT TIBBETTS: I just want to make sure that they're happy, sir.

THE CHAIRMAN: Right.

HON. D. KURT TIBBETTS: Mr. Chair, just while they're contemplating, I'm certain that you on your team would have had a fair amount of experience with this. Do you find a lot of variation with this in other Constitutions?

THE CHAIRMAN: I would have to check. I'd have to check the text. Some of them are simple majority of the elected members, I think. Yes, well — thank you. In the Turks and Caicos Islands Constitution, for example, it requires two-thirds to remove the Speaker, and for a vote of no confidence it is a majority, simple majority of the elected members. So there is a variation in that one. BVI ... have you got the BVI? We can look it up.

HON. W. MCKEEVA BUSH: Mr. Chairman, you don't want to leave the possibility of just a simple majority which, you know, gives reason or opportunity to change —

HON. D. KURT TIBBETTS: We don't have a problem with that, sir.

HON. W. MCKEEVA BUSH: I know.

HON. D. KURT TIBBETTS: Okay.

HON. W. MCKEEVA BUSH: I thought someone was saying perhaps —

[inaudible comment from the Leader of Government Business — microphone turned off]

HON. W. MCKEEVA BUSH: Yeah, that's why I spoke, because I heard them raise that and —

THE CHAIRMAN: I'm not pressing for a simple majority.

HON. W. MCKEEVA BUSH: Yes. We don't necessarily want to do everything that is in those Constitutions. And we have to be careful here because... I mean, I would like to see the government change, but ...

[inaudible comment from the Minister of Education — microphone not turned on]

HON. W. MCKEEVA BUSH: That's why you want to be careful.

[laughter]

HON. W. MCKEEVA BUSH: That you don't want to be changing every Monday morning. Okay? So, I think the two-thirds majority would have to stay.

HON. D. KURT TIBBETTS: For both positions?

HON. W. MCKEEVA BUSH: Whichever way you all go, yes.

[inaudible comment from the Leader of Government Business — microphone not turned on]

HON. W. MCKEEVA BUSH: Yeah, yeah, yeah. Oh, the poor old Speaker, yeah, unless she behaving herself badly.

GOVERNOR STUART JACK: Mr. Chair, could I just leave another thought, which I guess is what probably underlies the provisions in those other Constitutions that you've mentioned; that if the Premier — we're not talking about the government as such, we're talking about the Premier — is also protected by the two-thirds rule, we're effectively strengthening quite considerably the position of the Premier. He no longer becomes the first among equals in his Cabinet. And you could have a situation, which has occurred in other jurisdictions, whereby the Premier did not actually enjoy the majority support of his own party, but because of this rule was left in place and therefore you get a situation of ungovernability effectively.

HON. W. MCKEEVA BUSH: You're speaking to the ratio?

GOVERNOR STUART JACK: I'm talking about the ratio for the Premier, not for the Speaker.

HON. W. MCKEEVA BUSH: Oh.

GOVERNOR STUART JACK: I think there's an argument in terms of democracy and governability that the Premier should not be as protected as the Speaker, but that's my personal view.

HON. V. ARDEN MCLEAN: Mr. Chairman, that sounds very much like a former politician that is trying to get back now. That's why it's 9 now.

HON. W. MCKEEVA BUSH: But we have to give — we have to give consideration to rise of all those possibilities.

HON. V. ARDEN MCLEAN: Mr. Chairman, I don't say that we shouldn't. What I'm saying is that when you have — out of 18 people the simple majority would be 10, and when you get 12 people in that legislature that includes members of the Opposition —

HON. W. MCKEEVA BUSH: It would have to.

HON. V. ARDEN MCLEAN: — you would have 9 on the other side. You would have 9 on the other — 8 on the other side if you have formed a government. That means 4 people on that other side has lost confidence in that Chief Minister, or the Premier. I think it's reasonable.

You can't just on a whim and fancy remove a government. If you leave it at 9 it only takes one from the other side to go over and remove the whole government and bring the country into disarray. You need a fair amount from the government to go over on to the Opposition to remove a government. You know, that's —

THE CHAIRMAN: Right.

HON. V. ARDEN MCLEAN: You're not playing with removing an executive, you're playing with removing — bringing a country into disarray. And there must be clear indications that that Chief Minister/Premier — has not — does not enjoy the confidence of the majority of the legislature.

HON. W. MCKEEVA BUSH: Not necessarily.

THE CHAIRMAN: Right. I think we should move on.

HON. W. MCKEEVA BUSH: Yes.

THE CHAIRMAN: I think we should move on. Members of my delegation are getting very jumpy, and they may have further thoughts about this, but for the moment I prefer to move on. I notice that there is a consensus on two-thirds.

Okay.

HON. D. KURT TIBBETTS: Mr. Chair?

THE CHAIRMAN: Section 66. Yep.

HON. D. KURT TIBBETTS: What have we done?

THE CHAIRMAN: I've put two-thirds in both places.

HON. D. KURT TIBBETTS: Okay. So you don't need any more arguments?

THE CHAIRMAN: We don't need anymore arguments.

HON. D. KURT TIBBETTS: Okay, sir.

THE CHAIRMAN: Except, as I said, some members of my delegation are getting very jumpy, and I may have to come back to this if they persuade me that it's really necessary. But I hope not to.

HON. D. KURT TIBBETTS: So, would you like another argument or not?

THE CHAIRMAN: No.

HON. D. KURT TIBBETTS: Okay.

[laughter]

HON. D. KURT TIBBETTS: That's fine.

HON. W. MCKEEVA BUSH: Mr. Chairman, what we want to make certain is that we don't have an executive that has — that is immovable, and that means that if you don't want — if you're reposing that kind of authority in the Premier that you can — that he can do all sorts of things, like the law of the House, and when he sees trouble getting his way and then he can't get membership to do what they want to do. So you can't do it that way.

THE CHAIRMAN: Yep.

MR. ROLSTON M. ANGLIN: Mr. Chairman, can I just add one small very quick point from consideration of elected members?

In the formulation of this we need — in my opinion, we need to think about one thing. The one thing is: do you want the formula to be that there has to be at least one member of the executive to vote in a no-confidence against his own Premier or not? Because if you have a ten-eight government, that means there's three backbenchers, eight Opposition. That's 11. To get to 12 you need at least one.

If you feel comfortable that that needs to be the barometer or the test that there is a loss in confidence of the government, then the two-thirds works, in my opinion. And therefore — can you wait? And therefore, if your formula is that you want to have it that the test is a little higher that you want to have at least one of his own Cabinet also vote against him, then two-thirds is your way. I think you have to — that's the defining line in terms of whether or not you go two-thirds —

THE CHAIRMAN: Yes.

MR. ROLSTON M. ANGLIN: — or simple majority.

THE CHAIRMAN: My experience just with other territories where there have been successful no-confidence motions is that invariably a minister defects. Invariably. So, I'm not particularly fussed about this.

I think there's a very strong argument that one has to find the balance between the ability to turn out a government which has lost support amongst its own supporters, on the one hand, and preserving a certain amount of stability on the other. That's the balance one needs to try to strike.

HON. D. KURT TIBBETTS: And Mr. Chair, even though — even though I asked and you said no, everybody else has so I will, quickly.

It is obvious, sir, that in the operations of the Legislative Assembly if you have every single elected member outside of the Cabinet not supporting the Cabinet, the Cabinet would have to do something because they couldn't function because they would get no bills passed. That's all I was saying.

THE CHAIRMAN: Exactly.

All right, let's move on.

Section 66 I hope is all right.

Section 67?

68?

69 (1) we agreed we were going to move to 59 yesterday.

HON. W. MCKEEVA BUSH: Mr. Chairman?

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: Just on Section 68, perhaps it would be good to include a deputy in the lineup of the Opposition, too.

A MEMBER: Your microphone is off.

HON. W. MCKEEVA BUSH: Sorry. I am saying that perhaps it would be good to include a deputy in the lineup of the Opposition. I don't know if you would have any problem with that, but it's just a matter of how we're doing business so...

THE CHAIRMAN: Yes. I seem to remember we had... if you just bear with me for a moment. I think the draft of 2003 had something about this because there's something banging away in the back of my head.

Yes. In my copy of the 2003 Draft — I'm very glad that my memory was correct here — I have got in a suggested subsection which was not actually in the 2003 Draft, but I think resulted in debate in the Legislative Assembly afterwards.

But the text I have written down in pencil is as follows, and it would come after (5) — or actually it would come after (4) actually. It is this: **The Governor, acting in accordance with the advice of the Leader of the Opposition, shall appoint a deputy Leader of the Opposition from among the elected members of the Legislative Assembly in opposition to the government.**

HON. W. MCKEEVA BUSH: Yeah.

THE CHAIRMAN: We would have no problem with that if you would have no problem.

HON. W. MCKEEVA BUSH: Certainly that's what we would proffer, sir.

HON. V. ARDEN MCLEAN: Mr. Chairman, like I said yesterday, there has to be some criteria other than in the Governor's opinion the person who is — there has to be another means of mechanism, such as representation to the Governor.

HON. W. MCKEEVA BUSH: By who?

HON. V. ARDEN MCLEAN: By the members other than the government to appoint a Leader of the Opposition. They have to express their support, their confidence in the Leader of the Opposition before — it should not be the opinion of the Governor, in the opinion of the Governor who has — who is —

THE CHAIRMAN: Are you looking at 68 (2) (a), Arden?

HON. V. ARDEN MCLEAN: Yes. Yes.

THE CHAIRMAN: I'm not sure that the words "in the opinion of the Governor" are necessary here because — I think you have a point because (a) deals with appointing the leader in the Assembly of any opposition political party whose numerical strength is greater than that of any other. Then (b) deals with the situation where it appears to the Governor there is no such party but there is an elected member who would be acceptable as the leader to the majority of the members in opposition of the government. And then I think in the third one, in **(c) if it appears that the government there's no such person then the Governor should appoint the Leader of the Opposition that person who in his or her opinion would be acceptable to the greatest number.** I think that's a sort of tiebreaking where you would need to have "in the opinion of the Governor".

HON. V. ARDEN MCLEAN: Yeah, but Mr. Chairman —

THE CHAIRMAN: So we'll take it out of (a).

HON. V. ARDEN MCLEAN: Yeah. Mr. Chairman, my argument is founded on Section 50, which I hate to go back to, 51 where the Governor appoints the Premier on recommendation by the majority of the party that got the most — that got the majority of the legislature. So I don't see no reason why it should not be styled on that basis, where the majority of the Opposition members go to him or her and recommend a Leader of the Opposition. So it could just be — (a) is left and remove —

THE CHAIRMAN: Yeah, the equivalent of Section 50...

HON. V. ARDEN MCLEAN: One.

THE CHAIRMAN: 52 actually.

HON. V. ARDEN MCLEAN: Oh, it's two. Sorry. Sorry. Sorry. Sorry. And that's all we really need for the appointment of the Leader of the Opposition. There's no need to do (c) — no — there's no need to do 68 (b) and (c).

THE CHAIRMAN: No, you need — you need (b) and (c) in case there is no party.

HON. V. ARDEN MCLEAN: Pardon me?

THE CHAIRMAN: You need (b) and (c) in case there is no political party.

HON. V. ARDEN MCLEAN: Well, it should still be, Mr. Chairman, with respect, it should still be on recommendation —

THE CHAIRMAN: Okay.

HON. V. ARDEN MCLEAN: — of those who are elected whether there are four, five parties or not. But they're not the majority party. It should be a recommendation.

THE CHAIRMAN: Okay, I'll do that. Same sort of language as in Section 50 (2).

HON. D. KURT TIBBETTS: So, Mr. Chair?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Just quickly in summary, all we are seeking, as Minister McLean has explained, is that there is a process by which it is clear that the majority of elected members who are not the government recommend an individual because how it is worded now, the Governor's opinion may just be that.

THE CHAIRMAN: Yeah, okay. Good. That's understood. Let's move on.

Now is there a section — is there a draft section on referendums? I hope so.

PROFESSOR JEFFREY JOWELL: Yes, it is — it is being drafted at this very minute.

THE CHAIRMAN: Okay.

PROFESSOR JEFFREY JOWELL: It had been drafted; there were some amendments made, but it's on its way.

THE CHAIRMAN: On its way. So let's make a note to come back to that.

Section 71? I noticed in Section 71 in the middle (6) and (7) there are references to... right, that's agreed.

Section 72?

Section 73?

74?

75?

76?

77?

HON. D. KURT TIBBETTS: Wait a minute, sir. 74 (2), sir.

THE CHAIRMAN: 74 (2), yes.

HON. D. KURT TIBBETTS: Do we have to revisit that?

THE CHAIRMAN: Yes, I think we do. It says 18 members. What's the quorum you want?

HON. V. ARDEN MCLEAN: Simple majority.

THE CHAIRMAN: Ten.

A MEMBER: Ten.

HON. V. ARDEN MCLEAN: Well, why put numbers in there?

HON. CHARLES E. CLIFFORD: The numbers might change.

THE CHAIRMAN: Shall consist of a majority of ...

HON. V. ARDEN MCLEAN: A majority, yes.

THE CHAIRMAN: A majority of the ...

HON. V. ARDEN MCLEAN: Yeah, because we don't know when we're going to get the 18 or the 15.

HON. ALDEN M. MCLAUGHLIN, JR.: A majority of those present.

[laughter]

THE CHAIRMAN: A majority of the members of the Legislative Assembly.

And just to — just as a related point there, if we turn back to Section 60 on page 48... on page 48, Section 60. Then if you turn over the page to (3) this is where a law is passed to increase the number of elected members of the Assembly. It says: **(3) a law made in pursuance to (2) shall provide for the quorum.**

HON. V. ARDEN MCLEAN: There's no need for that.

THE CHAIRMAN: There's no for that I think if we have...

HON. V. ARDEN MCLEAN: If we are making provisions for the quorum elsewhere, there's no need to make a law.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Mr. Chairman? Mr. Chair?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Just quickly — and, again, this is perhaps just style — page 56 quickly, if you don't mind. It won't take a second. 71 (7). Are we “composing” a Finance Committee or is it “comprised” of?

THE CHAIRMAN: Sorry, just a moment.

HON. D. KURT TIBBETTS: **The Finance Committee shall be composed of...** Page 56, 71 (7).

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: I'm just asking you are we composing a Finance Committee?

THE CHAIRMAN: You don't — well, it's up to you. I'm not insisting. This comes from your draft.

HON. D. KURT TIBBETTS: I understand. We just noticed it.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: It sounds better to be comprised of.

THE CHAIRMAN: You could leave this for Standing Orders if you wanted to.

HON. V. ARDEN MCLEAN: No, no, we're talking about the word "comprised" or composed.

HON. D. KURT TIBBETTS: The Finance Committee shall be composed of...

THE CHAIRMAN: Shall comprise.

HON. D. KURT TIBBETTS: Yeah. That's all we're saying.

THE CHAIRMAN: And then the reference in the next line to "minister of finance", minister responsible for finance because we made the change yesterday.

HON. D. KURT TIBBETTS: Yes.

THE CHAIRMAN: And we do the same in (6).

Can I just for a moment go back to tidy up one point on quorum of Cabinet, because the — if we delete Section 60 (3), because it's not necessary if the quorum for the Legislative Assembly is stated to be a majority, okay? Then there's the question of what happens to the quorum in the Cabinet if the number of ministers increases? And at the moment the number in the quorum in Cabinet is stated to be four. Where is it, Susan? Section 47 (4).

HON. D. KURT TIBBETTS: So are we deleting 60 (3)?

THE CHAIRMAN: Yeah, we're —

HON. D. KURT TIBBETTS: We're deleting that?

THE CHAIRMAN: It's not necessary —

HON. D. KURT TIBBETTS: Right. I'm with you.

THE CHAIRMAN: If — if we sort out...

HON. D. KURT TIBBETTS: 47 (4).

THE CHAIRMAN: 47 (4) in the same way I suggest as we do with the other one, say —

HON. V. ARDEN MCLEAN: But that would be (3).

THE CHAIRMAN: If there are less — if there are less than a majority of the members present.

HON. V. ARDEN MCLEAN: Yeah. Present?

THE CHAIRMAN: Well, that's what it says here. **No business shall be transacted at any meeting of the Cabinet if there are less than four members present** it says at the moment, you see.

HON. V. ARDEN MCLEAN: But which is a majority of seven?

THE CHAIRMAN: Yeah, so the question is —

HON. V. ARDEN MCLEAN: Take it out and say majority.

THE CHAIRMAN: Less than a majority.
Now, there's a further question here —

HON. D. KURT TIBBETTS: Can we say —

THE CHAIRMAN: — which you might have a view on.

HON. D. KURT TIBBETTS: Can we say it in a positive manner rather than a negative manner?

THE CHAIRMAN: Majority —

HON. D. KURT TIBBETTS: But that's just for you to think about. Go right ahead, sir.

THE CHAIRMAN: Yeah. No, the substantive point is that for the purposes of that quorum do you want to specify a majority of elected?

HON. V. ARDEN MCLEAN: Yes.

THE CHAIRMAN: In other words, the majority of ministers are present.

HON. V. ARDEN MCLEAN: Yeah, because nobody else votes.

HON. ALDEN M. MCLAUGHLIN, JR.: But — I was going to say it doesn't matter, but I suppose it does because the other two members can't vote.

THE CHAIRMAN: No, but —

HON. V. ARDEN MCLEAN: But they could be present.

HON. ALDEN M. MCLAUGHLIN, JR.: But they could conspire with two or other ministers who are —

HON. D. KURT TIBBETTS: To hold a meeting?

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah, so we don't need it.

THE CHAIRMAN: Conspire?

[laughter]

THE CHAIRMAN: The Attorney General never conspires.

HON. ALDEN M. MCLAUGHLIN, JR.: You get my drift?

THE CHAIRMAN: I get your drift. So, do you want to say a majority of elected members? Majority of ministers.

MS. JULIANNA O'CONNOR-CONNOLLY: Mr. Chairman, when you're finished can we go back to 71 (1), please?

THE CHAIRMAN: Can I just — sorry, Julie, can I just make a note? A majority of ministers.

Sorry, Julianna. Welcome. How nice to see you again.

MS. JULIANNA O'CONNOR-CONNOLLY: Thank you. And I did pass a note. For the record, I had a prior commitment with the schools on the first day, and yesterday I couldn't get a flight to Grand Cayman, but thanks for your welcome today.

On 71 (7) is there any particular reason why we've drafted it so that the chairman of finance who would now be the minister of finance would only have a casting vote which would result in a status quo, as opposed to him also having an original vote, seeing that that person would now be an elected member of the committee?

HON. V. ARDEN MCLEAN: In effect, it would be the same thing. If he got a casting vote and he had — if he had maintained his original vote he would still be status quo.

[inaudible comments]

THE CHAIRMAN: I mean I'm in your hands on this.

HON. D. KURT TIBBETTS: Can we have just one minute to discuss it, sir? Just one minute.

[pause]

THE CHAIRMAN: Right. Have we got a conclusion?

HON. D. KURT TIBBETTS: Yeah, Mr. Chair, the point is valid, so I mean in thinking it through there should not be an elected member regardless of where he sits — he or she — who is disadvantaged and disenfranchised by everyone else having a vote and he or she not having one. So, we're saying that the chairman should have a vote. The only other question we need to determine is should it be an original and casting vote. You see, what it has here is that the person doesn't have a vote, and if it's a tie they have a casting vote.

HON. ALDEN M. MCLAUGHLIN, JR.: Just give them a casting vote. That's all you need.

HON. D. KURT TIBBETTS: Well, the way this is they have a casting vote.

[inaudible comments]

HON. D. KURT TIBBETTS: But do you want the chairman to be able to vote twice? That's the question. I'm not trying to make it convoluted, but look at how it's worded as it is.

Mr. Chair, we won't be long, sir. We want to get it right.

HON. V. ARDEN MCLEAN: If you give him a casting vote he has two votes, his original vote and the casting vote as chairman. That's the question now.

HON. D. KURT TIBBETTS: You see, how it reads now it says **who shall not vote on any question unless the votes are equal, in which event he or she will have and exercise a casting vote.** So if you revert to what you said originally, do we leave in the casting vote? Mind you, if we don't leave in the casting vote the effect is the same. So we have to make sure we know...

[inaudible comments]

HON. D. KURT TIBBETTS: That's what I'm saying.

HON. V. ARDEN MCLEAN: But if you're tied with him having his original vote there is no vote.

[inaudible comments]

HON. D. KURT TIBBETTS: No, no, no, no, we just need to get it right. But that's all I'm saying, we need to get it right. Do we want the minister who chairs Finance Committee to have two votes? That's the question.

HON. V. ARDEN MCLEAN: He must have a casting vote as chairman.

HON. D. KURT TIBBETTS: But the question is, do we want him to have two votes?

HON. V. ARDEN MCLEAN: Yes, he must. If we are arguing that — Mr. Chairman, if we're arguing that he must have an original vote, then, we have put him in a — him or her in a position where ...

HON. D. KURT TIBBETTS: So he needs to have a vote.

HON. V. ARDEN MCLEAN: We have removed him and put him a chairman. He needs a casting vote. It just needs to say he has a casting vote. But it doesn't have to say that he does not have — that he has his original vote. He has a vote period.

THE CHAIRMAN: I must say I'm surprised to find this detail in the Constitution. I know it comes from way back, 2003. But I'm sure the Standing Orders should deal with the voting rules in committees, and then if they're found not to work very well then they can be more easily changed than so prescribed in the Constitution. So, I would suggest —

HON. V. ARDEN MCLEAN: Take it out.

THE CHAIRMAN: Take it out. Finish (7) with the phrase **and shall be chaired by the minister responsible for finance** full stop. Are you happy with that?

Good. Thank you very much.

We move on to 76.

HON. SAMUEL W. BULGIN: Mr. Chair —

HON. CHARLES E. CLIFFORD: Just before we cross that, the section on voting.

THE CHAIRMAN: Yeah.

HON. CHARLES E. CLIFFORD: Section 75 (4) **the Deputy Governor and Attorney General shall not be entitled to vote.** Obviously we agree on that.

THE CHAIRMAN: Yes.

HON. CHARLES E. CLIFFORD: And we assume it's consensus now —

THE CHAIRMAN: Yes.

HON. CHARLES E. CLIFFORD: — around the table, so I think that footnote could be removed where it says it is an outstanding point.

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: And, Mr. Chairman, on the 75 (2) on the matter of the Speaker not voting, I think we need to hash that out. But again, I think it's best left for Standing Orders for that.

HON. V. ARDEN MCLEAN: But this is as Speaker, you know?

HON. D. KURT TIBBETTS: That's what he's saying. Make the Standing Orders say so, not the Constitution.

HON. W. MCKEEVA BUSH: Yeah, the Standing Orders because the Speaker does have a casting vote when there's a tie. When there's a tie.

HON. D. KURT TIBBETTS: Okay.

HON. W. MCKEEVA BUSH: But, again, I think we need to leave these for Standing Orders, sir.

HON. D. KURT TIBBETTS: Yeah.

HON. W. MCKEEVA BUSH: I agree with you.

HON. D. KURT TIBBETTS: If I might? If I might, Mr. Chairman, I think this is here on the assumption the Speaker is from outside.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: We have that one in the parking lot.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: If we come to conclusion that is different from that at the end of the day, then what the Leader of the Opposition has just pointed out will definitely have to be looked at.

HON. W. MCKEEVA BUSH: But we still need — the voting needs to be a matter of Standing Orders.

THE CHAIRMAN: Well, the — I was just going to say, if you revert to the current Constitution whereby the Speaker can be elected from inside or outside, then you go to the current Constitution, Section 35 (2).

HON. D. KURT TIBBETTS: Casting vote.

THE CHAIRMAN: Says — yeah — **the Speaker or other member presiding shall not vote unless on any question the votes are equally divided** —

HON. D. KURT TIBBETTS: Exactly.

THE CHAIRMAN: — **in which case he shall have and exercise a casting a vote.**

HON. D. KURT TIBBETTS: Right.

THE CHAIRMAN: So, I think if you're content to eventually go back to the current Constitution, I think the logic is just to keep the same rule that you're familiar with.

HON. D. KURT TIBBETTS: So we make note of 75 (2) for when we deal with that?

THE CHAIRMAN: Yes. And then if you did that, if you went back to the current Constitution rule, (3) of 75 would fall away.

MR. MICHAEL BRADLEY: Mr. Chairman, what is the situation if there is an elected member as Speaker and there's a vote of no-confidence in the Premier?

THE CHAIRMAN: Well, in other Constitutions we have usually provided — it is usually provided that the Speaker does not have a vote, does not have a casting vote. Yes, I think so. But we're going to have to check.

HON. V. ARDEN MCLEAN: Michael, what kind of monkey wrench you throwing into these now?

[laughter]

[inaudible comments]

HON. D. KURT TIBBETTS: Mr. Bradley, you're saying something, sir?

MR. MICHAEL BRADLEY: Sorry. For the benefit of the Leader of Government Business, I raised with our chairman as to what the position would be if the Speaker was an elected member and a vote of no-confidence was proposed in the Premier. Would the Speaker not be entitled to vote if she —

HON. D. KURT TIBBETTS: To an original member —

MR. MICHAEL BRADLEY: [inaudible talkover] or would she be —

HON. D. KURT TIBBETTS: To —

MR. MICHAEL BRADLEY: Hmm?

HON. D. KURT TIBBETTS: To an original vote but not a casting vote. But we're doing a little bit of research, that's why I asked for it. And the point of the Leader of the Opposition about it being in the Standing Orders, we just want to see what obtains now with all of those sections.

THE CHAIRMAN: All right. We'll have to come back.

HON. D. KURT TIBBETTS: And by the way, since Mr. Bradley brought this up — and I'm not going to go into this issue — anything we can solve here we wish to solve here. We're not going to encourage anything carrying with us to London if we can solve it here, okay? Just telling you that.

THE CHAIRMAN: Right. We'll have a look at it —

HON. SAMUEL W. BULGIN: Mr. Chair, just one —

THE CHAIRMAN: We'll have a little bit of research over the lunch period.

HON. D. KURT TIBBETTS: Yes, sir.

THE CHAIRMAN: Sorry. Sam?

HON. SAMUEL W. BULGIN: One observation on a different point of course. 71 (10) —

THE CHAIRMAN: Yep.

HON. SAMUEL W. BULGIN: — says **standing committee to establish or will have the power to summon any minister, AG, public officer...** et cetera. Is it understood that this committee does not have the power to summon the Deputy Governor?

HON. V. ARDEN MCLEAN: But the Deputy Governor is a public officer isn't he?

HON. SAMUEL W. BULGIN: No, it doesn't say that. This says any public officer for which a minister has responsibility.

THE CHAIRMAN: Of a department or ministry... I think the Deputy Governor should be inserted in there, yes.

HON. ALDEN M. MCLAUGHLIN, JR.: We'd actually like to be able to summon the Governor, too, but perhaps that wouldn't find favour with you, sir.

THE CHAIRMAN: You'd like to summon the Governor?

HON. ALDEN M. MCLAUGHLIN, JR.: As well, yeah, because he has special responsibilities that we might want to ask him.

THE CHAIRMAN: Yes. But what there is provision for elsewhere is for the Governor to delegate to a member of the House how to deal with special responsibilities in the House.

[inaudible comments]

[pause]

THE CHAIRMAN: I think we should have a break because I think people are getting...

HON. D. KURT TIBBETTS: Mr. Bradley — we're doing a break, sir?

HON. EDNA M. MOYLE: Yes, we are.

HON. D. KURT TIBBETTS: Okay, fine.

RECESS

RESUMED

THE CHAIRMAN: Section 79.

Section 80?

Right. The next one we need to look at it is Section 77, Introduction of Bills. No problem there, I hope.

Section 78?

79?

Section 80? Section 80. Disallowance of Laws. And what I've done here is simply to... taking account of the points you made in the first round about disallowance, I've drafted this in exactly the same way as in the new BVI Constitution. The key point is that there's not an unlimited power of disallowance. Subsection (1) writes in, as in the new BVI Constitution, a requirement that there must be a period of time given for the Legislative Assembly an opportunity to reconsider the law in question. And as a matter of —

HON. D. KURT TIBBETTS: Mr. Chair?

THE CHAIRMAN: Yes, please.

HON. D. KURT TIBBETTS: Should there be anything in here ensuring that reasons are given? In other words, this is simply saying that we're not going to assent. Or rather that even though the Governor has assented that we're not going to accept. It could be presumed, but do we need to say anything about that? Are you dealing with 80 (1), sir?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Right.

THE CHAIRMAN: Yeah. No, I'm thinking about it.

HON. D. KURT TIBBETTS: Okay.

[pause]

THE CHAIRMAN: No. I mean, I can see the point. I'm just trying to think how it might be worked in.

HON. D. KURT TIBBETTS: Are we to presume, Mr. Chair, that where it says **who shall advise the Speaker of that period in order to give the LA an opportunity to reconsider the law in question**, should we assume that that's what that means?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Then I withdraw my comment.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: If you are satisfied.

THE CHAIRMAN: Yeah. I mean, as Susan just said to me, I mean, the whole system would not make sense.

HON. D. KURT TIBBETTS: That is what I was asking.

THE CHAIRMAN: Unless the problem that had been identified in London was not explained.

HON. D. KURT TIBBETTS: It's just that in this day and age, sir, it's very difficult to take anything for granted.

HON. V. ARDEN MCLEAN: Mr. Chairman, should that not also apply to 79?

THE CHAIRMAN: Well, I think in 79 it's pretty clear that the Governor — if the Governor returns a bill with proposed amendments they would have to be explained.

HON. V. ARDEN MCLEAN: We have — we have had situation here where no —

THE CHAIRMAN: Let me just deal with that.

HON. V. ARDEN MCLEAN: Okay, sure.

THE CHAIRMAN: I'm sure you could put in — this is 79 (1) with it **any amendments which he or she may recommend and the reasons for them**. Is that what you're — I think that's fine, 'and the reasons for them'.

Okay, so in 79 (1) we put in after the words "which he or she may recommend", we insert the words "and the reasons for them".

And in 80 (1)...

MS. JULIANNA O'CONNOR-CONNOLLY: Mr. Chair —

THE CHAIRMAN: With — sorry.

MS. JULIANNA O'CONNOR-CONNOLLY: While you're looking at 81 would you give due consideration to the insertion of perhaps two words

in the second line where it refers to the expiration of a period? Are there any objections to inserting “reasonable period”? And where it refers to in the third line “with respect to the Governor” can we put some catalyst in there for the time of advisement, whether we say “immediately” or “as soon as practicable” or something, so that we don't have a situation where for whatever scenario we could imagine we're caught in the middle of a time?

HON. D. KURT TIBBETTS: Mr. Chair, if the lady member doesn't mind, I want to add to that argument and go back to 79, but it's all to do with the same thing, just as you were talking about making the addition to 79 about the reasons and then going back to 80 to do the same thing. I don't want you to lose your train of thought. But I can envisage, Mr. Chair... I can easily envisage an occasion where 90 days could do all kinds of damage for a particular bill if it is — I mean, it is something that could be considered absolutely necessary, and because there is a disagreement either from His Excellency or — and by extension Her Majesty, and which means for that particular bill nothing will happen over that 90-day period.

I don't know where the 90-day period came from. It could well be our own saying — and I'm not arguing that — but in thinking about it around the table here now, 90 days might be a bit too long.

THE CHAIRMAN: Well, I think it was —

HON. D. KURT TIBBETTS: So, I think what the lady member was trying to get around is just leaving it up to whenever somebody feels like, but at the same time from the very beginning in 79 I think we need to — I don't know. His Excellency might have some comments on that with regards to that time period because I don't know — I can't sit where he sits to imagine what it would take.

THE CHAIRMAN: I think we discussed it at the last round, but, Governor?

GOVERNOR STUART JACK: I mean, from my limited experience here — and we haven't had many occasions when I've had to even ask myself the question whether something should be returned. It doesn't happen very often so I don't have a lot of experience. But there are just a couple of practicalities which mean there has to be a reasonable period of time. One of them is that sometimes the legislation is extremely long and complex, and with the best will in the world it's going to take a Governor a while to get through it. And if he did have — if a Governor, he or she did have any doubts might want to take their own legal advice or discuss it with the members or the relevant minister or whoever. And depending on their availability that might need a little bit of time.

But most commonly what seems to happen — and this has happened to me — is that you on reading you find minor problems with the text which are not substantive where something's gone wrong with the drafting. Now, they can be dealt with quite simply under the current rules and regulations.

HON. D. KURT TIBBETTS: And if I might —

GOVERNOR STUART JACK: But if it's something substantive you may need a period of weeks. Ninety days may be too long —

HON. D. KURT TIBBETTS: But if I might —

GOVERNOR STUART JACK: But you don't want to shorten it too much.

HON. D. KURT TIBBETTS: If I might interrupt His Excellency through you, Mr. Chair, just to say in practical terms, though, we must bear in mind that when a law is — yeah, a bill... well, whichever one is being assented to, before we get to that point that goes through the Cabinet, at which point in time the president, His Excellency, will have had a good stab at it from then, understanding that when it goes to the Legislative Assembly there may be changes. But also when the Governor is going — is to assent to a bill, the Attorney General advises after passage through the Legislative Assembly from the technical standpoint on whatever issues may arise, however that is. So, my only point is to add to what His Excellency has said, in practical terms I really don't see 90 days being necessary at all.

GOVERNOR STUART JACK: Sorry, could I comment on that further?

The Leader of Government Business has actually raised a very good point, which is that it goes through the Attorney General before it comes to the Governor for assent. And when it comes to the Governor for assent there is a covering certificate which summarises the legislation and gives the Attorney General's view as well as to whether the Governor can properly assent to it. And in doing so, the sort of issues that might prevent that — for example, if unwittingly — hopefully unwittingly — the Legislative Assembly was to pass some legislation which was not compatible with one of the international conventions or treaties to which the UK government was committed and had been extended to the Cayman Islands, the Attorney General would bring that to the attention of the Governor. And it doesn't happen very off I'm glad to say, but — so he needs — his staff and the Attorney General need some time, and often that can be several weeks. I mean, usually the vast bulk of the time between it being signed off by the Speaker and the clerk of the House and it being signed off by the Governor, the bulk of that time is the time

it has taken for the Attorney General's chamber to scrutinise it, which is understandable. So you've got to build that time in.

And then if — when it did get to the Governor, if there was still an issue, which is not impossible and has arisen, the Governor may need some time to further consult or to take advice himself. So I don't think you want to pair it down to say one month. I don't think that would be realistic. But maybe you don't need a full 90 days.

HON. D. KURT TIBBETTS: Would you suggest a time?

GOVERNOR STUART JACK: Sixty days. Let's ask the Attorney General his view because, as I say, his staff and he have an important part to play in this.

HON. V. ARDEN MCLEAN: Mr. Chairman, whilst the Attorney General is contemplating that question, I would bring members' attention to 81, under the Governor's Reserve Powers, where the Governor can... reserves the power not to assent to the bill — to a bill passed. And under 2 (b) the Governor gives it to Cabinet and there is a time frame which is reasonable and expedient that the Governor would expect from Cabinet to reply. And then (3), if any member of Cabinet does not agree he has 30 days to submit a statement in writing to the Governor — to the Governor who shall forward that to the Secretary of State. But what I was trying to do was put some time frames based on the proposal in 80 (1), the Governor's reserve power, see if those are acceptable, then it would be reasonable to have time frames in the other — in 80, in the disallowance.

GOVERNOR STUART JACK: Sorry, can I make another further point for why we want to allow adequate time, as expedient as possible but adequate time?

What you don't want is you don't want — because you haven't had adequate time to scrutinise things properly, that it goes through and then we get into a situation where it has to be disallowed because by that time the law is enforced and the potential consequences of subsequently disallowing a law are potentially much greater. It's better to get it all sorted out at the earlier stages. And hopefully it gets sorted out at the Cabinet stage because we all know sometimes things appear in Cabinet at rather short notice and there isn't time to — for everyone — or for the Governor anyway — to scrutinise something in detail before it's put — agreed by Cabinet and then submitted to the LA. And the Governor doesn't know what amendments take place in the LA until such time as it comes back for assent.

So, a lot of this is theoretical because it doesn't happen — in my experience these problems don't happen very often. And of course the presumption of the whole Constitution is that normally the Governor

would assent to these legislation anyway. It's only really contingency provisions for hopefully those very rare occasions when there's a problem.

HON. D. KURT TIBBETTS: Okay. Mr. Chair, I think on reflection, while we would like to seek a shorter time that perhaps given all the circumstances that are possible maybe 60 days is reasonable.

THE CHAIRMAN: All right. I think 60.

HON. D. KURT TIBBETTS: But — but should it not be in 79, first of all, that the Governor shall?

A MEMBER: Yes.

HON. D. KURT TIBBETTS: Because this is to do with return of bills. It says “may” as it is, and that means if he doesn't feel like next year is good...

HON. ALDEN M. MCLAUGHLIN, JR.: No, you —

THE CHAIRMAN: You don't want to oblige him.

HON. ALDEN M. MCLAUGHLIN, JR.: You don't want to say “shall” because that will oblige him to send every bill back. You don't want him to do that.

HON. D. KURT TIBBETTS: No —

THE CHAIRMAN: I have a series —

HON. D. KURT TIBBETTS: No —

THE CHAIRMAN: I have a series of suggestions.

HON. D. KURT TIBBETTS: Okay, let's hear them.

THE CHAIRMAN: Okay. 79 (1) substitute 60 for 90, and in the third line after “recommend” insert the words “and the reasons for them”. That's the first.

Section 80 (1) **a law assented to by the Governor may be disallowed by Her Majesty through a Secretary of State; but no law shall be disallowed until the expiration of a reasonable period notified by a Secretary of State to the Governor with an explanation of the difficulties perceived by the Secretary of State and the Governor — rather than “who” — and the Governor shall advise the**

Speaker of that period and those difficulties in order — sorry — **and the Governor shall forthwith advise** — see how I'm trying to help you? — **shall forthwith advise the Speaker of that period and those difficulties, in order to give the** Legislative Assembly **an opportunity to reconsider the law in question.** Good?

HON. D. KURT TIBBETTS: Mr. Chair, at case in any point in time you doubt, we know, at all times, sir, that you are trying to help us.

THE CHAIRMAN: Right. Thank you.

Good. I think if that's acceptable, then I think we've got another outstanding point cleared up, Section 80. So can we move to Section 81? Section 81? Agreed?

HON. ALDEN M. MCLAUGHLIN, JR.: No, sir. We believe — we believe that Section 81, sir, doesn't belong in this modern Constitution that we are trying to settle. Its genesis is much older, much less modern constitutional framework, which is the '72 Constitution that we had.

There are some problems we have with it. First, it doesn't reflect well, I think, on the stature of a legislature for the Governor to be able to force a piece of legislation through that legislature notwithstanding that the elected members don't want it to happen. And then there's this problematic phrase at the start: **If the Governor considers it necessary and expedient in the interest of good governance.** You know what we've said about that and its vagueness.

And then there's another problem from a democratic standpoint in relation to line four that the **Governor can do this notwithstanding any provisions of the Constitution or any law or Standing Orders.** We think that that just doesn't fit in the context of the Constitution which is supposed to govern all of these various matters in this way.

So, what we're proposing, sir... we're not saying that the United Kingdom Government through its Governor can't do — can't pass legislation in extreme circumstances if it thinks that it is appropriate in the Territory. We're certainly not trying to say that.

We've had a look at what Gibraltar has done, and we propose language similar to what they have in Section 34 of their Constitution and I'll read it. It will, if accepted, give the Governor the ability to enact legislation with the permission of the Secretary of State. But it doesn't go through this farce of forcing it through the Legislative Assembly against the will of elected members, which we think is undesirable and presentationally it's just very bad.

So it would read: **If the Governor considers that the enactment is necessary or desirable with respect to or in the interest of any matter for which he is responsible under Section 55 (1) but after consultation with the Premier it appears to him that the government is unwilling to support the introduction into the**

Parliament — or the LA, whatever we call it — **of a bill for the purpose for that... I lost my... support the introduction into Parliament of a bill for the purpose but the Parliament is unlikely to pass** — this has got two lines repeated.

The Governor may with the prior approval of the Secretary of State cause a bill for the purpose to be published in the gazette and may notwithstanding that the bill has not been passed by Parliament assent thereto on behalf of Her Majesty.

We think that is a much neater, much cleaner way of dealing with this sort of thing than appearing to force it through the Legislative Assembly against — and that would also create some reputational issues for the jurisdiction as well. It just looks bad. I mean it looks like there's a major fight between the Governor and the LA and the Governor's forcing something through the LA. It's much cleaner and much neater if in exercise of his executive authority and function the Governor with the approval of the Secretary of State just does it.

THE CHAIRMAN: I think — do you have a text that is a modified version of the —

HON. ALDEN M. MCLAUGHLIN, JR.: It's Section 34 of the Gibraltar Constitution.

THE CHAIRMAN: I see. But you haven't got any separate text — you are simply saying —

HON. ALDEN M. MCLAUGHLIN, JR.: No, I just marked this up. I just marked this up.

THE CHAIRMAN: Yes. Yes. Yes.

Well, I note — I note — I note the reasonableness of your proposal, and I think we just need to take some time — we'll take some time over lunch to think whether that's okay because the only difference in substance, really, is the question of scope. And the scope of the draft, Section 81 is good governance, the scope of the Gibraltar one is special responsibilities areas of the Governor. There's a difference in scope so we'll just need to think that over. But I'm grateful to you for making a reasonable proposal there. We'll give you an answer later.

All right. Let's zoom on.

82?

83?

HON. D. KURT TIBBETTS: 83.

HON. W. MCKEEVA BUSH: Mr. Chairman, on 83.

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: Subsection (2) where it says that... I'm just wondering whether — I know what they're trying to get across, but I'm just wondering whether it's the right wording: **and thereafter there shall be at least one session of the Assembly in every year** because a session is the year.

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: So maybe... I guess it's just the legalese of the wording.

THE CHAIRMAN: This provision is exactly the same as in the current Constitution.

HON. W. MCKEEVA BUSH: Yeah, but that was — that was drawn up the worst wording in the world. It came from Africa.

[inaudible comments]

HON. W. MCKEEVA BUSH: But in legislative terms a session is a year.

[inaudible comments]

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: So they go on to say at least one session of the Assembly in every year.

THE CHAIRMAN: Is your — do you have a problem with that or not?

HON. W. MCKEEVA BUSH: I'm struggling to — I've always had a problem with how it was written.

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: But maybe it can't be written any other way.

[inaudible comment]

HON. W. MCKEEVA BUSH: I know that's what they're saying but you're still not catching me.

Anyway, sir, I've lived with it for 24 years, I guess I can live with it for another 24 years.

[inaudible comment]

HON. W. MCKEEVA BUSH: Hey, you better try to reach some mileage first before you talk about —

[laughter]

HON. W. MCKEEVA BUSH: Remember what the Bible says. Let him that take off his armour brag but him that put it on, he can't do no bragging.

PASTOR AL EBANKS: Mr. Chairman?

THE CHAIRMAN: Pastor Al, yes.

PASTOR AL EBANKS: I'd just like to comment in relationship to (2), again, that some of the other hats that I wear in the community there has been concern expressed that the legislature would only be required to — and Mr. Bush's explanation about one session being an entire year.

HON. W. MCKEEVA BUSH: Yeah.

PASTOR AL EBANKS: But concern that this could somehow be interpreted to mean that they would only be required to meet on one occasion throughout the year. And, you know, there's been concern expressed about that, that there would be some regularity of meetings.

HON. W. MCKEEVA BUSH: Mr. Chairman, there is some concern as Brother Al says in regards to that whole thing, but we are now trying to make some changes to the Standing Orders that will order things better than it is. Mind you, it takes a good government to make a good government, but we are in the process of making some changes to the Standing Orders. Hopefully that will be done by the new — new session.

HON. D. KURT TIBBETTS: This obtains now.

PASTOR AL EBANKS: Well, if history is anything, if you get — again, the point that was made about a Premier or government that for whatever reason chooses to act in a certain way... I know that you have referendum and other matters in there, but I think again that it would not necessarily be inappropriate — I mean, I think the government by function probably has, what, three or four meetings every year within — or more, and I'm just saying some token amount other than one meeting in 12 months —

HON. D. KURT TIBBETTS: Right. Well, just —

PASTOR AL EBANKS: — would be desirable.

HON. D. KURT TIBBETTS: Right. Through you, Mr. Chair, just so that you will know, there are other pieces of legislation, not the Constitution, but there are other pieces of legislation which force meetings on a regular basis by way of certain timelines, and budget, Finance Committee, and all of those things, the whole framework makes it physically impossible for one meeting a year to meet all of those requirements. And it was simply that because of all of those other things — and I mean that, a myriad of things which need to occur — we just didn't want to argue about how often you put this in here because we didn't want for anybody to have any idea that whatever this says you don't have to do anymore.

So, when it says once a year what it really does is it stipulates something constitutionally, but at the same time when you revert to all of the other laws and all of the other pieces of legislation, it just... so, if you're talking about from standing outside the box point and just looking at it, then I don't really have a huge problem. But I just don't know what else you would put that would really satisfy.

THE CHAIRMAN: All right? I think the point is that it is rather — it is language which actually reflects the parliamentary practice in the UK where there is an annual session, which in the UK goes from usually from October to November to the following one, then there's a prorogation and there's a new session. But within that session there are obviously several meetings. In fact, it's in session most of the time subject to recesses.

I mean, if you — one possibility will be to add another subsection which prescribes — I'm only suggesting this — that the Legislative Assembly shall meet quarterly or meet at least every three months, something like that. Now, if that accords with your practice that means... you know, this is within a single annual session.

[inaudible comment from Leader of Government Business]

[inaudible comment from Pastor Al Ebanks]

THE CHAIRMAN: Would you see any objection or value in having a (3) saying that the Legislative Assembly shall meet at least once every three months?

HON. V. ARDEN MCLEAN: Mr. Chairman, our Standing Orders makes provisions for quarterly meetings within the sessions.

THE CHAIRMAN: Yeah.

HON. V. ARDEN MCLEAN: I don't see how we could — it would be in furtherance of having meetings if it's in the Constitution. But maybe — maybe I need to take that back because you could get a Premier who decides to not follow the Standing Orders and don't meet for a whole session, have no meetings for a whole session. That is possible.

Now, I don't know how Misick suggested it, but it had to be in conjunction with the Governor because he has — he has prorogued until April. And I'm only using that to say that there is — there may be some merit to Pastor Al's argument.

THE CHAIRMAN: Well, I think if it's a matter of — I can see that an ordinary member of the public reading this could say, 'Oh gosh,' you know, 'they only meet once a year and then there could be another year's gap.'

So, I would have thought there might — Hmm?

HON. D. KURT TIBBETTS: Suppose physically something happens and [inaudible – microphone not turned on] What I'm saying is from a practical standpoint if we included that in the Constitution and we ended up that it so happened that certain things were happening and in that quarterly period you went over by a week, ten days or two weeks before you actually physically met, then what's the answer?

[inaudible comment]

PASTOR AL EBANKS: Mr. Chairman, I just simply say that I think it's an important point and, you know, again, those that are in Parliament understand the function of it.

[inaudible comments]

PASTOR AL EBANKS: Again, I think — I think something other than the one —

HON. W. MCKEEVA BUSH: You see —

[inaudible comments]

PASTOR AL EBANKS: But we leave that to you all.

HON. W. MCKEEVA BUSH: Mr. Chairman, I hear what Pastor Al is saying about what perceptions are, but we can't — we really can't operate governance on perception all the time, and most time either. But I understand because people say so to me.

But I think it's good enough for the Constitution to say that, and then our Standing Orders spells out and gives the flexibility for the government to be able to call the Assembly together. Because as the Leader of Government Business has said, there are times when — and I'm glad they found that out — that when you have to do things, you know, that not falling in normally.

HON. D. KURT TIBBETTS: Mr. Chairman — just quickly. Mr. Chairman, what if there was just something quickly referring to the Standing Orders which would set out the — in other words, say that — say something in it that the Standing Orders will dictate?

THE CHAIRMAN: Well, one could — one could certainly do that. I was just going to — a thought came into my head and I would like to suggest it and then suggest that you think about it and maybe discuss it over lunch and come back.

But instead of (2), because I can see that its meaning is confusing and the Leader of the Opposition has raised his long-standing concern about the wording. What if instead of this it said... leave out the whole of the first one and a half lines and start: **there shall be at least one session of the Legislative Assembly in every calendar year, and the Assembly shall meet — and within each session the Assembly shall meet at least twice in each calendar year.** At least twice.

So, that would be very simple. Of course, Standing Orders could provide for more meetings than twice but the constitutional minimum would be twice in each calendar year. And then the public would be able to say, 'Well, there is at a minimum twice a year our elected Assembly will meet together and there cannot be a gap, that long gap.'

HON. W. MCKEEVA BUSH: Some of that wording is good, but, Mr. Chairman, what I don't — what I wouldn't want to happen is that we leave the impression that government only have to call it twice. But the other wording I think really works well because it's very clear.

HON. V. ARDEN MCLEAN: Mr. Chairman, one of the things with the — and the chairman of that is not here — with the Standing Orders right now is looking at having — proposing to the membership of the legislature to have continuous meetings, that is once per week. So, I don't know how — if that is acceptable, which is what is practiced throughout the majority of the Caribbean countries — like a Monday or Wednesday or something like that but if it goes into the next day. So what we would have is a running agenda, eh? You put things in the agenda and then they run and then the government set the time. But I don't know how that would work if we say it has to meet at least twice within that session.

THE CHAIRMAN: Well, I'm just suggesting randomly a minimum to reassure the public. You could word it in a different way. I mean you could say at least — shall meet at least three times a year, meet at least four times a year.

Anyway, can I leave you with a thought and you can discuss it more over lunch because I think we've done it to death for the time being?

HON. W. MCKEEVA BUSH: Yeah.

THE CHAIRMAN: I mean as a minimum, in order to simplify the drafting of this subsection, I would suggest deleting the first one and a half lines and — all the way up to “thereafter” delete all that and simply say: **there shall be at least one session of the** Legislative Assembly **in every calendar year**, full stop for the time being. The question is whether one wants to add anything about the number of meetings within a session. I leave you to think about all of that. Delete all the “so however that”. I can see the Chamber of Commerce applauding me now. Simplifying the —

MR. EDDIE THOMPSON: Mr. Chairman, at the risk of beating this to death, and just from my personal perspective, we here in the Cayman Islands have enjoyed a unique situation in that we've had relative, you know, non-events that's taken place on this Island without any major significance compared to other countries. And so, in taking what both the Government and the Opposition have said, we definitely, in my view, should be careful about restricting or setting a minimum amount, simply because today we're at peace, tomorrow our neighbours may not be, and we have a whole different situation at hand. And whatever growing global conflicts that we have, that's one thing that I don't know that we're considering fully that would affect the amount of meetings we would have to have. Add to that, I don't think that any reasonable government would expect to be re-elected should they not be representing their people more than once a year.

THE CHAIRMAN: Yes, quite so. Quite so.
Susan, yes?

MS. SUSAN DICKSON: Thank you.

I just wanted to make one more point, picking up on what Minister Arden said, which was this point about — he mentioned TCI and prorogation, and their Constitution is drafted like this. And if you look at 81 you see that the Governor has to act in accordance with the advice of the Premier to prorogue the Legislative Assembly. So with that provision the Governor hasn't a choice. He has to act on the Premier's advice.

And then with the combination of that and what we have in 83 (2), it means that the Assembly could be prorogued for up to a period of a year. I notice in the BVI Constitution they provide that the House has to meet within a period of three months. So a period of not more than three months passes between the last sitting in one session and the first sitting in the next session, which means a prorogation couldn't last for longer than that because at the moment you do have this situation. I mean, it may be in practice that they'll have to reconvene to pass financial legislation or whatever but, you know, based on this you could prorogue for up to a year, on the advice of the Premier.

[inaudible comments]

MS. SUSAN DICKSON: Twelve months can pass between the last sitting in one session and the first sitting in the next so it's not prorogued.

HON. W. MCKEEVA BUSH: But what is being — if you're moving to 84 we have some fundamental problems with... if you're moving to 84, Mr. Chairman.

THE CHAIRMAN: Yes, okay.

HON. W. MCKEEVA BUSH: Because we want to look at it. I don't have wording for it, but it gives rise for concern, knowing that things can happen about the prorogation and dissolution on the advice.

HON. D. KURT TIBBETTS: Your problem is on the advice of the Premier?

HON. W. MCKEEVA BUSH: Oh, yes.

HON. D. KURT TIBBETTS: Or acting after consultation with the Premier?

HON. W. MCKEEVA BUSH: Acting in accordance with the advice of the Premier and in proclamation —

[inaudible comment by the Leader of Government Business]

HON. W. MCKEEVA BUSH: And I didn't give it no wording.

[inaudible comments]

HON. W. MCKEEVA BUSH: Yeah, but if you take it to extremes, let's say, and the thing that something can happen, the Premier — as has happened in other territories — can tell the Governor, 'Look, these are a

bunch of renegades I have to deal with, prorogue this House now,' and all that sort of thing. Anything can happen.

So, as I said Mr. Chairman, I don't have wording —

HON. D. KURT TIBBETTS: [inaudible – microphone not turned on]
What are you suggesting?

HON. W. MCKEEVA BUSH: I'm suggesting we have a rethink on it.

HON. D. KURT TIBBETTS: What obtains now [inaudible – microphone not turned on]

[inaudible comments]

THE CHAIRMAN: **The Governor may at any time by a proclamation prorogue or dissolve the Assembly.**

[inaudible comment by the Leader of Government Business]

HON. W. MCKEEVA BUSH: Sorry?

HON. D. KURT TIBBETTS: **The Governor may at any time by proclamation prorogue the** Legislative Assembly. That's what happens now.

[inaudible comments]

THE CHAIRMAN: Would the concern be — would your concern, McKeeva, be met if (1) said “after consultation with” instead of “in accordance with the advice of”?

HON. W. MCKEEVA BUSH: Consultation?

HON. D. KURT TIBBETTS: Consultation for both?

HON. W. MCKEEVA BUSH: Yes. Yes. Yes. I guess he has to consult the Premier.

[inaudible comments]

HON. W. MCKEEVA BUSH: I hear your —

THE CHAIRMAN: Right.

[inaudible comments]

THE CHAIRMAN: So 84 (1) will say: **acting after consultation** —

[inaudible comments]

THE CHAIRMAN: **The Governor acting after consultation with the Premier may prorogue the Legislative Assembly annually.**

HON. D. KURT TIBBETTS: Are we going to say shall do so annually?

THE CHAIRMAN: Well, if it's acting in consultation the Governor retains some discretion because it's not binding — the Premier's advice is not binding. So...

[inaudible comments]

THE CHAIRMAN: The Governor acting after consultation with the Premier...

HON. D. KURT TIBBETTS: May prorogue the Legislative Assembly.

THE CHAIRMAN: May prorogue the Legislative Assembly and shall do so...

HON. D. KURT TIBBETTS: Annually.

THE CHAIRMAN: Annually. Shall do so annually...

Right. Can we move on?

85?

86?

87?

And when we come to 88, this is... I'm on tenterhooks to know what the position is now about the single-member-constituencies issue, unless you're going to drag —

PROFESSOR JEFFREY JOWELL: Just before we enter those dark and dangerous waters, could I suggest that Public Accounts Committee, Section 87, be taken in those other institutions supporting constitutional democracy, or however you phrase that particular section with the Human Rights Commission and —

THE CHAIRMAN: Oh, you want to move it to...

PROFESSOR JEFFREY JOWELL: I would suggest that that should be one of those bodies that...

THE CHAIRMAN: Moved to part... whatever it is.

PROFESSOR JEFFREY JOWELL: Yes.

THE CHAIRMAN: Part IX. Part VIII.

PROFESSOR JEFFREY JOWELL: The Leader of Government Business has corrected me on this and he's absolutely right. It's part of the committees of the House —

THE CHAIRMAN: Right. Leave it where it is.

PROFESSOR JEFFREY JOWELL: — rather than part of special commissions. I withdraw my —

THE CHAIRMAN: Okay, thank you.

GOVERNOR STUART JACK: Mr. Chairman, just a point of clarification. Does the phrase “Authorities” here cover government-owned companies?

THE CHAIRMAN: Does cover what? Sorry?

GOVERNOR STUART JACK: Does the phrase “Authorities” — there's a reference here to dealings of all authorities. Does that encompass government-owned companies which is something which the legislature might want to — the PAC might want to scrutinise.

THE CHAIRMAN: All authorities, offices and departments of government and of all courts, as well as all corporations owned by the government or something like that? And all — as well as all government-owned companies. Companies.

Right.

[inaudible]

THE CHAIRMAN: Right. Single-member constituencies. I'm determined to have a discussion of this, and I hope a resolution before lunch. A half a day later than I hoped we'd get to this.

HON. D. KURT TIBBETTS: Say that again, sir.

THE CHAIRMAN: Half a day later than I had hoped. We've arrived at near the end of Part VII, although there are still — there are always several sections to go. Anyway, shall we try and — are there any comments on the drafting of Section 88 —

HON. W. MCKEEVA BUSH: Yes, Mr. Chairman.

THE CHAIRMAN: Okay. Go ahead.

HON. W. MCKEEVA BUSH: Mr. Chairman, on 88 we have put forward our position on this matter, and we hold to that position that this makeup — new makeup as proposed will do no real good for the Islands except cost us money that we don't have.

While I guess an argument could be made that this is democracy and that is what has been made, there are other areas, countries where we have the same system, or similar system to what we have here in multiple constituencies. And I have always advocated that it is best for these Islands if, rather than jumping in headlong we take our time and move to this — to get this at a later stage as — and take a leaf out of Bermuda's book, because if you talk to them they've had — they're still not finding it the best form of election and the best for the Island, in fact, is what I'm told.

So I — knowing what I know about what the expectations are of our people — and expectation are rising — I just can't see how this is going to help us, better us. What good is it going to do for government? What good is it going to do for the people? The people will simply be worse off because you're giving them one representative instead of having three, four or two. And for those districts that have one, well, that is simply the way it is.

[inaudible comments]

HON. W. MCKEEVA BUSH: That's the way — Mr. Chairman, I know that there are two — at least two members here who are single members, but they understand and they can't be —

A MEMBER: No.

HON. W. MCKEEVA BUSH: Well, I know you mightn't have no understanding on some things, but nevertheless, you have understanding on this. That is only because you are that size district why you only have one representative.

[inaudible comments]

HON. W. MCKEEVA BUSH: Well, create — well, go have more children.

[laughter]

HON. W. MCKEEVA BUSH: I am not going to support this, sir, because it just can't... it's just not good for these Islands, and as I said, it's just going to cost us more money. And if you think it's not, then go ahead. I — maximum time that I have left being a representative, if I'm re-elected,

Mr. Chairman, could be one full term, one full term, but the people of these Islands will go on forever. And some on my left extreme want more time, I know that, and they are younger. So if they believe that this is good for this country, just you wait and see, Mr. Chairman.

HON. V. ARDEN MCLEAN: Mr. Chairman, I don't know if I'm going to advance this argument any further —

HON. W. MCKEEVA BUSH: No.

HON. V. ARDEN MCLEAN: — by reiterating what I have said since I have been advocating for since Christ were on the [inaudible] beach.

[laughter]

HON. V. ARDEN MCLEAN: I have — I grew up in a single-member constituency. The people of East End are better off individually than anyone in Bodden Town, Cayman Brac, West Bay and George Town because —

HON. W. MCKEEVA BUSH: Why?

HON. V. ARDEN MCLEAN: They are better off from a political perspective because they know who their representative is. They don't have to try to find out which one they have to go to.

So, I have always advocated for a single-member constituency, but it — it's unfair, it's highly unfair to the people of East End and North Side not to have a choice, too. They pay the same tax; they should be treated as equal to their counterparts in West Bay or anywhere else that has multi-member constituency.

Now, there is a position that many in this country has taken, and I'm going to throw it out again here today, which is that many wants to be a part of the Island-wide process, such as we have in Montserrat and we also employ in BVI, which is at-large votes — constituencies. Now, I don't know if that's the answer. I know in BVI — in Montserrat it's eight and everybody votes for eight, but you only have 5,000 population, too, and that's one big constituency. In BVI you have I think it's 11 or nine, or 10 single-member constituencies, and then you have three at-large candidates that is elected.

I don't know if that's the answer, but I do know that there needs to be broad... some equality in the representation for the people in East End and North Side. I think it's fair. I think it's reasonable.

The people of West Bay or George Town are no less capable of understanding that they only go to the poll and vote for one than the people of East End. The people of East End has been doing it all their life, and North Side.

So, I think there needs to — we need to come up with some formula that gives them a feeling of belonging — I think Michael used the other day the word “belonger”. But the feeling of belonging to this country and being treated fairly.

And I ain't going to try to advance it any further than that. But I know many people is not going to assist, or they think it's not going to assist, those who are politicians and would-be politicians, and I believe that is the opposition to a single members constituency in this country. But I believe it would be — it would promote democracy and it certainly would give the people a clear indication and idea of who their representative is. But people are running away from responsibilities. That is what is causing this Opposition.

HON. W. MCKEEVA BUSH: Mr. Chairman, I don't agree with anything much that the speaker just completing said. I'm sure that we would like to be on an equal footing, West Bay would like to be on an equal footing with East End. We have four members, they have one, and they have a Cabinet minister. That's not the way it works.

HON. V. ARDEN MCLEAN: Get out the Opposition.

[laughter]

HON. W. MCKEEVA BUSH: Soon. Soon.

I just can't see where we're talking about equality. And I've been trying to search my conscience to see if this gonna make us better, and I just can't see.

I'm sure that the people of East End or North Side do not want to spend more money, and this is the end result of this proposal. We better understand that.

If you believe that if we stood up in West Bay — and right now we have one post office — that you're not going to want four when you're finished — and they might want five — you making a big mistake and it's going to be the same — it will be the same in other Territories. You're going to be saying, ‘I want a primary school in this district’ and the representative is going to be duty bound to go and fight for it to save his political hide.

Right now when you're talking about responsibility, we have responsibility because... I can't do anything unless I consult my three colleagues in the district. The single member only consults himself and that's what he thinks is right.

THE CHAIRMAN: Sorry to interrupt. Plainly we're not going to —

HON. W. MCKEEVA BUSH: And, Mr. Chairman — no, we're not going to, but I want to say about Montserrat — Montserrat is because they've

had a particular situation. And BVI, when you talk to BVI they say, 'We wish we hadn't gone that route'.

THE CHAIRMAN: Yes. Plainly we're not — thank you for all those views. We're no further forward than we were in September or in 2003. So, we will have to put this down as one that we have to try to resolve at the last round and move on.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman?

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: There is something as we've talked about it — let me go back to my original position which I keep repeating some people say far too often.

The most important part of this exercise, the most important objective of this exercise I believe is to redefine the relationship, the constitutional relationship between us and the United Kingdom so that we have a better working relationship, one which is — better regulates the way government operates and functions, gives us a better system of governance.

These other issues are what I call local issues, and by that I'm not trying to say that they're unimportant issues. But they are certainly much less important to the people of these Islands than is the overall relationship between us and the United Kingdom, and what their elected government can and cannot do, and how much authority the Governor can exercise without consulting with or without agreement of his Cabinet. Those things are increasingly matters of major importance to everyone who lives, works here, or has any interest in these Islands.

We have reached I believe — I hope a consensus in relation to how we add ministers to Cabinet and how we increase the number of elected members by using — by putting in the Constitution a provision which would allow the Legislative Assembly itself to increase the members of the House and consequently the members of Cabinet.

Perhaps we could reach an agreement in a similar way in relation to this exercise if we were to write into the Constitution a provision which would allow for — by legislation for the House to determine how districts or constituencies are provided for so that it wouldn't go into the Constitution; but if down the road the House was able to come to some view about a change to the present arrangement, it wouldn't — we wouldn't have to change the Constitution again. We could simply pass a law the way that we have the Elections Law, which would deal with the issue of how the Island is divided up for the purposes of elections.

And I float that as a possible way to reach a compromise on this issue because it really would be a travesty if this issue were the one that stuck out and prevented us from getting a document that everyone

around this table could actually get behind. I am most concerned that we wind up going to the UK — to a UK minister to argue over whether we have single-member constituencies or not. That is not going to impress her.

THE CHAIRMAN: Well, thank you.

I think the sort of compromise area I was thinking of tallies with that, because the status quo on the Constitution of the Cayman Islands is that in Section 28 (d) of the current Constitution it is a matter for ordinary legislation to determine the division of the Islands into electoral districts for the purpose of elections. So, under the current Constitution there is no prescription of how many constituencies and whether single member or multi-member, it's a matter for local legislation.

And if this had still been a matter of dispute by the time we got to London, I would have advised my minister that the way through is simply to keep the status quo and leave it for further consideration in the future by the elected representatives of the people, to determine for themselves whether a change is needed, and if so, what change and over what timescale.

So, if the Government and the Opposition are content to go with that, in other words, leave the current arrangements as they are, it is a matter for the Legislative Assembly to determine in the future — as it has been for decades past — then we certainly are not going to object.

I think just before I finish there's a knock-on question to this, and that is whether — if we went with that solution that's fairly straightforward. Section 88 would come out and there would simply be added in Section 94 a paragraph equivalent to 28 (4) (d) of the current Constitution saying the same words. So, amongst the list of matters which the legislature —

HON. D. KURT TIBBETTS: What section, sir?

THE CHAIRMAN: Section 94. 94 is the equivalent to Section 28 of the Constitution.

HON. D. KURT TIBBETTS: Okay.

THE CHAIRMAN: And it lists the sort of things that the legislature may by law provide for in connection with elections you see.

And one would simply put back in there — put in there a new paragraph using exactly the same words as Section 28 (d) of the present Constitution which are **the division of the Islands into electoral districts for the purpose of elections**. So, one would cover the point here. One would obviously take out Section 88.

But the subsidiary question is, if we did that we could either omit as well the next two sections on Electoral Boundary Commission and

review and alteration of electoral constituency boundaries which at the moment are drafted on the footing that there would be single-member constituencies. And my understanding is — well, the current Constitution of the Cayman Islands has no special provisions for a Constituency Boundary Commission. There was something added in 2000 to provide for a preparation for single-member constituencies, but that would fall away.

So the question is, in any new Constitution — I think it's a question for consideration whether you want to provide in a constitution for an Electoral Boundary Commission to be required to meet every so often and review the boundaries, or whether to leave that matter for the electoral law or leave it for ordinary legislation. That's the consequential question we have to consider.

HON. D. KURT TIBBETTS: Mr. Chair?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: Obviously this is new, and I'm pretty certain the Opposition would want to think about it. And maybe that's the next one for the parking lot because we don't have much space left, so that everybody has a chance to think about it for a little bit more sir.

MR. ROLSTON M. ANGLIN: Mr. Chairman, I just want to make something clear. What was it that the Leader of Government Business mentioned that the Opposition needs to think about, sir?

HON. D. KURT TIBBETTS: Not just the Opposition.

THE CHAIRMAN: No, they do, too.

HON. D. KURT TIBBETTS: Everybody.

THE CHAIRMAN: It's the subsidiary question —

HON. D. KURT TIBBETTS: I wasn't limiting it to the Opposition.

THE CHAIRMAN: — I just described. Okay? So, that's another one we'll have to come back to.

But so, we jump over.

MS. JULIANNA O'CONNOR-CONNOLLY: Mr. Chairman?

THE CHAIRMAN: 89 and 90.

MS. JULIANNA O'CONNOR-CONNOLLY: I agree with that obviously, but if we come back can I then reserve a right to comment on the Cayman Brac and Little Cayman situation as it relates specifically to what we're going to come back to?

THE CHAIRMAN: Yes.

MS. JULIANNA O'CONNOR-CONNOLLY: Okay.

THE CHAIRMAN: 91 — I hope 91 and 92 and 93 are all right with everyone. I have no note of outstanding points there or 94.

Moving into Part V.

Part V, the only issue I recall of being outstanding here, because I think most of this is accepted and the only new thing really is the Judicial and Legal Services Commission.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, before we move on and lest we forget.... Oh, it's fine. It's fine.

THE CHAIRMAN: Shall we try and do Judicial and Legal Services Commission before lunch, and then I think we'll be in good shape? I know there are things we're to come back to, such as your draft text on referendums, but I'd just like to have time to read that before coming back. But we will come back to it. I think it looks good at first reading. And then there are one or two other issues that we need to come back to as well.

So, shall we just have a look at Section 106, unless there is anything else before that?

And we have one — one point to raise here, and I have talked to my colleagues and indeed the Attorney General about it, and that relates to (1) (c) which at the moment provides that **two members of this new commission will be legally qualified and appointed by the Governor after consultation with representatives of legal professional organisations in the Cayman Islands**. And I recall we had a discussion of this at the first round; and there seems to me a risk with the wording as it is at the moment that there could be appointed under this paragraph practicing attorneys in the Cayman Islands who would therefore play a major role in sitting on questions of appointment or discipline or even removal of Grand Court judges before whom they may regularly appear — likewise magistrates, Attorney General, DPP, Crown counsel and so on — and that this would not be desirable in such a small jurisdiction. And that a preferable solution would be to... one possible preferable solution would be to write in words which made it clear that any such persons were not practicing advocates, not practicing in the Cayman Islands. So that would mean that they would have to be legally qualified, which I think is appropriate in a commission like this,

but not practicing. Therefore they're far less likely to be influenced by their day-to-day activities, as it were, and the people they come into relationship with. I don't know whether the Attorney General would like to add anything to this.

Sam?

HON. SAMUEL W. BULGIN: That particular — thank you, Mr. Chair. That particular formulation would certainly address the major concern that I have with it, because if you have practicing attorneys who sits on the commission or... sit on the commission, then have to appear before a judge, it would cause difficulties for both the attorney and the judge himself, especially in the context of the Cayman Islands where it's a very small jurisdiction and some of the judges are on contract that are up for renewal. And in addition to that this JLSC has power to discipline judges as well, so you could find a situation where a judge, a Crown counsel, a magistrate knowing that his or her contract is coming up for renewal could be less than robust with a particular attorney because that particular attorney in another month or so is going to adjudicate his contract renewal and so on and so forth.

But there is the other issue of course where a litigant knowing that a particular matter has been decided by a judge whose contract has just been renewed by a lawyer who appears before him, it could also cause a spectrum of impropriety. So I think either way it will address those concerns.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I have equal — on reflection I have equal concerns about the Chief Justice and the president of the Court of Appeal because my life has taught me that there are no such thing as cardboard men or women. And they are so close and, in fact, have direct responsibility in the case of the Chief Justice for the oversight of these judges that I worry really about their — their — I would be really concerned I think about their objectivity, because if the Chief Justice is dealing with a situation — and we don't have to caste again around for examples — is dealing with a situation where he's very dissatisfied with the conduct or behaviour of a particular judge and so forth as it relates to him, it is going to be very difficult I believe. And whether he's able to be objective is one thing but it will not be perceived that he's being objective in his handling of these matters in relation to a judge who has personally displeased him. So to be truthful I'm even more concerned about that than I am about the issue of a member of the bar.

PROFESSOR JEFFREY JOWELL: Could I ask —

THE CHAIRMAN: Jeffery, yes.

PROFESSOR JEFFREY JOWELL: Could I ask for clarification, whether the Attorney's objection lies in the fact that the Judicial and Legal Services Commission only discipline judges, et cetera, or does his objection also extend to the appointments function? Because it would seem that in terms of appointments you're talking about selecting people who are not yet judges, and there would be no — I can't see where the conflict of interest would necessarily lie. But in terms of discipline, I take the point he's making.

HON. SAMUEL W. BULGIN: Thank you, Professor. The point is, though, that unlike other jurisdictions our judges when they are appointed they don't enjoy a security of tenure until 70. A number of them, most of them for that matter, are on five-year contracts, so these contracts come up for renewal from time to time and those renewals would be dealt with by the JLSC. In other jurisdictions you don't have that problem because once a judge is appointed usually they're appointed until 65 or 62. Here they're appointed on contract. The magistrates, for example, are on two- and three-year contracts, the Crown counsel are on two- and three-year contracts, and so they come up for renewal from time to time.

So they might find themselves in a situation where Crown counsel is standing next to a defence attorney in an adversarial position and takes a position which offends him, and that person is then required to adjudicate on his contract renewal in another week or two. So you have a real sort of difficulty.

HON. V. ARDEN MCLEAN: But, Mr. Chairman, it extends also to the fact that if that judge, or Crown counsel for that matter, just recently appointed that person, there is — you know, there is a cloud that would always be hanging over their... 'Well, you know, I have to be grateful to this individual'. I'm not saying that will happen but the perception is there.

My concern with — I hear the AG talking about the two members, the two qualified members and the chairman as well, and I have the same concerns also. But mine extend a little further in that these non-practicing people — i.e. has just come out of the big firms or the firms or whatever — are usually still involved with these companies as directors, or have formed their own companies which whilst it may not be criminal — criminal stuff, it could turn into commercial difficulties when their companies are up against — or up against a particular — or engage on a particular case. So, where would we ever get — and this for the AG and maybe you, Michael — where would we ever get judges then of non-practicing professionals, lawyers, qualified lawyers to sit on it? We would have to bring them in from overseas.

And we certainly do not want to find ourselves in a situation where we have ourselves in — or have ourselves in that we still do, or does —

with CIMA, where we're paying them a couple hundred thousand dollars a year just to come sit for two meetings.

MR. MICHAEL BRADLEY: Mr. Chairman, I'm just waiting for somebody to raise the point that they're unhappy with political appointees, and we really are back at the drawing board again.

HON. V. ARDEN MCLEAN: They all fall into the same category because, in my view, the judiciary needs to maintain its independence, and you can't do that. That's like everybody talks about appointing the Speaker from on the outside. Who you think appoints the Speaker? The majority of the Legislative Assembly. Who you think the majority of the Legislative Assembly is? It's the government. It's the government that appointed it.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, this — Arden, you're not ready to step down yet. That would be a step down.

Mr. Chairman, I think — I think the important lesson from all of this is that it is wrong for us to presume simply because certain — certain posts or positions are held by certain people that they are going to be devoid of personal views and interests and biases. Whether it's the Chief Justice, or the president of the Court of Appeal, or some lawyer, or somebody who's been appointed on the advice of the Leader of the Opposition or the Leader of Government Business, what we must seek to do is to create the right kind of balance on this commission. And we ought not to walk down the road of saying, well, as long as they're judges you know, they're sacrosanct, you know, they're like God.

THE CHAIRMAN: I have a proposal to make.

HON. V. ARDEN MCLEAN: Okay.

THE CHAIRMAN: And that is this: this is a sort of completely different list, and it is 106 (1) at the moment.

HON. D. KURT TIBBETTS: You're not changing the heading?

THE CHAIRMAN: No. No, I'm just changing the composition.

HON. D. KURT TIBBETTS: Composition.

THE CHAIRMAN: Okay? That is that **the Judicial and Legal Services Commission shall consist of (a) — I haven't written it down — (a) a chairman and two other members appointed by the Governor acting after consultation with the Premier and the Leader of the Opposition from among persons who hold or have held high judicial**

office. High judicial office is defined at the end as “present or former judges”.

HON. D. KURT TIBBETTS: Former judges —

THE CHAIRMAN: Have held high official office. These are senior judges either present or retired. The Governor would appoint the chairman and two members from among people who hold or have held high judicial office.

Then —

HON. W. MCKEEVA BUSH: Judicial.

THE CHAIRMAN: High judicial office. So, this is three members appointed by the Governor — that's the chairman and two other members — who must have had senior judicial experience in their lives. And the Governor chooses them after consulting both the Leader of — the Premier and the Leader of the Opposition so that they can have a say in the matter.

And then two other members appointed by the Governor acting after consultation with the Premier and the Leader of the Opposition, neither of whom shall be a legal practitioner. So, there will be three members who would have senior judicial experience and two non-legal members to provide leavening and common sense to this body.

And there would be political input but not political determination in any of those —

[inaudible comments]

THE CHAIRMAN: Three, two. Three plus two. I am suggesting this just as something to think about.

[inaudible comments]

HON. W. MCKEEVA BUSH: So you're not saying that the judges must be on there? You're not saying that?

HON. V. ARDEN MCLEAN: They could be.

THE CHAIRMAN: I'm saying that —

HON. W. MCKEEVA BUSH: They could be —

THE CHAIRMAN: Sorry?

HON. W. MCKEEVA BUSH: They could be? The judges...

THE CHAIRMAN: The last two. No, the second — the last two you would keep — you would keep “neither of whom shall be a legal practitioner”.

[inaudible comments]

THE CHAIRMAN: Yeah. So, I'm suggesting — I'm suggesting, but this is only for you to think about — that all of these appointments, all members will be appointed by the Governor acting after consultation with the Premier and the Leader of the Opposition.

Now, I don't feel strongly about keeping 106 (1) (d) as it is, which is slightly different in that the two non-legal members would be appointed on the advice of the Premier and the Leader of the Opposition. So they would really be political nominees. If you feel that that would be preferable —

HON. W. MCKEEVA BUSH: Mr. Chair?

HON. ALDEN M. MCLAUGHLIN, JR.: The one difficult — sorry, Mac, if I might.

The one difficulty I have, the bit — as strongly as the AG feels about members of the bar not having any say, I feel equally strongly that it would be a huge omission, a void, not to have the views of people who have some experience, especially when we're talking about appointments in relation to judges, because they are the individuals who are on the sharp end of all of this and are usually better placed to make assessments about an individual's abilities and issues and so forth than anybody else. And to simply reserve it or to people who have held high judicial office I think would be a mistake. I would suggest that we include high judicial office, or high judicial or legal office, or something like that, which wouldn't preclude the appointment of a lawyer, because the way it's drafted now, lawyers would be...

[inaudible comment]

HON. ALDEN M. MCLAUGHLIN, JR.: It wouldn't matter — no, but if we just leave it like that the Governor could exercise his judgment as to who is right and proper to put there. But if it goes as we are — as you proposed it, sir, it would preclude lawyers altogether unless the lawyer had become a judge.

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: And, Mr. Chairman, I am — thank you, Mr. Chairman.

I was going to ask the question why are we leaving out — why are we leaving out legal practitioner there, Mr. Chairman, and all the other areas? Because you're adding... legal practitioners would mean bar — the Cayman bar — the society and the bar, and you would leave out a lot of Caymanians. And the problem is that in our small community where we have a limited expertise, we have to try to utilise all expertise that we can. And if — I just didn't know why it was being said that we should leave out the practitioner.

HON. D. KURT TIBBETTS: You're talking about (d)?

HON. W. MCKEEVA BUSH: (d), yeah.

[inaudible comments]

THE CHAIRMAN: Well, it was your proposal that neither of them should be a legal practitioner. I mean an option is that you take — you delete those words and simply let the Premier and the Leader of the Opposition make their nominations without any restriction under this. These are the two — these are the two political nominees.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah —

MR. MICHAEL BRADLEY: Perhaps an acceptable compromise would be that the Governor shall appoint and state that two persons holding legal qualifications, one at least of whom shall have held or uphold high judicial office, which would give the ability to appoint a judge and an attorney.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah. Well, the original proposal had six members anyhow, so I don't think we should artificially confine or constrain the numbers that we can have.

But I mean if we think in the Cayman context I think we can all think — I take the point about someone who is before the court every day, you wouldn't want him or her to be on the commission. I accept that entirely. But I can think of a fair number of very experienced former litigators in Cayman who would bring tremendous experience of the jurisdiction and balance to this, and I don't want to preclude us from being able to appoint those kinds of people.

GOVERNOR STUART JACK: Mr. Chairman, can I make a comment?

I think we're gradually getting to a reasonable balance; but in support of what Mr. McLaughlin has said, the formula which you came up with you could end up with a situation — quite easily end up with a situation, probably would end up with a situation — in which there would be nobody on that commission that had experience of the law in

the Cayman Islands. And unless we were appointing somebody who was practicing presently as a judge here or had recently practiced as a judge here — and there may be reasons why he wouldn't want to do that.

So I think that there has to be some kind of local dimension to this because at the end of the day what you're looking for is people who are going to be able to judge... well, be able to assess the judicial qualifications, credentials of the candidates, and indeed also in a disciplinary situation understand what is expected of a judge, but at the same time somebody who is going to have — be able to operate in this kind of community and is likely to have the confidence of this community. So you've got to have — you've got to have a local input one way or another. And not just the two appointed on the advice of the political leadership who are explicitly non-lawyers, you've got to have somebody who has the experience of practicing the law in this jurisdiction.

THE CHAIRMAN: Well, perhaps the best thing is if — if over the lunch break we try and write down — we, the UK, try and write down a revised draft.

I mean, I think what I'm inclining towards is something like... I mean, assuming that the world will not come to an end if the CJ and the president of the Court of Appeal are written out of this — assuming the world will not come to an end if that happens — that providing something like the chairman and one other member would be appointed by the Governor from amongst persons who hold or have held high judicial office. Two members — then we go to 106 (1) (c) **two members who shall be legally qualified but not practicing in the Cayman Islands appointed by the Governor acting after consultation with representatives of legal and professional organisations in the Cayman Islands.** So that gets your input from the legal and professional organisations but meets the point that the Attorney and I were worried about. So, essentially, that's retired or non-practicing people.

And then (d) would be more or less as it is in this text, so the balance therefore would be two judicial but not necessarily the CJ and the president of the Court of Appeal. It would be for the Governor to choose — I would even write in after consultation with the Premier and Leader of the Opposition so that any political sensitivities could be fed in to the process — two legally qualified but not practicing and two political nominees. So that would be the balance.

But we'll try and write something down over the lunch break. And I suggest we — I think we've done very well and thank you —

HON. SAMUEL W. BULGIN: Before you take a break, may I just correct something?

THE CHAIRMAN: One more point for the AG —

HON. SAMUEL W. BULGIN: Not of any substance.

Minister McLaughlin I think unintentionally says that despite the AG's not wanting the bar to have a view, I say I didn't say any such thing. These things are recorded and in the era of freedom of information and disclosure please be careful. I did not say that I do not want the bar to have a say in this thing, okay?

HON. ALDEN M. MCLAUGHLIN, JR.: I'm heartened by that clarification, sir.

THE CHAIRMAN: Okay. Well, there's usually no more... there's usually no more — sorry.

PROFESSOR JEFFREY JOWELL: Just one point. Will we come back to the question of procedures for the removals or suspension or discipline of judges? At the moment there's a rather complex procedure which goes through the Privy Council under Section 4 of the Judicial Committee Act of 1873. It's all set out in Section 102 (3), but if the recommendation is going to come now from the Judicial Appointments Committee, then there would have to be a recommendation, presumably, to the Governor.

Would the same procedures be set, be instigated through that recommendation, or would it be a different kinds of procedures? I think that kind of connection between the old removal procedures with tribunals and expense and so on, judges coming out from London would have to be put into sync with what is expected now under the Judicial Services Commission.

THE CHAIRMAN: Yes —

PROFESSOR JEFFREY JOWELL: Just for after lunch. I don't think we have to have that discussion —

THE CHAIRMAN: Okay. It doesn't so much relate to Section 102 because that's Court of Appeal judges. It's the equivalent one for Grand Court judges isn't it? So it's 97 (3). One could I think quite simply write in there Judicial and Legal Services Commission rather than the tribunal. That's the idea.

PROFESSOR JEFFREY JOWELL: Absolutely. And then perhaps put in a slightly sleeker procedure, but one that gives the required protection. But I think this has to be thought through.

THE CHAIRMAN: Yes. Well, let's break now, and I would like to try and start again at half past one. I know it's shorter but we've still got an awful lot to do. Half past one to restart.

RECESS

RESUMED

THE CHAIRMAN: Composition of the Judicial and Legal Services Commission. And I have written down in the lunch break something to reflect the idea that I read out before lunch. So shall I do that?

So, what I would suggest is that Section 106 (1) would read like this — Have 106 (1) in front of you: **There shall be in and for the Cayman Islands a Judicial and Legal Services Commission which shall consist of: (a) a chairman and one other member appointed by the Governor acting after consultation with the Premier and the Leader of the Opposition from among persons who hold or have held high judicial office; (b) two members who shall be legally qualified but are not practicing law in the Cayman Islands, appointed by the Governor after consultation with representatives of legal professional organisations in the Cayman Islands; and (c) — this would be the same as in the current text — two members appointed by the Governor acting in accordance with the advice of the Premier and the Leader of the Opposition who will each nominate one member neither of whom shall be a legal practitioner.**

That's ... does that sound good?

[inaudible comments]

HON. D. KURT TIBBETTS: Mr. Chair, could you please?

THE CHAIRMAN: Repeat it? Right. A revised section for 106 (1)a: **There shall be in and for the Cayman Islands a Judicial and Legal Services Commission which shall consist of: (a) a chairman and one other member appointed by the Governor acting after consultation with the Premier and the Leader of the Opposition from among persons who hold are have held high judicial office; (b) two members who shall be legally qualified but are not practicing law in the Cayman Islands, appointed by the Governor after consultation with representatives of legal professional organisations in the Cayman Islands; (c) — which is the same text as the current 106 (1) (d) — two members appointed by the Governor acting in accordance with the advice of the Premier and the Leader of the Opposition who will each nominate one member, neither of whom shall be a legal practitioner.**

Does that sound good?

MR. ROLSTON M. ANGLIN: That sounds good.

THE CHAIRMAN: Excellent. So, then consequentially in (3) and (4) instead of saying — the references there to (1) (c) or (d) would be simply references to (1) because we're removing the (a) and (b), the Chief Justice and the president of the Court of Appeal. Those are consequential changes, but in substance.

Good. All right. Is there anything else on 106 or 107? No?

Then we shall —

[inaudible comment]

HON. V. ARDEN MCLEAN: We're still on 106, right?

HON. W. MCKEEVA BUSH: No.

THE CHAIRMAN: Well, I was asking whether you had anything on Section 106 or 107.

HON. V. ARDEN MCLEAN: Yes. My — the thing that I had highlighted here, if that commission is going to be responsible for discipline, why then would we still allow the Governor the right to remove people from office?

THE CHAIRMAN: This is you mean in (3) (d)? 106 (3) (d)? This relates only to removing a member of the commission for inability to discharge the functions of office or misbehaviour. This comes from your draft.

[inaudible comments]

THE CHAIRMAN: No, it's only members of the commission. Okay?

107? Nothing on 107?

Then we come back to —

PROFESSOR JEFFREY JOWELL: Well, if I may say, again, the question of connecting removals and disciplinary action...

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: Or are we just about to come back to that?

THE CHAIRMAN: No. Well, we'll go to that now.

PROFESSOR JEFFREY JOWELL: How does that coordinate with the preceding sections? It has to do with...

THE CHAIRMAN: Removal of a Grand Court judge? Is that what you're on.

Okay, well, if we turn back to 97... if we turn back to Section 97, okay? Under Section 97 as now drafted under (4) part of the procedure for removal of a Grand Court judge from office for inability or misbehaviour requires the Governor to set up a tribunal to inquire into the matter and advise the Governor whether their case is serious enough to ask Her Majesty to refer it to the Privy Council.

But as I think Jeffery suggested before we broke for lunch, if we have set up, as we are proposing to do, a Judicial and Legal Services Commission with substantial high judicial representation on it, it would be convenient, and I would say acceptable, to provide in Section 97 (4) that this part of the procedure should be carried out by the Judicial and Legal Services Commission itself instead of having to set up from scratch a tribunal and all the expenses that goes with paying the people to have to sit on that tribunal. If you have a standing body which is entrusted with appointments of Grand Court judges, you might as well use it for considering question of removal of a Grand Court judge.

HON. D. KURT TIBBETTS: Mr. Chairman?

THE CHAIRMAN: If that is acceptable in principle one could — I could redraft that quite simply to deal with that.

HON. D. KURT TIBBETTS: Mr. Chairman, obviously we would be looking in that direction, sir, because limited though his experience may be in this field, the Governor can verify that this other method regarding a tribunal can be extremely costly...

THE CHAIRMAN: Yep.

HON. D. KURT TIBBETTS: To the country's coffers.

THE CHAIRMAN: Okay. So, if that's acceptable —

GOVERNOR STUART JACK: Sorry, could I just comment on that?

THE CHAIRMAN: Yes, Governor.

GOVERNOR STUART JACK: I'm not at all disagreeing with what the Leader of Government Business has just said.

One of the advantages, I think, with having this new commission is that certain matters, disciplinary matters, could be disposed of before we have to get to the point of ever having a tribunal in the first place.

THE CHAIRMAN: Yep.

GOVERNOR STUART JACK: But there then arises a potentially legal issue, which I'm not qualified really to judge but just to draw your attention to a possible area, that might come under dispute.

Under the present practice — present practice — before the matter can be referred by the Governor to a tribunal, the Governor in practice has to act as an examining magistrate to establish whether there is *prima facie* case to answer; and that is based on a ruling of the Privy Council in a previous case so that all the evidence has to be presented to the judge who is the subject of the complaints, and that person has to have an opportunity to present their counter arguments, all of which of course is done expensively by lawyers, before the Governor can rightfully decide whether there is a case to refer to a tribunal.

So, at the moment the Privy Council expects a two-stage process. Now, whether — and the next issue — and therefore would this meet that actual requirement, first question.

Second question is that if, if, this Judicial and Legal Services Commission had been involved in attempting to deal with complaints against that particular judge at an earlier stage of the process but unsuccessfully, and then the matter had to be considered for reference to the judicial committee of the Privy Council, would the Privy Council — would anybody be satisfied if it's the same commission that looked at it a second time in different circumstances? Those are some legal issues that I don't know the answer to, I just pose them as queries in my own mind.

PROFESSOR JEFFREY JOWELL: I was about to address that very issue, and I'm grateful for that. I think it completes the picture. One ought to — I'm pleased that that is — that we're aware of those procedures.

I believe — I don't know if you agree — that one could get around that by simply writing in an extra provision under Section 107 to the effect that **any suspension, removal or disciplinarian action taken under this section shall be carried out in accordance with the highest standards of procedural fairness**, or words to that effect. In other words, write in that this has to be done in accordance with the requisite and highest standards of procedural fairness. And then of course you'd leave it to the judicial legal services to work this through in accordance with Privy Council rulings, administrative law standards of procedural fairness, and what is right and most convenient in the circumstances.

I'm not sure quite where — I think that would probably, probably do it, but I'd just like to put that forward.

THE CHAIRMAN: Yes. I think it would be very useful actually. We could put it in after (7), after 107 (7) I think probably. Could you read it again, Jeffery?

PROFESSOR JEFFREY JOWELL: Any suspension, removal or disciplinary action.

THE CHAIRMAN: Hold on. Suspension, removal...

PROFESSOR JEFFREY JOWELL: Suspension, removal or disciplinary action taken under this section...

THE CHAIRMAN: Yeah.

PROFESSOR JEFFREY JOWELL: Shall be carried out in accordance with the highest standards of procedural fairness, or if you wish, highest appropriate standards because suspension or disciplinary action may not require the same procedures as removal.

THE CHAIRMAN: Yeah.

PROFESSOR JEFFREY JOWELL: So highest appropriate standards of procedural fairness.

THE CHAIRMAN: That's a very helpful suggestion I think. So we would put that in as (8) and renumber accordingly.

And then we have the important next subsection requiring the admission to draw up the code of conduct of the —

HON. D. KURT TIBBETTS: Mr. Chair?

THE CHAIRMAN: — judiciary and the procedure for dealing with complaints. Yes.

HON. D. KURT TIBBETTS: Mr. Chair, just to make sure my mind is clear, are we saying then that there will still be opportunity for this tribunal thing for this to operate?

THE CHAIRMAN: No, there wouldn't be a need for a tribunal.

HON. D. KURT TIBBETTS: Thank you.

THE CHAIRMAN: There would still be however for the — I mean as drafted for the question of removing a Court of Appeal judge because under Section 102 that provides for the same procedure as for the Grand Court judges.

Now, I suppose we could think of doing the same thing in Section 102, the only difference is the Court of Appeal judges are not appointed under the current draft by the Governor on the advice of the Judicial and

Legal Services Commission. The Judicial and Legal Services Commission has no jurisdiction in relation to Court of Appeal judges.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I was going to — sorry to stop you there, but I was going to raise that point and ask you to explain why you felt they should fall outside the scope of the Judicial and Legal Services Commission, the Court of Appeal judges.

THE CHAIRMAN: Yes. Well, I think it was really a reflection of our discussions at the first round. I think we came to the conclusion — but I may be mistaken. I thought we came to the conclusion that they were by virtue of their seniority not appropriate for dealing with by this commission. But I don't know. Do you have a strong view on this?

HON. ALDEN M. MCLAUGHLIN, JR.: Well, I don't think that, in and of itself, is a good reason to say, well, the Governor alone can go and appoint them.

THE CHAIRMAN: Well...

HON. ALDEN M. MCLAUGHLIN, JR.: I think some of the reservations the last time around were because the commission was made up of the Chief Justice and the president of the Court of Appeal. But if that specific bit is gone, I certainly don't see a proper basis for us distinguishing between who should appoint the Grand Court judges and who should appoint the Court of Appeal judges.

GOVERNOR STUART JACK: And can I say, Mr. Chairman, I agree with Minister McLaughlin in this case.

THE CHAIRMAN: Okay. Sam, did you want to say anything?

HON. SAMUEL W. BULGIN: No, I wasn't following.

THE CHAIRMAN: Oh.

HON. SAMUEL W. BULGIN: Sorry, Mr. Chairman, my fault.

THE CHAIRMAN: All right. Well, I don't think we have a fundamental objection. I mean, under the current draft... just to be clear under the current draft of Section 101 (2) the Governor wouldn't alone have power to appoint Court of Appeal judges. It would be in accordance with instructions received from Her Majesty through —

HON. SAMUEL W. BULGIN: Can I just ask, Mr. Chairman, what's the position with the other OTs with respect to the appointment of Court of Appeal judges?

THE CHAIRMAN: Well, I think the — I think the closest one is Gibraltar. Let me just check.

[pause]

HON. SAMUEL W. BULGIN: Gibraltar and Turks would be the two that will come in.

THE CHAIRMAN: Yes — no, in Gibraltar the Court of Appeal judges, like the Supreme Court Judges, are appointed on the advice of the commissioner. So we'd be doing the same as in Gibraltar, but not the same as it is in the Turks and Caicos where it remains with the Governor. But I don't have a strong objection to that.

Okay, so —

GOVERNOR STUART JACK: Sorry, Mr. Chairman. Can I just make another point that goes back to the question of using this commission in place of a tribunal to decide whether an allegedly miscreant judge would be referred to the judicial committee of the Privy Council.

Would the Privy Council be satisfied that the process had been dealt with by a body, the majority of whom were people who did not have high judicial — were not serving or had not served in high judicial office, because we're only talking about two of the six being such people.

THE CHAIRMAN: Yes.

GOVERNOR STUART JACK: Whereas a judge is being judged by somebody other than judges.

THE CHAIRMAN: Yes. Well, my attitude would be whether they like it or not if the Constitution provides for the procedure before it goes to that to be done by a body which is a mixed body, they have to lump it. I mean they have the final say. I mean, do you agree with me, Jeffery?

HON. SAMUEL W. BULGIN: I can hear that you don't plan to appear before them anytime soon.

[laughter]

THE CHAIRMAN: What did you say?

HON. SAMUEL W. BULGIN: I can plainly hear that you don't plan to appear before the Privy Council.

[laughter]

HON. SAMUEL W. BULGIN: And the discipline of the Court of Appeal judge is not part of the remit of this commission; is that correct?

THE CHAIRMAN: Well, we would put in Section 102 (4) instead of requirement to set up by tribunal we would use the JCLS, a Judicial and Legal Services Commission.

HON. SAMUEL W. BULGIN: To discipline the Court of Appeal judges?

THE CHAIRMAN: No, in cases of removal, but discipline would be for the commission as well as for the — as for all the others.

HON. SAMUEL W. BULGIN: I can live with that if it's Grand Court. I can't live with that for Court of Appeal judges because the final — one of the things about this is that any appeal from any sort of thing that is done by the commission is going to a Grand Court judge as well as a Court of Appeal. And in Gibraltar the issue — they have power to make appointment, but they do not have power to remove or exercise this power of control, and I think that goes for good reason.

HON. D. KURT TIBBETTS: So who has the authority then?

HON. SAMUEL W. BULGIN: Somebody else. But I can understand the reason for the Court of Appeal judges not being subject to the nuances of the commission for disciplinary purposes. I think that would emasculate the entire independence of the judiciary, not intentionally but that's what it amounts to.

HON. D. KURT TIBBETTS: Mr. Chair, just to say to you I don't know how the matter can be resolved, but all I'm saying is that for God's sake not by a tribunal, some other mechanism but not by the experiences we have of a tribunal. And I mean that sincerely.

HON. SAMUEL W. BULGIN: No, I agree with you.

HON. D. KURT TIBBETTS: And I know what you're saying. You understand what I'm saying?

HON. SAMUEL W. BULGIN: I agree with you. And there's the issue of cost, but there's a more fundamental issue — there's a more

fundamental issue — of how sacrosanct at least a Court of Appeal should be. It is a final local court.

HON. D. KURT TIBBETTS: I respect that.

HON. ALDEN M. MCLAUGHLIN, JR.: I'm not following that, Sam.

HON. SAMUEL W. BULGIN: That it would be, in my view, untenable, as a matter of fact objectionable, for the Judicial and Legal Services Commission to exercise disciplinary control over the judges of the Court of Appeal, including the president of the Court of Appeal.

HON. ALDEN M. MCLAUGHLIN, JR.: Why?

HON. SAMUEL W. BULGIN: It just — it just doesn't happen anywhere else.

HON. ALDEN M. MCLAUGHLIN, JR.: No, but hang on. Let's analyse this a little. But then who would or who should?

HON. SAMUEL W. BULGIN: Somebody else. Somebody else. Some other body.

HON. D. KURT TIBBETTS: So who does it in Gibraltar?

HON. SAMUEL W. BULGIN: I need to look at Gibraltar.

THE CHAIRMAN: I don't think it says it.

HON. SAMUEL W. BULGIN: I think we need to reserve it — right, it doesn't say so. I think we need to reserve or position on that because it's not something that I can agree with so easily. I can tell you that.

THE CHAIRMAN: Read it out, Michael.

MR. MICHAEL BRADLEY: If it would help, one of the constitutions we've been quoting recently is, among others, the Turks and Caicos one, and there the provision, appointments to judicial officers, says **power to make appointment to the offices of judge of the Supreme Court, judge of the Court of Appeal, magistrate and registrar and to remove and exercise disciplinary control for persons holding and directing these offices of the magistrate and registrar is vested in the Governor acting with the advice of the Judicial Services Commission unless the Governor's instructed by a magistrate through a Secretary of State to do otherwise.**

So, the power to make appointments to the Court of Appeal is vested in the Governor acting on the advice of —

HON. SAMUEL W. BULGIN: Of the commission.

MR. MICHAEL BRADLEY: Yeah, on the advice of the commission and the power to remove is only of persons holding the offices of magistrate and registrar.

HON. D. KURT TIBBETTS: So what you're saying —

HON. SAMUEL W. BULGIN: Not the Court of Appeal?

MR. MICHAEL BRADLEY: No.

THE CHAIRMAN: But what about the disciplinary power, Michael?

MR. MICHAEL BRADLEY: That's the same. **The power to remove or exercise disciplinary control of persons acting in the offices of magistrate and registrar is vested in the Governor.** But it seems to be silent about removal...

[pause]

MR. MICHAEL BRADLEY: It's under another section and says that **if Governor considers the question of removing a judge from the Court of Appeal for various reasons he appoints a tribunal.**

HON. SAMUEL W. BULGIN: Section 78 (4)?

MR. MICHAEL BRADLEY: Yeah, which is the same as we have here at the moment.

THE CHAIRMAN: All of these Constitutions as far as I'm aware are silent about who disciplines short of removal or suspension pending possible removal. They're all silent on who exercises disciplinary control over members of the senior judiciary. And I think the reason for that is that the judiciary sort out their own discipline by means of their own rules. And, you know, if it's — this is why it's important to have in as we have here requirement for this commission to provide for a judicial code of conduct.

Now, they — my understanding, although there are people here who will know more about how judges work than I do — is that they are essentially a self-regulating body in terms of discipline. I suppose under the current situation in the Overseas Territories there's no one other than the Governor if a judge is thought to be misbehaving, short of

removal there's nobody else other than the Governor who can call in the judge and say 'This is not good enough', you know. I mean, I know for a fact this has happened in one or two places, not here but in one or two places, and there was nobody else to do it. There was no constitutional express provision about it, but there was simply no one else to do it. I think that's the — that's the position.

Governor?

GOVERNOR STUART JACK: That is certainly the position, but even if a Governor does have what the judiciary seem to call "a word to the wise" — wonderful expression — that maybe they should act in a different way, there's nothing — there's absolutely no way of compelling them to take that advice or to even consider it. The only disciplinary option provided for in the Constitution is the nuclear option of the tribunal. And the whole point of a code of conduct and a commission — one of the points as far as I'm concerned — is to get away from having either — having effectively no option short of a nuclear bond.

And in England they have now moved — they've realised that problem and they've set up an office of judicial complaints and a procedure and a code of conduct so that low-level complaints and allegations, many of which have been proven to have no basis anyway — are dealt with without having either the do-nothing option or the nuclear option.

PROFESSOR JEFFREY JOWELL: Could I just ask that all this may be solved by the fact that in any event, as I understand it — and I'm not absolutely sure of my ground here but as I think it applies — once the Governor has decided that the removal process ought to be implemented, the matter has to be referred to by Her Majesty to the judicial committee of the Privy Council. Now, at that point — and it's ultimately that body that will make the final decision, so there's another opportunity of a hearing and inquiry if the hearing and inquiry at the local level has not been sufficient either because the procedures haven't been intensive enough or because there's a conflict of interest or because the personnel don't have their requisite qualifications. So there's another hoop through which to jump, and there you get the kind of protection that I think we're seeking for all the judges. Am I wrong about that?

THE CHAIRMAN: No, that's the end of the trail. That's the end of the trail, the removal process.

PROFESSOR JEFFREY JOWELL: Because there's another bite at the cherry...

THE CHAIRMAN: Yeah.

PROFESSOR JEFFREY JOWELL: I think it's not absolutely dire that, you know —

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: — everything be done at local level. It's better that you do as much as you can but —

THE CHAIRMAN: I mean I —

HON. SAMUEL W. BULGIN: The commission doesn't seem to play a part here. In Gibraltar it is a tribunal that is set up by the Governor. There's no place for the commission.

THE CHAIRMAN: No. That's true.

HON. SAMUEL W. BULGIN: Right. And it is — is that the case as well in Turks and Caicos?

THE CHAIRMAN: Yes.

HON. SAMUEL W. BULGIN: Right.

THE CHAIRMAN: Yes. However, I'm not — I mean, I think it's a choice really for you to make. From our perspective, provided that there is a fair and independent body, a body independent of government — the executive — that looks into these matters, and in the very last resort there is even, as Jeffery has just reminded us, the Privy Council to essentially advise the Queen whether a judge should be removed, we certainly don't see an objection to substituting the commission for a tribunal in the process of removal of senior judges.

Then there's a second question which Sam raised of disciplinary powers short of removal who administer reprimand, who ticks them off and say, 'Next time you know we are serious', all that sort of thing, in accordance with such disciplinary rules as apply to senior judges.

Now, I'm not sure I see an objection in principle to this proposed commission having that power given that part of its duties are to set up — are to draw up a judicial code of conduct. And the — it isn't as if... it isn't as if the independence of the senior judiciary is being interfered with by government, by the executive. It's rather that by comparison with the present situation where it's the Governor who administers the rap over the knuckles or asks difficult questions to a possibly erring senior judge, it is an independent commission advising the Governor about that. And in a way you could argue that the position is actually improved for the senior judges.

Now, in the nature of things some senior judges will be outraged by anything that takes out of their own hands their own self-regulation of their behaviour. But... I'm sorry but at the end of the day they don't decide everything. The AG is walking out now.

[laughter]

THE CHAIRMAN: He doesn't want to hear anymore.

Okay, so I think — shall we substitute also in the section about removal of Court of Appeal judges we do the same thing as for the Grand Court judges, one would use the commission rather than a tribunal, and incorporate in Section 107 the Court of Appeal judges as well as Grand Court judges within the remit of the commission, and we would add in the “Jowell Formula” on highest appropriate standards of procedural fairness. Okay?

PROFESSOR JEFFREY JOWELL: And if I may respectfully, just that it might be worth consulting the Privy Council on this to see whether it fits with their procedures. I have no idea how they regard it, but there just may be some objections from that source. Presumably that would be done anyway.

THE CHAIRMAN: Right. I'm not sure that we'll do that, but...

PROFESSOR JEFFREY JOWELL: I suggest that you don't do it.

THE CHAIRMAN: Well, I know what you're saying, but in the end I think policy is for Secretary of State to advise Her Majesty to make this order if he or she feels it right to do so, and they must take the consequences.

[inaudible comment]

THE CHAIRMAN: No tribunal. No tribunal.

Good. Can we just then move to Part VI, Public —

PROFESSOR JEFFREY JOWELL: One further point. On Section 108, as I recorded the discussion on that section at the previous meeting this was meant to reflect a provision in the constitutional reformat, the UK one, which requires adequate funds to be provided. There are two other aspects of that act — duties under that act which were alluded to last time, one of which is to uphold the rule of law and judicial independence. It seemed to me that it might strengthen this, but **the legislature and the Cabinet shall uphold the rule of law and judicial and independence and ensure that adequate funds are provided.**

THE CHAIRMAN: The legislature and the Cabinet shall uphold.

PROFESSOR JEFFREY JOWELL: The rule of law and judicial independence. Section 108. It reflects the new duties, the first duties to uphold the rule of law under the constitutional reformat.

THE CHAIRMAN: The rule of law and judicial independence.

PROFESSOR JEFFREY JOWELL: And answers the fear that perhaps these sections are meant to undermine any of those things. They're not so we might as well be clear about it.

THE CHAIRMAN: Yes. So uphold the rule of law and judicial independence and ensure ...

PROFESSOR JEFFREY JOWELL: Uphold the rule of law and judicial independence and shall ensure that adequate funds... et cetera.

THE CHAIRMAN: Excellent.

HON. D. KURT TIBBETTS: Mr. Chairman?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: Just quickly, sir. 107 (7) — (6) rather, 107 (6). **Person holding the office of Attorney General, director of prosecutors or magistrate may only be removed from office for inability to discharge the functions of his or her office whether arising from infirmative body or mind or any other case or for misbehaviour.**

Just wanting to confirm, the Attorney General and the DPP, they will be civil servants?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: So, what happens then with the business of how long they can serve in office? How long meaning to what age? Is that civil service or...

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: So that would take care of that?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: Just wanted to make sure.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: I know that even if 60 is the limit, our Attorney General has many more years to go, but I was just wanting to make sure, sir.

THE CHAIRMAN: Yeah.

[inaudible comments]

THE CHAIRMAN: Right. Moving on to the important Part VI. Part VI.

I hope there aren't — are there any points you would like to raise on Part VI because there's one that I will mention in the light of the note that was circulated by the Cayman Islands side, the note from Ken Jefferson about the position of Financial Secretary.

Okay? Okay?

I was going to mention under Part VI, but it also is relevant to Part VII, the position of Financial Secretary.

HON. D. KURT TIBBETTS: Yes, we'd like to deal with that, sir.

THE CHAIRMAN: Yes, I'm going to deal with it now if you like.

Now, as I understand it, there is a consensus that the office of Financial Secretary should not be abolished even if there is, as we envisage in this draft, a minister responsible for finance. And we are content with that along the lines of the suggestions made in Ken Jefferson's note which consists of three amendments to this draft which we did some work on last evening so I can tell you what they are.

And the first one comes up in Section 110 on page 76.

HON. D. KURT TIBBETTS: Page what?

THE CHAIRMAN: 76. Section 110 about the appointment of public officers. And you'll see that in general the power to make appointments to public offices vests in the Governor. The Governor may delegate, but under (4) there are certain high offices which the Governor may not delegate, so the Governor and the Governor alone.

And Ken's note recommends that the Financial Secretary should be put in that list basically. He's saying the Constitution should state the appointment, exercising disciplinary control and removal of the Financial Secretary are the domain of the Governor acting in his or her discretion. This would preserve the independence of the office of Financial Secretary.

And so, the first amendment of this group of three would be to put in to Section 110 (4) in front of "Commissioner of Police" "Financial

Secretary”. Okay? And the effect of that would be that like the Commissioner of Police, auditor general, complaints commissioner, the Governor may not delegate that power of appointment, discipline or removal. That would meet one of his points.

The second point is very easy, and that is in the Covering Order at page 4. If we turn to page 4 of the whole draft you'll see that Section 6 (1) in the Covering Order says **any office (except those of Chief Secretary and Financial Secretary) established by or under the former Constitution shall continue**, and that was drafted on the assumption that there would not be a Financial Secretary under the new Constitution. But if there is still to be, obviously we would need to delete the words “and Financial Secretary” in section — the first line of Section 6 (1). He points that out — Ken points that out in his note as well. So that's a thing that has to be done.

And the third thing — and the third thing I would suggest is a new section, a short new section in Part VII headed Finance, a short new section reading as follows, heading Financial Secretary... heading Financial Secretary — this might come after, by the way, Section 116, so 117 — **there shall be a Financial Secretary who shall be the principal advisor to the minister responsible for finance, and whose office shall be a public office.** And that corresponds with the recommendation of Ken Jefferson.

And it's carefully worded “who shall be the principal advisor to the minister responsible for finance”, and therefore is not the policy maker for finance, he's the principal advisor to the minister responsible for finance. And that's what he's suggesting and I think that is a sensible way of putting it. In fact, it shouldn't be described in any other way.

So, if everybody's content with that, we would make those changes and there will continue to be an advisory Financial Secretary, principal advisor to the minister responsible for finance.

Okay?

HON. V. ARDEN MCLEAN: Would that be an administrative person who has his own staff and everything?

THE CHAIRMAN: No, he would be a public officer. He would be equivalent to a permanent secretary, in effect, but having a title of Financial Secretary. I mean I would envisage — it's up to you organise where he sits and which you know — in which card of the government he sits, but in effect he would be the permanent secretary for financial matters equivalent to other permanent secretaries responsible for other matters, but with the title Financial Secretary and a different function which will be specified in the Constitution as principal advisor to the minister responsible for finance. I don't think the Constitution can do anything else than say those few things, and then it's up to you how you brigade him, as it were, and pay.

HON. V. ARDEN MCLEAN: But certainly the principal legal advisor to government is... legal advisor to government is not a permanent secretary.

THE CHAIRMAN: No.

HON. V. ARDEN MCLEAN: So we need to be careful we're not creating some kind of animal here that — I'm only using him as an example. Maybe we're creating another one of those animals where we have — and not necessarily him, the AG office where you have there — and then you have another office that does all the work, because currently the Financial Secretary is — has his own not portfolio, what they call...

HON. D. KURT TIBBETTS: It is portfolio.

HON. V. ARDEN MCLEAN: Portfolio, yeah.

[inaudible comments]

THE CHAIRMAN: Yeah. I mean, you have to — you have to bear in mind that the Attorney General is not responsible to any minister. The Attorney General is an independent high legal officer who is the principal legal advisor to the government. The Financial Secretary under this conception by contrast is stated to be a principal advisor to the minister responsible for finance. Therefore... in other words, is in the same position as a permanent secretary who is the principal advisor to minister for this or minister for that. Do you see what I mean? So it's not creating a strange creature or whatever it is you said.

HON. V. ARDEN MCLEAN: According to how you see it. But what I'm saying is, we may very well get in a situation where while he's equal to permanent secretary, he has to be over on the other side creating — creating another office to be able to advise the minister as opposed to being a permanent secretary, which has all of the trappings of all of the offices that is there now.

THE CHAIRMAN: Well, I'm not sure I'm following, Arden. I mean, if you're unhappy about this, I will willingly delete all of these provisions. I mean, it's not me that's pressing for all of this. It's Ken Jefferson and supported by — I thought supported by the Government and the Opposition and everybody else. I don't see what your worry is actually. But if you change your mind then we'll quickly take it all out again. You know, I'm in your hands on this. We are neutral on this.

HON. CHARLES E. CLIFFORD: Mr. Chairman, I think the issue here is more to do with qualifications, and I think we're getting a little too caught up in the title.

I believe the main concern, and the reason why this may be an issue in some quarters, is ensuring that the minister of finance, whoever he is or she is at any particular time, has the appropriate level of professional financial advice. So, maybe the provisions need to focus on the qualifications of the Financial Secretary or permanent secretary of finance.

THE CHAIRMAN: I don't — I'm sorry, I don't really understand where this is going. I thought we were doing something to help you guys, and now I do it and now...

[inaudible comments]

MR. ROLSTON M. ANGLIN: Mr. Chairman, what you have outlined came about from discussions yesterday, as you've accurately said, and the thought was that there is a key function in governance, namely the budgeting and, in particular, the budgeting and monitoring aspect which cuts across the whole of government. So unlike a ministry of health, unlike a ministry of tourism that is a specific subject that is confined to a singular ministry, the concept is that when it comes to finance there is a desire to try to ensure that as much as possible there is a person who is constitutionally protected in and enshrined in the Constitution, not exactly the same way, but certainly running along some of the same trains of thought that there is an auditor general that has a very specific function that cuts across the whole of government.

THE CHAIRMAN: Yep.

MR. ROLSTON M. ANGLIN: And that you make it quite clear that the person is not a minister and does not have any ministerial responsibilities. The Constitution provides for there to be a minister with responsibility for finance, and this person is that minister's principal advisor.

And so, I certainly cannot see from what you have read to us why there would be any great risk to us. And so I think that we ought to concentrate on the fact that this is indeed a special area just like legal advice, just like the auditing function, that the financial aspect and ensuring that there is a neutral Financial Secretary is indeed very, very important. I think it's the other thing that we agreed that is — and there's an important distinction that members need to focus on and think about.

What you've just outlined and read is that he is the principal advisor to the minister with responsibility for finance, and so certainly

along the way that minister and his Cabinet when there are specific areas that they need additional resources and assistance on have the capacity — have the capacity — to... and then whichever way they feel necessary and fit get that assistance and help. And so that minister still will be in charge.

So let's use, for example, the government is going to do a new bond issue which may — which more than likely is well beyond the scope of the office of the Financial Secretary. The Cabinet still and that minister still has the authority to go out, hire a firm that knows how to go about procuring and — executing rather and issuance — bond issuance, for example.

So I certainly don't see where there would be a huge deal. I mean...

[inaudible comment by Leader of Government Business]

MR. ROLSTON M. ANGLIN: Oh.

[inaudible comment]

MR. ROLSTON M. ANGLIN: Right. And certainly one of the things — I'm not sure if it's in your wording, but I think it is important to note that that person would be the permanent secretary and the chief officer within —

[inaudible comment]

MR. ROLSTON M. ANGLIN: He may not be now? He may not be?

HON. D. KURT TIBBETTS: That's the whole idea why we're doing this.

THE CHAIRMAN: Okay. So are we — I'm grateful to Rolston for explaining the thing a lot better than I could.

So just to reread the proposed new Section 117: **there shall be a Financial Secretary who shall be the principal advisor to the minister responsible for finance, and whose office shall be a public office** full stop. Okay?

HON. D. KURT TIBBETTS: Can you repeat it, please, sir?

THE CHAIRMAN: **There shall be a Financial Secretary who shall be the principal advisor to the minister responsible for finance, and whose office shall be a public office** full stop. This is exactly what Ken Jefferson's note suggested in paragraph 9 (b), so I'm really just doing what he recommends. And we don't need to say anything more, I don't think. All right?

And then the constitutional — it would be a constitutional office with that description of function, and being a public officer he would be appointed under Section 110 like every other public officer, but in accordance with 110 (4) it would be for the Governor alone, and not somebody delegated down by the Governor, to make the appointment, and only the Governor can appoint or removes the Financial Secretary.

All right? Good. Thank you very much.

Is there anything else on Part VI?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman?

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: 109, which we skipped over. These are small points but the civil service isn't defined. I think we need to say the overriding duty of public officers.

THE CHAIRMAN: Yes, overriding duty of public officers.

HON. ALDEN M. MCLAUGHLIN, JR.: And I believe Section 109 should start **subject to this Constitution all public officers must because** there are instances or may be instances within the Constitution where, for instance, the auditor general and so forth, and the complaints commissioner...

THE CHAIRMAN: Yes, quite right. Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: Wouldn't be implementing government policy and so forth.

THE CHAIRMAN: Yes, absolutely right. Thank you.

HON. D. KURT TIBBETTS: Subject to this Constitution.

THE CHAIRMAN: Subject to this Constitution all public officers must...

HON. D. KURT TIBBETTS: Mr. Chair?

THE CHAIRMAN: (a) and (b).

HON. D. KURT TIBBETTS: In Section 110.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: (4).

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: There is now such a creature as the information commissioner.

THE CHAIRMAN: Right.

HON. D. KURT TIBBETTS: AG, should the information commissioner's title not be added into these here?

[inaudible comments]

THE CHAIRMAN: I mean, the only thought I have about that question is the information — there's no other reference in this Draft Constitution to the information commission. There is a reference later to freedom of information in Section 119. I mean, I don't suppose it's an overriding objection to put into 110 (4) a high office holder who is not mentioned elsewhere in the Constitution, but it's slightly odd. I mean, I think, you know, if you think it appropriate that the information commissioner should be in that list of sacred cows we could put it in.

HON. D. KURT TIBBETTS: No.

THE CHAIRMAN: No, if you like we could put it in. What it will mean is that no law made under the Constitution, no ordinary law —

HON. D. KURT TIBBETTS: I asked the AG. I just wondered did you have an opinion, AG?

HON. SAMUEL W. BULGIN: Well, I just thinking aloud whether the intention was to give expression to it in the Constitution in the same way as the complaints commissioner and the auditor general. I mean, I know it is by virtue of the Freedom of Information Law the office itself is sufficiently —

HON. D. KURT TIBBETTS: By that law?

HON. SAMUEL W. BULGIN: By that law. And whether it is necessary in those circumstances to give expression to it here in the Constitution if that's the intention, I really don't know. It just never occurred to me at all.

MR. MICHAEL BRADLEY: I think the list of offices here under 110 (4) are all offices that are referred to elsewhere in the Constitution, and this would be the first time you're bringing in an office which isn't contained in this document.

HON. D. KURT TIBBETTS: I hear what you're saying, Mr. Bradley, and there is no mention of the office of information commissioner outside of that.

THE CHAIRMAN: No. No.

HON. D. KURT TIBBETTS: But, I mean, is it that we don't consider it important enough for it to be a constitutionally recognised office? If that's the case, then, can it — should it go along 119, since Mr. Bradley doesn't think that it's worthy of going alongside of the complaints commissioner's post?

MR. MICHAEL BRADLEY: No. I'm saying if you think it's sufficiently appropriate to make special constitutional provisions for it, the post itself should be established by and be referred to in the Constitution.

HON. D. KURT TIBBETTS: Mr. Chair, one second. One second. I think there's a very important point here. The Cabinet Secretary has just reminded me.

The appointment of the information commissioner through the Freedom of Information Law requires a very specific procedure performed through the offices of His Excellency the Governor, so there can be no delegation for that appointment, hence the need for it to be in this subsection which protects these other posts from any delegation.

THE CHAIRMAN: All right. Just we'll write it in after complaints commissioner.

HON. D. KURT TIBBETTS: No, sir, let's put it in before.

THE CHAIRMAN: All right. Before if you like. Auditor general, information commissioner, complaints commissioner.

HON. D. KURT TIBBETTS: Yes, sir.

THE CHAIRMAN: All right?

HON. D. KURT TIBBETTS: Yes, sir.

THE CHAIRMAN: Right. Jolly good.

Anything else on Part VI? Part... anything else on Part VI?

PROFESSOR JEFFREY JOWELL: Yes, under Commission for Standards in Public Life Section 112 on page 78.

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: (9) (f)

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: **To recommend codes of conduct to prevent any minister, public authority or public officer employing their power for any personal benefit or advantage.** Could we add — Government would like to add there **and legislation to provide appropriate sanctions.** So one of the tasks of the Commission for Standards in Public Life would not only be to recommend codes of conduct, but also “and legislation”, recommending legislation, to provide appropriate sanctions.

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: Otherwise it's toothless.

THE CHAIRMAN: Fine, so that comes in after “benefit or advantage”, “and legislation to provide appropriate sanctions”.

PROFESSOR JEFFREY JOWELL: Yes.

THE CHAIRMAN: Very good.

HON. W. MCKEEVA BUSH: Mr. Chairman, I'm sorry I had to take a call and be outside when you did... on page 76 I just had a query there on auditor general. I don't want to take you back, I won't be long, I promise you, unless somebody else bees long. But where it says that 111 (2).

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: **The auditor general may be removed from office only for inability** — only for inability — **to discharge the functions of his or her office whether arising from infirmative body or mind** — whatever — **or misbehaviour.** We only want to say “only” there?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Why?

THE CHAIRMAN: Because this is an exclusive... these are the only grounds on which the — these are the only grounds on which the auditor general may be removed: inability to discharge the functions or

misbehaviour. And it's essential, therefore, to have the word "only". The purpose of this —

HON. W. MCKEEVA BUSH: But misbehaviour is not even defined.

THE CHAIRMAN: The purpose of this is to give the auditor general security of tenure for —

HON. W. MCKEEVA BUSH: Sir, I was very instrumental in getting that done back after '92 elections.

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: However, you don't want a situation where you build up a king, and even though the Governor, being the only one that can move him, can only move him under straightjacket conditions. And I'm just wondering whether that should not be looked at because it says only — I mean he can get up to any kind of rascality. We mightn't know what we doing.

I don't know — like I said, I recognise the importance of... and the — of his independence, of his independence. Not having I think "misbehaviour" defined in any shape or form I think is very, very wide open for him to carry on, as I said, rascality.

THE CHAIRMAN: As it happens — I mean, I don't know whether there's a general wish

[inaudible comments]

THE CHAIRMAN: I don't know whether there's a general wish to define misbehaviour in some way. Now, the word "misbehaviour" crops up not just in this context but in the context of the judges and others whose offices are specially protected, security of tenure.

Now, this came up in our discussions with our dear friends in Montserrat, and they asked the same question, 'What does misbehaviour mean?' So I went away and found I think it was a UN document about proper behaviour of judges, wasn't it? And it defined misbehaviour as **behaviour that renders a person unfit to discharge his or her duties. Misbehaviour means behaviour that renders a person unfit to discharge his or her duties.** Unfit for office basically.

So if you would find — if you think it would be helpful and everybody's content we could put into the interpretation section at the end **misbehaviour means behaviour that renders a person unfit to discharge his or her duties.**

HON. SAMUEL W. BULGIN: Mr. Chair, whilst it might be helpful to put it in there, the fact is that it is not that prescriptive.

THE CHAIRMAN: No, nothing can be.

HON. SAMUEL W. BULGIN: Right. There are a number of authorities — at least there are two Privy Council matters that I'm aware of - one has to do with the thing of the accountant general from Grenada that went all the way to the Privy Council, and there's another one with a judge from Trinidad, and they were referred for removal because of misbehaviour. And there was a long discourse in both judgments about the meaning of misbehaviour in public office, and they all concluded in the end that it is fairly fluid concept depending on the office, depending on the standard, depending on the expectations and depending on a number of other variables, and they were quite content to do that provided rather than to make it prescriptive in any way at all. So common law is really a fluid concept.

THE CHAIRMAN: Yeah, okay. Thank you.
Right. We role on?

MR. ROLSTON M. ANGLIN: Mr. Chairman, just on this point I wondered, firstly, if His Excellency had a view, because certainly in recent times the... what has happened with the judges has caused — has forced him actually to have to think about how these things work, and in reading and looking at this we certainly haven't had in recent times necessarily anything for him to — to have caused him — to force him to have to think about what in real life, day-to-day with an auditor general, and whether or not he would feel comfortable that this would be a clear enough and a useful enough tool to deal with matters as they arose. Because I listened carefully to your — to one interpretation of misbehaviour and certainly that is rather — rather wide.

The other thing that I would like to look at is, is obviously we've also included a section under Public Accounts Committee, and we do not have in Cayman a very clear, I believe, connection between the audit office — well, this isn't clear. Perhaps that's something that could be enhanced between the auditor general and his office and the PAC, because certainly one of the things that we have grappled with, and we've had two schools of thought on it, has been how does the PAC function and interact with the audit office. I can tell you from being on the committee now eight years that initially we were thinking and we had actually even talked to other members of the House about putting together a secretariat within the legislature to support the committee and its work. However, there was a visit by a young lady from the UK's audit office whom we met with and had a detailed discussion of exactly the mechanics behind how their PAC and the auditor general's office in the

UK actually works. And certainly there is bits of that that actually happens in Cayman already.

And perhaps we might need to formalise those relationships a bit more because it certainly would save the country expense, and it would seem to be logical from a practice standpoint to try to mirror what occurs in the UK in that that would lend itself to a lot of precedent. And so you would have real-life precedent as to exactly what should happen and you would then be going about trying to practice and behave in a way that is comparable to another well-established system versus trying to set something up that's slightly different and then you're sort of trying to recreate the wheel, as it were.

I believe that certainly there needs to be some form of sort of... and I say all of this bearing in mind 111 (6), which causes there to be a direct link between the auditor general's office and the Public Accounts Committee. But on the flipside we do need — I do believe there needs to be some more formalised, maybe thought-out mechanism that actually deals with the event where there is perhaps an auditor general's office or an auditor general role who has sort of gone off the beaten path and is not behaving properly in office.

HON. SAMUEL W. BULGIN: Mr. Chair — and maybe Professor Jowell can assist me here — in just about every areas of the Constitution there is either a procedure for dealing with infractions and/or the procedure to establish codes of conducts for these public officers. But if you look at the auditor general and complaints commissioner and so on, there is really no similar arrangements anywhere. And if you look at 111, for example, it just says the reasons for the removal, but it doesn't go on to say how that is going to be done. There's no mechanism, there's no framework in the Constitution or any law which says the Governor, if he receives a complaint he sets up a tribunal, he considers the thing or so on. There's really no mechanism at all in this — in there.

MR. ROLSTON M. ANGLIN: And, Mr. Chairman, just to add one more point before His Excellency weighs in, because another what I believe to be, in my view, frustrating point of how the practice of the audit office in Cayman actually operates on a day-to-day basis is this whole concept that — and I'm not sure, His Excellency can shed light on this point — as far as I'm aware, he also meets on an intermittent basis with His Excellency, who is the head of the executive arm of government.

Now, as — with His Excellency's position as president of executive and the fact — and I could see why there would have been necessities for that in early days of Cayman, but certainly I believe we've gotten to the point now that we have one of the best established systems as it relates to a functioning Public Accounts Committee. There is also a commitment that the — that we are going to change one practice in the Territory which is that the committee will be chaired by the Leader of the

Opposition or his designate, which will be an important improvement for us.

And so, if you take all of that into consideration, and you take into account that we do need to set up a proper — in my mind, in my opinion — a proper system as to how this office ought to be interacting with the Public Accounts Committee, perhaps we need to also get to the level of maturity where this whole business that he frequently meets with His Excellency, who is the president of the executive, ceases as well.

GOVERNOR STUART JACK: Mr. Anglin's made a number of points and excuse me if I forget any of them. Please remind me.

As for the facts as currently pertain, the auditor general, the complaints commissioner, and I guess this will be the same situation, slightly different with the information commissioner, there is at the moment I, as Governor — any Governor has no power to direct them. And I can assure you that the current incumbents do not accept direction from the Governor if — or would not, I haven't tried, nor would I try. They represent in my perception — and I think this is the intention in the Constitution and in local legislation — that they should be important checks — among the most important checks and balances on what the executive does. And therefore they have to have a degree of independence. It is right, in my view, that they have a degree of protection provided for by the Constitution.

Where the issue arises is that there is no procedure, as the Attorney General has just mentioned — and this applies also to the complaints commissioner and will apply I think to the complaints commissioner. There's no procedure for dealing with any misbehaviour, or should I say more accurately dealing with any allegations of misbehaviour. I mean, by their very nature these positions — and I think again the information commissioner is likely to be the same — are ones that have a built-in ability, an even uncanny ability to get up the noses of the executive. That's what they're there to do.

And frequently members of government and civil servants do not like — do not feel comfortable with what the auditor general or the complaints commissioner, or possibly in the future the information commissioner, do. But that's their job.

What you've got to do is you've got to protect them from unnecessary interference while at the same time accepting that they, like anybody else, are capable of misbehaviour. And there must be some way of dealing with their misbehaviour which doesn't set the threshold so low that they're subject to political interference or interference from any member of the executive whether elected or a public officer.

And they periodically do meet with me — not that often actually — and I can assure you there is only one subject which they raise on every single occasion which is their remuneration. And beyond that they broadly keep me informed of what they're doing, but in no sense at all do

they ask for direction from me or do they accept direction from me. And that is not how it operates, and that would be inappropriate for any member of the executive elected or unelected to try to exert that influence over them.

There is another question which is the relationship between those officers and the Legislative Assembly and those committees of the Legislative Assembly to whom they're accountable. And that's — well, as you know, I don't attend the Legislative Assembly or those committee meetings so I can't from firsthand experience say exactly what transpires. But certainly in my mind, as Rolston has raised you know there, is an issue of how well that process is working or whether there are ways in which it could be enforced.

And the final point I make is a personal point because I do not have direct experience. My personal view is that the Public Accounts Committee has a fundamental role in providing checks and balances ensuring that the executive, elected and official, is using the public money properly. And in order to do that, the Public Accounts Committee needs to have the capacity, including the specialist expertise in order to do that properly. And one way of addressing that is the one which I think you've referred to, Rolston, which is the practice, as I understand it, in the UK, of course a much larger jurisdiction, which is to draw to some extent on the services of the auditing body, the national audit office — or in the case here it would be the auditor general's office. But that is something really which the legislature needs to address. You know, it's not for the executive to decide how you should best as legislators carry out that important checking role through the Public Accounts Committee.

MR. ROLSTON M. ANGLIN: Mr. Chairman, if I might just interject one thing.

One of the things — and Mr. Bodden, the current chairman, can attest to this. One of the things that struck me when we met with the young lady that came from the audit office, as she outlined precisely what obtains in the UK she made it quite clear as far as she was concerned her boss, the current auditor general was concerned, their boss is the chairman of the Public Accounts Committee. So it's not just a matter of there's this loose relationship and you're just there with expertise that they may use from time to time. There is a very close working relationship.

Now, obviously what we have here in 111 (6) which says save that the auditor general is answerable to the Public Accounts Committee, Legislative Assembly and must attend upon the committee at its request, I think the question is, is that heightening and strengthening the relationship to the point that the PAC is indeed — does indeed have then the type of relationship that will allow it to really carry out its functions

at the maximum potential. I think that's the question that certainly remains in my mind.

THE CHAIRMAN: No, I this —

MR. ROLSTON M. ANGLIN: If this language does it I'm not sure.

THE CHAIRMAN: No, I think — I mean my understanding was that those words were put in precisely for that purpose, to make it clear if you read (6) as a whole, nobody — nobody — can or may lawfully instruct the auditor general save that the auditor general is answerable to the Public Accounts Committee as he should be. You know it is — that's the relationship and must attend on the Public Accounts Committee at its request.

And then you've got (6) which provides for the auditor general submit reports to the Public Accounts Committee at least twice a year and as requested by the committee.

And then turning back to (5) on the bottom of page 76 that's important as well because it indicates that the functions of the auditor general and the accountability of that post and the audit office shall be further prescribed by law.

So here you've got an obligation for ordinary legislation to fill this out, and no doubt you know with the help of experts like the visitor you referred to. You know the Constitution can only do so much of the story. You know, ordinary legislation is envisaged to fill out this relationship and make it work better.

HON. W. MCKEEVA BUSH: Mr. Chairman?

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: We want to make it clear that we're not talking about shifting checks and balances and independence in any shape or form. But what we do — what we would hope that our Constitution would do was to ensure that there are checks and balances and not a open or carte blanche situation where nobody got any say over him and he comes in like a cowboy and does as he please. And I have tried to be as generic as possible, and I'm trying to talk about what can impact us. I don't want to refer to any — any particular situation, but you just can't have that.

While there must be independence, and we want that to be, and there must be checks and balances, you can't have a situation where — where, as I said, you have a cowboy. So there has to be something somewhere, whether that's another law — and if it's in another law you don't want the Constitution written so that the law becomes impotent.

I certainly wouldn't subscribe to that. And we are a small, small Island, and things that he do, he says, and how he says it, and how he carries on does have an effect on people lives. And that has to be taken into consideration when we're talking about checks and balances and when we're talking about independence of his position. But he not God. No. Don't subscribe to that either.

PROFESSOR JEFFREY JOWELL: Chair, I'm sorry I haven't come back on the Attorney's comment to me. I'm afraid I was out of the room just a few seconds before so I missed the discussion. But I'm happy to talk about it over the break, whenever that might be.

THE CHAIRMAN: Okay, thank you.

Right. Well, what I'd very much like to do is, if we can get to the end of the text before we have a break and then come back to the multistory car park —

[laughter]

THE CHAIRMAN: — many things are — have been placed.

I assume you would like — you would prefer to see Section 112 on Commission for Standards in Public Life removed to the new part which has a wonderful heading which I didn't note down, something like Institutions to Support Democracy or something —

PROFESSOR JEFFREY JOWELL: I found out what the provision was. It was in South African Constitution. It's a bit longer than perhaps should be here. It's called there the State Institution Supporting Constitutional Democracy. That's a bit of a mouthful but certainly institutions.

THE CHAIRMAN: Institutions.

PROFESSOR JEFFREY JOWELL: Supporting either constitutional democracy or democracy.

THE CHAIRMAN: Institutions supporting democracy I would have thought would be enough.

PROFESSOR JEFFREY JOWELL: Yeah. I would agree.

THE CHAIRMAN: And you agree that the — that Section 112 should go then as well?

PROFESSOR JEFFREY JOWELL: I would think so.

THE CHAIRMAN: So you would have the Commission of Public Standards in Life, the Human Rights Commission, the complaints commissioner, the registrar of interests, freedom of information would all be there.

PROFESSOR JEFFREY JOWELL: Yeah.

THE CHAIRMAN: Yeah.

PROFESSOR JEFFREY JOWELL: That's right.

THE CHAIRMAN: And ... okay, so I must make a note to remove that. Move to Part VIII.

Finance.

We're missing a text on public debt, Section 116. I have to say that I tried to find — I tried to do this at home by looking at your Public Finance Management Law, is it? That's what it's called?

HON. W. MCKEEVA BUSH: Yes.

THE CHAIRMAN: And I couldn't find a provision of the kind that you're referring to in your modernisation proposing, but it may be that it had been amended and I didn't have the most up-to-date version of the law. So I gave up and put in brackets here provision to follow and drafted by Cayman Islands delegation. I did try, I promise you. I read it many times and still didn't find it.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chair, I've been struggling, I think most of us, to recall exactly what — how we left it after the last talks. And I think the best we can recollect was that upon reflection the Opposition said they would support the proposal which is contained in our revised proposals subject to, shall I call, it a let-out clause in the event that there were...

THE CHAIRMAN: Emergencies.

HON. ALDEN M. MCLAUGHLIN, JR.: Emergencies or special circumstances of something like that. I think that's what I recall.

THE CHAIRMAN: Yes. I do too.

MR. ROLSTON M. ANGLIN: Mr. Chairman, that is the case, and perhaps instead of trying to draft a specific provision, I think the let-out clauses are already in the PMFL if I recall. And certainly one way of going about this is to say that this will be governed by legislation. In

other words, however that legislation is grafted it would enjoy the support of the Constitution.

So, for example, we don't know what's going to happen five, ten years from now in terms of interest rates and rates of payment or the economy. And so if you try to stick a specific rate that's irrelevant to the times, including inflation, et cetera that you live in, you could very well get stuck in terms of what — and I think that's the key. I think the key is that you want whatever's in legislation to be underpinned by the constitutional provision.

HON. D. KURT TIBBETTS: Through you Mr. Chair. But, Mr. CPA, we're not talking about rates. We're talking about a percentage, not rates.

MR. ROLSTON M. ANGLIN: Yes, the percentage. The percentage rate. Yes, that's what I mean. Sorry.

HON. D. KURT TIBBETTS: When you use the word “rate” by itself you infer...

MR. ROLSTON M. ANGLIN: Sorry, Mr. Chairman —

HON. D. KURT TIBBETTS: If you understand what I'm saying.

MR. ROLSTON M. ANGLIN: The actual percentage that is enshrined in the PMFL could be underpinned by a constitutional provision.

HON. D. KURT TIBBETTS: Right. But the point I really wanted to make, through you, Mr. Chair, was the initial thought was that legislation could be changed quite readily — I'm just telling you what the original thought was because I hear your point. But the original thought was that legislation could be changed quite readily, so you wanted something enshrined in the Constitution which didn't allow for those changes to be done readily.

So, to say that the Constitution would support what the legislation says defeats the purpose of that point, whether we're clinging to that point is another matter, but that was the point originally which led to the thought, if you understand what I'm saying.

MR. ROLSTON M. ANGLIN: And, Mr. Chairman, my first response I think is the thought process we had in terms of actually trying to put a specific percentage in here. Because you could — you just do not know what the world economy will bring, and therefore not knowing what the world economy will bring, to then come and try to stick a percentage in and you just don't know how interest rates are going to move and there's a whole —

HON. D. KURT TIBBETTS: No, I understand exactly what you're saying. I just don't know how to achieve the purpose.

THE CHAIRMAN: Well, it's evident that there isn't a draft for this section, and I don't see any purpose really in going on talking about it. If it's still the case that the Government wants to say something about this, if it is, then I would suggest that you have a — we come back to it after a tea break rather than trying to wonder this or wonder that. You know, I'm surprised that there isn't a text, to be perfectly honest, that we could look at, but if there isn't there isn't.

Anyway can we just go through the rest of the text? Is there anything else that anyone else has to raise a point on? No?

Well, we can go back to —

PROFESSOR JEFFREY JOWELL: Yes, please. The final section, Section 122.

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: Now, that paragraph refers to the reserve power to Her Majesty to make laws for the peace, order and good governance of the Cayman Islands. When we discussed this last — the last round of talks it could I think be arguably assumed that that power was mainly to come in, in order to restore order. Since that time the Caicos Islands case implies that this is an absolutely full power of Her Majesty to come in and do anything she wishes at any time and is totally unrestricted. Insofar as there was any doubt about the extent of the power this case in the House of Lords now removes that doubt. As a result, it is more draconian you might say than it might have been a few weeks ago.

THE CHAIRMAN: Not in our view.

PROFESSOR JEFFREY JOWELL: No, not in your view, but in our view.

[laughter]

THE CHAIRMAN: We always knew it like that.

[laughter]

PROFESSOR JEFFREY JOWELL: Now, I understand that this Constitution cannot, in any way, reduce that power of Her Majesty. But since the West Indies Act under which it is given, 1962, which simply lays down that power without commenting on its exercise. And since the

Constitution can at least govern the Governor's functions we would propose Section 122 (1) be what it is there, and there be a (2) there which is directed to the Governor which goes as follows: **The Governor shall wherever practicable consult with the Premier** — or Cabinet perhaps — **in advance of any exercise of the power under Section 122 (1). The Governor shall wherever practicable consult with the Premier/Cabinet in advance of any exercise — in advance of any exercise of the power under 122 (1), and then possibly unless such consultation is prejudicial to Her Majesty's service. Unless such consultation is prejudicial to Her Majesty's service.** We're not pushing that last little bit but we suspect you might.

[laughter]

PROFESSOR JEFFREY JOWELL: So this speaks to the Governor's powers to try — all it says is, 'Look, Governor, if you get wind of this happening — if you get wind of this happening in advance, please consult us and we might do what's necessary before the powers are exercised'.

THE CHAIRMAN: Yes. Yes. Well, thank you very much. We'll think about that.

My esteemed colleague, Susan, just passed me a note saying don't agree to nothing. This may be because she wants a break while we think about it.

But, no, we'll have to think that over. I mean I think it's a — I've got the hang of it.

The question is — can you leave us to think about that?

The question is whether to have a quick look at the draft Covering Order before we come to the car park, because I had forgotten we needed to look at the Covering Order, or to have a break first and start that.

HON. V. ARDEN MCLEAN: A quick five and a short ten.

THE CHAIRMAN: Pardon?

HON. V. ARDEN MCLEAN: A quick five and a short ten.

THE CHAIRMAN: A quick five and a short ten?

HON. W. MCKEEVA BUSH: Before you do that, Mr. Chairman.

THE CHAIRMAN: Yes.

THE CHAIRMAN: Mr. Chairman, I've been... and it's just something in my mind where this wording — and we keep using it, it's been in the Constitution, Her Majesty.

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: Rather than Her Majesty's government. Now, that — I know that that could well — could be — mean that we're talking about Her Majesty's government in the Islands. But just because I know how some people think and how some people read and don't want Her Majesty to be caught up in any — any licks.

[laughter]

HON. W. MCKEEVA BUSH: Rather... if it's possible to shape that differently.

THE CHAIRMAN: I'm afraid not because Her Majesty is the Crown.

HON. V. ARDEN MCLEAN: Speak your colonialist behaviour.

THE CHAIRMAN: Her Majesty is the Crown —

HON. W. MCKEEVA BUSH: I've been called worse things so...

THE CHAIRMAN: Her Majesty is the Crown and the head of the — she's head of state of the UK and the head of the Cayman Islands and there's no way of ducking that.

HON. W. MCKEEVA BUSH: Just connotations at time, that's all you know? There's no way to shape it you say? You sure that in all your experience you can't find different wording?

THE CHAIRMAN: No. I'm quite sure.

HON. W. MCKEEVA BUSH: Like you could use the Crown rather than Her Majesty.

THE CHAIRMAN: Well, you see, the trouble is in some places such as this, Section 122, we're stuck with the language of the West Indies Act which says — which uses the term “Her Majesty, “reserve to Her Majesty”. Anyway I think it's very difficult.

HON. D. KURT TIBBETTS: Are we going to have to change it to His Majesty if and when that happens?

THE CHAIRMAN: Ah! That's coped with by — in our legislation that's coped with — that's dealt with by the Interpretation Act.

HON. W. MCKEEVA BUSH: Interpretation Act. Well, sir, as I said, I just know how some people twist and turn and blame.

THE CHAIRMAN: We'll have a ten minute break now and then come back as soon as we can to the car park.

RECESS

RESUMED

THE CHAIRMAN: Right. Ladies and gentlemen, we must crack on. I'd just like to say a few words first about what time we have left. And...

[inaudible comments]

THE CHAIRMAN: Okay? I'd like to say a few words first about the time we have left and how best to use it. And we have — we have some time this afternoon. I know that Minister McLaughlin has an engagement at 6:00, was it, so we should use the time before then as profitably as we can. I mean, I think it's up to the Government whether they are prepared to go on after he's left the room, but I would quite understand if they didn't wish to do that. But we can meet tomorrow at 9:00, and carry on and bring the curtain down on private discussions at 11:30. And as I understand it, the media and the public are being advised that the final closing session in public would be at noon tomorrow, 12 noon. So that gives us quite a bit of time to run around the car park. But before doing that we have to be able to look at the draft Covering Order, pages 2 to 5 of this text. I hope there isn't a great deal of time we need to spend on it, but I wanted to make a couple of remarks about it in explanation in case it would be helpful.

So, if you could just turn to page 2. This draft Covering Order is in very standard terms for constitution orders for Overseas Territories, and you'll see that it deals in Section 3 with revocations. All the existing constitution orders which are then listed on page 5 would be revoked. And there's another one to be added to the list which is the order — the Cayman Islands Constitution Amendment Order 2008. That's the little Order in Council that was made at your request in November, was it Susan, the last constitution amendment order was made?

MS. SUSAN DICKSON: Yes.

THE CHAIRMAN: In December. So that would need to be added in there.

Then Section 4 is the one I want to focus on in particular because this deals with the timing — this deals with the timing of any new constitution taking effect, and the delay in certain provisions taking effect. So Section 4 (1) would provide: **subject to (2) and (3) Schedule II shall have effect from the Constitution of the Cayman Islands on the appointed day.** And the appointed day is defined on page 2, Section 2 (1). It means the day appointed by the Governor under Section 1 (2).

Now, under Section 1 (2) the Governor decides the appointed day by proclamation. This is because the new Constitution that is envisaged would come into force midterm, not upon a dissolution of the Legislative Assembly, but after the next elections assuming the public supported it in the referendum. And at an appropriate time during the course of the next parliamentary term the Governor would make a proclamation designating a particular day for most of the new Constitution to come into force, and that would be the effect of Section 4 (1).

Then Section 4 (2) deals with the delayed application of the Bill of Rights. **Part I of the Constitution shall have effect from two years after the appointed day or from such earlier day after the appointed day as the Governor acting in his or her discretion may appoint by proclamation published in a government notice.**

Now, I drafted it that way because I think as we agreed last time there should be a two-year delay, but it may be that one could bring that forward. If it was all thought to be a good idea to bring the Bill of Rights into force less than two years after the appointed day, that allows for that to happen.

HON. W. MCKEEVA BUSH: Mr. Chairman, on the Bill of Rights you have a lot of — a lot of areas that the Bill of Rights will impact, and you'd want to give government time to have all that done - laws changed and so on. And we would — you would want two years or more to have that come into force. I think the UK had quite a bit of time.

A MEMBER: Two years.

HON. D. KURT TIBBETTS: UK had two? I thought it was five.

THE CHAIRMAN: Well, we could settle on two years certainly if that's what you would prefer.

HON. W. MCKEEVA BUSH: Yeah. But there are things like children's law and all these other things that would need to be — quite a bit of laws that would need to be changed from what I understood.

HON. D. KURT TIBBETTS: Yeah, Mr. Chair, just a quick question to you.

Do you have any idea what the thought is with regards this two years? What happens if just for ease of mind on our part we asked for three years? What would be the reaction? And this is not for any other reason than what is practical.

[pause]

HON. D. KURT TIBBETTS: Mr. Chair, just so that you will know, I believe that it is consensus among all the elected members that three years is a preferable time, and again, for all practical reasons because we wouldn't want to have a constitutional provision which the country simply cannot meet. And I believe that if you even go back to the UK's experience, they will easily appreciate that.

THE CHAIRMAN: Well, if we settled on three years, it would be three years certain.

HON. D. KURT TIBBETTS: And that's it.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: But not this business about beforehand.

THE CHAIRMAN: No, no. So Section 4 (2) would read **Part I of the Constitution shall have effect from the day three years after the appointed day** full stop. Yeah?

Now, that raises the question, if you have three years, do we need to make special provision to delay for an even longer period the provisions about segregation of prisoners?

[inaudible comment by Leader of the Opposition — microphone not turned on]

THE CHAIRMAN: I thought when we discussed it the day before yesterday it was on the basis of on two plus two years. That would make four years.

[inaudible comment by Leader of the Opposition — microphone not turned on]

HON. D. KURT TIBBETTS: But you laugh and you're forcing me to laugh, too. But I see where the nose coming from.

THE CHAIRMAN: So we would need to add in some words **but Section 6 (2) and (3) — whatever it is — shall have effect... but Section 6 (2)**

and (3) shall have effect one year thereafter. Okay? So it's four years for those provisions, it's three years for all the rest. Is that agreed?

HON. D. KURT TIBBETTS: Don't look like we have a choice, sir.

THE CHAIRMAN: And then Section 4 (3) deals with a number of specific cases which suspend certain the operation of certain provisions until the dissolution of the Legislative Assembly after the — the next dissolution after the appointed day. And that is that under Section 45 (1) (b) — this is a reference to the maximum number of ministers other than the Premier — six other ministers refers where a reference to five other ministers. So, you would continue with a Premier and five other ministers until the next dissolution, and the reason for that is that the number of — sorry?

HON. ALDEN M. MCLAUGHLIN, JR.: Premier.

[inaudible comment by the Leader of Government Business — microphone not turned on]

THE CHAIRMAN: Ah. What is the current position?

HON. ALDEN M. MCLAUGHLIN, JR.: Five.

THE CHAIRMAN: Five.

HON. ALDEN M. MCLAUGHLIN, JR.: Five total.

THE CHAIRMAN: So it's six other ministers reference to four other ministers. Section 45 (2) of the Constitution will have no effect. That's the provision that allows for an increase in the number of ministers to take account of an increase in the number of elected members.

Section 60 (1) (b) shall have effect as the reference to — instead of 17 there we would put 18, 18 elected members where a reference to 15 elected members. Accordingly, Section 60 — then Section 60 (2)... and (3) has gone out, so section (2) of the Constitution shall have no effect.

And then there's a reference to Section 88. And Section 88 at the moment, subject to confirmation of the — of the provisional agreement that there will not be any provision for single-member constituencies, Section 88 will be deleted, so there wouldn't need to be a reference to Section 88 in Section 4 (3) here. But that's one of the things in the parking lot as, I understand it, at the moment.

So the — in summary, the position is that because a new constitution would be brought into force during the term, the next parliamentary term, for however long, for the rest of that parliamentary term the number of ministers and the number of elected members would

stay the same. They can't do anything else because you can't increase in the middle of a parliamentary term the number of members and consequently the number of ministers. At the next dissolution after the Constitution comes into force, the provisions with the new numbers kicks in so that there can then be a Premier and six other ministers and then there would be 18 elected members. Okay?

And after that, in the future after that there is power built into the Constitution for further increases to be made by ordinary law, you know, the provisions we've discussed. So that's how it would work.

And there's a related provision here which is Section 8 on page 4, and this depends on whether there is in the new Constitution provision for an Electoral Boundaries Commission, which is as envisaged in the draft at the moment, as soon as practicable after the appointed day and before the Legislative Assembly is dissolved in accordance with 7 (3) — that's the dissolution after the — the next dissolution after the new Constitution comes into force. **The Governor shall appoint an Electoral Boundary Commission in accordance with Section 89 of the Constitution. The commission so appointed shall as soon as practicable and in accordance with Section 90 of the Constitution review the electoral constituency boundaries and submit a report to the Governor and the Legislative Assembly concerning its recommendations for changes in the boundaries of the constituencies with a view to establishing...** now, this is where if there's not a single-member constituency situation, we need to change the words here. But the point is with a view to... I'm not drafting it, but the idea is with a view to dealing with a Legislative Assembly of 18 members rather than 15. You see what I mean?

[inaudible comments]

THE CHAIRMAN: And so, in order to prepare for that increase by three there needs to be a boundary commission to look at the constituencies and to form a recommendation about how they should be, how the three additional members should be accommodated. Okay? So that's the purpose of that. But I — you know if the provision about single-member constituencies is deleted, we need to change the wording at the end of this provision.

HON. D. KURT TIBBETTS: But if and whenever that's going to be handled by law?

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: But — well, that's the point I wanted to come to, Mr. Chairman.

I believe that this particular provision needs to be drafted in broad enough terms to accommodate the possible increase — two things: the possibility to increase membership beyond the 18; and the possibility to move to single-member constituencies, if it ever happens. Otherwise, if you create the ability to achieve those two things by ordinary legislation, but you don't have the ability to extend the function and scope of the boundary commission in the same way you'd have to go back for a constitutional change.

THE CHAIRMAN: No. This is an advantage of having in the Constitution the two sections on a boundary commission and review of boundaries, which is 89 and 90 at the moment which we have to come back to in a little while.

This provision here, Section 8 (2) in the Covering Order is a transitional provision, so it's just designed to do the one thing that needs to be done immediately, or as soon as possible, after the Constitution comes into force, which is to prepare for an increase from 15 to 18. Any further increases in the future, there need to be an Electoral Boundary Commission to deal with it, and we can provide for that in the Constitution itself. All right?

Okay. Now the other things are fairly straightforward and quite traditional in constitution orders for Overseas Territories.

Section 5 deals with the maintenance of the existing laws enforced in the Cayman Islands, and that they should be read in conformity with the new Constitution. But there is a power in Section 5 (2) which might not be necessary, but there is a power of — if it's helpful — for the Governor to make regulations — this is the Governor on the advice of the Cabinet to make regulations — necessary modifications within 12 months. Now, you may prefer not to use this or not even to have it and leave any necessary modifications to be done by the ordinary legislative process - passing of a bill and the enactment of a law. For example, Gibraltar did this, I think. They passed an “ordinance” they call it in Gibraltar, making a whole series of changes to bring the existing law into conformity with the whole Constitution. But this is a — an additional power to do so by regulations, without prejudice to it being done by the ordinary legislative process, and also without prejudice to any regulations then being amended by the ordinary legislative process. This is a traditional provision, but it's not essential. You don't have to have it if you don't want to.

Then Section 6 preserves existing offices and officers, and the only one — the only specific cases that need to be dealt with here are the Chief Secretary whose office will cease to exist, so that's why it says “any office except that of Chief Secretary” and we've deleted “and Financial Secretary” already. **Any office except that of Chief Secretary established by or under the former Constitution and existing immediately before the appointed day shall not after that day so far**

as is consistent with the Constitution continue as if it had been established by or under the Constitution. And then 6 (2) deals with **continuing in office the people who hold those offices**, and 6 (3) **that they be deemed to make any necessary oaths.** 6 (4) deals with the specific case of the Premier and it provides that: **the person who immediately before the appointed day who holds the office of Leader of Government Business shall on and after that day hold the office of Premier in accordance with the Constitution.** So, that's a specific case because the office of Leader of Government Business is going to disappear and be replaced by that of Premier.

[inaudible comments]

THE CHAIRMAN: Go on.

HON. D. KURT TIBBETTS: Mr. Chair, I was — just quickly back to 5 (2) so that we're all clear on this. I'm sure I heard you mention when you speak — spoke to this, the Governor.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: That is on the advice of the Cabinet?

THE CHAIRMAN: Yeah, because it's a reference to the Governor only, so the normal rule applies.

HON. D. KURT TIBBETTS: Which is on the advice of the Cabinet?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: Right.

THE CHAIRMAN: You can — I'm happy to specify it in this instance if you prefer it because it's in the order and not in the Constitution. But that's the intention. It's not a matter for the Governor doing what he thinks best, it's — this is a matter for the Governor with the advice of the Cabinet.

HON. V. ARDEN MCLEAN: Well, I — Mr. Chairman, I believe we need to specify “on advice from Cabinet” because in the interpretation Section 121 **“Governor” means the person for the time being holding the office of the Governor of the Cayman Islands** —

THE CHAIRMAN: Yeah.

HON. V. ARDEN MCLEAN: Includes any person for the time being.

THE CHAIRMAN: Yeah. Well, I mean I think the normal — I think you know to find out how the Governor must exercise this power you would go, really, to the section on exercise of the Governor's functions which is the one that states that unless there's an exception that applies, the Governor acts in accordance with the advice of the Cabinet. But I'm happy to — if you want this Section 5 (2), I'm quite happy to write in here just for the avoidance of any doubt “the Governor acting in accordance with the advice of the Cabinet”.

[inaudible comments]

HON. V. ARDEN MCLEAN: Well, I think it's — in 33 it is very specific.

THE CHAIRMAN: Yep. Yeah.

HON. V. ARDEN MCLEAN: Yeah, that's fine.

THE CHAIRMAN: I mean, there is a question whether — whether... there is a question of substance here whether it is useful or necessary or politically acceptable for this special power to be done because this is really saying — it's trusting the executives to make regulations to make a series of modifications to bring the existing law into conformity with the Constitution. It would be quite understandable if you collectively took the view that it would be better to do that thing by ordinary legislation. You know, it would be the task of the dear old AG's chambers to sit down and draw up a bill making any consequential changes that need to be done.

HON. V. ARDEN MCLEAN: But that would necessitate reviewing the entire thing and taking it to the Legislative Assembly, every law in this country, really.

THE CHAIRMAN: Well, yes. But there is a safety net and that is Section 5 (1). If you look at Section 5 (1) you see **subject to existing laws** —

HON. V. ARDEN MCLEAN: Okay.

THE CHAIRMAN: — **should have effect on the last appointed days if made in pursuance of this Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.** That's the safety net.

HON. V. ARDEN MCLEAN: Yes. Yes.

THE CHAIRMAN: But of course it does leave it to the courts to do that interpreting exercise.

HON. V. ARDEN MCLEAN: Until (2) is —

THE CHAIRMAN: Exactly. So then if you're worried about it being misunderstood, the sensible thing to do is to provide for any modifications by law — by law or by regulations if you...

HON. V. ARDEN MCLEAN: Well, this way it doesn't put any pressure on anyone to get it done within a specified timeframe.

THE CHAIRMAN: No. That's right. Your safety net is 5 (1).

HON. V. ARDEN MCLEAN: Yeah, so

HON. D. KURT TIBBETTS: Which one are you on, Mr. Chairman?

THE CHAIRMAN: I've gone back to 5 (2) because you wanted to...

[inaudible comments]

HON. D. KURT TIBBETTS: Mr. President —Chair. Mr. Chair... we usually have Mr. President on Tuesdays. I forgot what day it is.

The Governor may by regulations published in a government notice at any time not later than 12 months after the appointed day... and if we so choose we could have in “upon the advice of Cabinet”.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: **Make such modifications or adaptations to any existing law.** There are some who as — while we understand that this is over and above the usual process of legislation through the Cabinet, through Legislative Assembly, and Governor's assent, there are some who are not comfortable with Cabinet's ability to make those changes to existing legislation by creating regulations which don't call for debate and public notice. Can you tell me — can you tell me the purpose of this?

THE CHAIRMAN: Yeah. I mean, as I said, I think the purpose of it really is to provide quicker method of making any necessary consequential changes. However, as I said earlier, I would quite understand — and actually privately support — the idea that making changes to existing law to bring them into conformity with the constitution, although it may be a rather tedious and mechanical task, is one that should be done by the ordinary legislative process, because I

think if I was a member of your legislative body, I think I would want to see it and check that it was all done properly. Even though it is very tedious, I think I might have better things to do, but I would feel more comfortable in my conscience if I'd had a chance to look at it.

So, if it's your preference collectively to do that job in a normal legislative process — as they did in Gibraltar recently, they don't have a proper bill and they, you know — then we would simply delete 5 (2) and (3) which say nothing about this.

HON. D. KURT TIBBETTS: All right. Just another question.

Is there any possibility... it's hard to judge it, but just to flesh it all the way out, I'm just thinking that in some instances — I don't know how many, I don't know that yet — there may be just very minor changes which really don't call for content, or substance, or anything like that, and... but you see the way this is worded you could do any one with it. So is there a way to have this provision as in 5 (2) but to limit that to what are considered — what's that word? — inconsequential?

THE CHAIRMAN: Yeah, but that's difficult because then it's —

HON. D. KURT TIBBETTS: No, that's what I'm just asking you, sir.

THE CHAIRMAN: Yeah —

HON. D. KURT TIBBETTS: So, basically, you either have it or you don't have it?

THE CHAIRMAN: Yeah, I think so. I think so.

HON. D. KURT TIBBETTS: All right.

HON. SAMUEL W. BULGIN: Mr. Chair, can I just ask in follow-up to what the Leader is saying?

Is there anything in (2), 5 (2) that would prevent the government saying 'We want these regulations to be by way of affirmative resolution by the LA'? Do they have that flexibility? In that way, it occasions a debate in the House.

MR. MICHAEL BRADLEY: Surely, Mr. Chairman, all that 5 (2) is doing is saying that there is a shortcut to tidying up the laws that you're not making any substantive change to the law. The laws have already been modified under 5 (1), and read and construed with such modifications as are necessary to bring them into line with the Constitution. And if there is no substantive changes being made in the laws, then there's an argument for saying that the —

HON. D. KURT TIBBETTS: Ah, when you read the two of them together I see what you're saying.

MR. MICHAEL BRADLEY: — by regulation.

There's also another point that I would make that if you look at the terms of the law, or revision law which have a passing acquaintance, there is power there to make such necessary and consequential adaptations as to bring the law that you're revising into conformity with any other law. And, in fact, I have reason to believe that the law revision commissioner has from time to time exercised that when he's satisfied that there's no change being made to the law.

HON. D. KURT TIBBETTS: You have reason to believe that especially when you look in the mirror.

[laughter]

THE CHAIRMAN: Well, it's your choice, I think. It's your choice.

HON. D. KURT TIBBETTS: Does that shed any different light?

MR. MICHAEL BRADLEY: It's there so that the public can clearly understand what the present state of a law is after the constitution has come into force. And I just think that it's for the benefit of the public if there is because the situation is that the law is altered by the constitution.

THE CHAIRMAN: I mean, I must say that I'm not sure that it actually makes a great deal of difference if you have — if you write in an affirmative resolution procedure for the Legislative Assembly to doing it by a bill and a law, because... okay, you'd have to — there's a different procedure. But I think if there's any hesitation about entrusting the executive with this on any side, even though it may seem innocent, some of the things that could — some of the things are very mechanical. For example, no doubt there are all sorts of things in finance legislation referring to Financial Secretary which would need to be changed to minister responsible for finance. There may be a judgment about that, you know. It might — in some cases it might not be as mechanical as it looks, and there may be an interpretation of the constitution that's required. So there may be some judgment that has to be exercised.

HON. SAMUEL W. BULGIN: The point about — sorry. Sorry. The point about affirmative resolution... you referenced that just now, but it might not necessarily occasion a debate. All that happens is that I think they want some comfort from knowing that there's transparency and openness to what is being done to avoid any suspicions.

The — it might very well be that all that is required is the amendment — the amended regulation is done, goes to Legislative Assembly with an explanatory note. Whoever has conduct of the matter reads the explanatory note and the House is asked to vote on it. I suspect that nine out of ten times you won't have a debate, but you will have an acclamation in the House where people say, 'I heard the explanatory note and I vote for it' and that's the end of it. But the public would have heard the explanation why it is being done. All of that can take ten minutes.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, we've been working on the basis of trying to build consensus and cooperation and getting a document that we can all get behind. And I understand the concern and discomfort of the lady member in the Opposition in relation to this.

So, might I suggest, although it might well be a bit redundant to say so that we could adopt Section 115 (2) of the BVI order which says: **the legislature may by law make such amendments in any existing laws that appear to it to be necessary and expedient for bringing that law into conformity with this Constitution or otherwise for giving effect to this Constitution...** and so forth. The reason I say it may be a bit redundant is that it should be fairly obvious the legislature would have that ability. But I think it just makes that clear that that's what's proposed, and I think it would meet the concerns of Miss Julianna.

THE CHAIRMAN: Yes. Yes.

HON. D. KURT TIBBETTS: Leave 5 (1) and substitute that for that?

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah.

THE CHAIRMAN: It's actually — yeah, I'm happy to do that. As a matter of fact, I don't think it's necessary to say this because it's — the legislature can do it, but if you'd like to put that in instead ...

HON. D. KURT TIBBETTS: So, what is it again —

THE CHAIRMAN: Yeah, so 112 (5) of BVI instead of (2) and (3). Okay? Okay?

HON. ALDEN M. MCLAUGHLIN, JR.: And you may need the (3) from BVI as well just to —

THE CHAIRMAN: Oh, yes.

HON. ALDEN M. MCLAUGHLIN, JR.: So there's a definition of existing laws.

THE CHAIRMAN: We've got that already there.

HON. ALDEN M. MCLAUGHLIN, JR.: Oh, we've got that already?

THE CHAIRMAN: We've got that there already in (4).

HON. ALDEN M. MCLAUGHLIN, JR.: Then we're good.

THE CHAIRMAN: Yeah, we are. Okay?

I think we're nearly through.

Then Section 7, the Legislative Assembly. This is designed to make sure that by virtue of the existing Constitution being revoked all new members of the Legislative Assembly don't lose your seats because there's no Assembly anymore. So it provides that: **any person except the Chief Secretary and Financial Secretary who immediately before the appointed day is a member of the former Legislative Assembly defined as the one under the existing Constitution shall on that day become a member of the Legislative Assembly under the new Constitution, shall be deemed to have complied with Section 64 which is a taking of oaths, and shall hold his or her seat in accordance with the Constitution.**

HON. D. KURT TIBBETTS: Mr. Chair?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: This is a little separate, but I just want to find out.

The way it works here with us now constitutionally, if you are not an elected member of the Cabinet, and you are an elected member, ordinary elected member, whenever the House is dissolved —

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: — whenever the House is dissolved, then you are no longer an elected representative?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: So that means in our case for, what, six weeks... somewhere between six weeks and two months, almost on the average two months the elected representatives are no longer elected representatives, which means that although there is no sitting of the

Legislative Assembly, it really means that the country for that period of time only has five elected representatives. That's what it means.

Now, there's provision that if it is necessary to recall Parliament that you can recall the members. But I am just wondering what obtains in — from your experience in other jurisdictions because it just seems weird for that interim —

THE CHAIRMAN: Well —

HON. D. KURT TIBBETTS: — for the country to only have five elected representatives.

THE CHAIRMAN: Well, it's the same in the UK. I mean, when Parliament is dissolved.

HON. D. KURT TIBBETTS: So that's where it comes from?

THE CHAIRMAN: Yeah. When Parliament is dissolved ministers continue to hold their offices until a new government is formed.

HON. D. KURT TIBBETTS: What's the usual —

THE CHAIRMAN: But the — there's no member of Parliament —

HON. D. KURT TIBBETTS: What's the usual time span between dissolution and election?

THE CHAIRMAN: Well, do you know? Three or four weeks probably. About three or four weeks, I should think, maybe a bit more sometimes. But the government of the country goes on, you see.

[inaudible comments]

HON. D. KURT TIBBETTS: The government can call their own elections or as is fixed. Madam Speaker, what's the time of prorogation — dissolution I mean?

HON. EDNA M. MOYLE: Two months.

[inaudible comments]

HON. D. KURT TIBBETTS: So it's eight weeks.

[inaudible comments]

HON. D. KURT TIBBETTS: It's eight weeks. It's eight weeks. And then there's another week after the elections before anyone is sworn in. And I'm just — I'm just wondering if that is something that we shouldn't at least cut the period down.

THE CHAIRMAN: Yes. Well, at the moment it's in Section 86, on page 61.

HON. D. KURT TIBBETTS: Of the draft?

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: Mr. Chairman?

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: Mr. Chairman, there should be no reason why we can't have a shorter period of time. There — I mean, we're here talking about modernising, and I want to help the government as much as I can.

[laughter]

[inaudible comments]

HON. W. MCKEEVA BUSH: But the reality is — the reality is, is that elected members, in the eyes of the public and on the demands of the public, are elected members until they lose the election. And I understand the conventions and precedents of the Westminster system, but it's not practical here, and I think we need to get — as I say, get away from it, get a closer time. I don't know how generous the Government want to be in paying people, but it needs to be looked at.

THE CHAIRMAN: Well, at the moment it prescribes that **a general election shall be held at such time within two months — at such time within two months after dissolution of the Assembly as the Governor shall appoint by proclamation published in the government notice.** That's the Governor on the advice of the Cabinet of course.

[inaudible comment]

HON. D. KURT TIBBETTS: Mr. Chair, if I might?

THE CHAIRMAN: So you could bring that period down if —

HON. D. KURT TIBBETTS: No. No. What I'm saying is I'm not so sure — forgive me but I'm not so sure that we wish to tamper with any of the election calendar that exists. I think it's only how it affects... well, I don't know. Is it that once the Legislative Assembly is dissolved that the representative is no longer representative?

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: Yes.

MEMBERS: Yes.

HON. D. KURT TIBBETTS: It is? Okay. So if that's the case then — if that's the case...

HON. V. ARDEN MCLEAN: The Governor can call the dissolution three weeks before. It's still within two months.

HON. W. MCKEEVA BUSH: That's right.

MR. MICHAEL BRADLEY: I think if you — and Mr. Connor might be able to help. I think if you look at the Election Law the timetable of that is such that you can shorten it beyond the two months. To make it six weeks would mean necessarily amendments and shortening periods under the Elections Law.

HON. ALDEN M. MCLAUGHLIN, JR.: So be it. It happens everywhere else in the world.

HON. V. ARDEN MCLEAN: But the — but, Michael, does it follow through that the Election Law and the registration and the likes and likes and likes and preparation therefore... does it follow through that they tie together — that ties with the dissolution of the House? I don't think so because you can declare that an election must be held other than the House being dissolved. You can do that. The Governor has a responsibility through proclamation to call an election. It has nothing to do with the dissolution of the House. It just so happens that we tie them all in.

HON. D. KURT TIBBETTS: In other words, you can keep your nomination day and every other day and simply say that the general election of members of the Legislative Assembly shall be held at such time within one month after every dissolution of the Assembly. But the election timetables don't have to change because of that.

[inaudible comments]

HON. D. KURT TIBBETTS: They do? Orrett? Tell me more.

[inaudible comments]

HON. D. KURT TIBBETTS: But what I'm saying is, is that all hinged to the dissolution?

MR. ORRETT CONNOR: Yes.

HON. V. ARDEN MCLEAN: No.

HON. D. KURT TIBBETTS: Forgive my ignorance but explain why.

HON. V. ARDEN MCLEAN: If — everybody should — I should be able as a newcomer or as an incumbent to go and get nominated next week, to run the general election while I'm still a sitting member. I have to get nomination.

MR. MICHAEL BRADLEY: The Legislative Assembly passed the Elections Law. If they wish to change it, it's within their competence to do so.

HON. W. MCKEEVA BUSH: Of course.

MR. MICHAEL BRADLEY: But what I'm saying is at present my recollection is that the period of two months must be put in here otherwise emergency changes will be needed for the Elections Law. And again I defer to Mr. Connor who is more experienced than I am.

HON. D. KURT TIBBETTS: But you see... okay, so ministers are still elected until election day?

HON. W. MCKEEVA BUSH: And nominated —

THE CHAIRMAN: No, they continue after. They continue — the ministers continue in office until a new Premier is appointed.

HON. D. KURT TIBBETTS: Yeah, that's what I mean. But they, too, on nomination day, while they are elected...

HON. V. ARDEN MCLEAN: Have to go and get nominated.

HON. D. KURT TIBBETTS: They have to get and nominated in the same way.

HON. V. ARDEN MCLEAN: Exactly. And we're still holding office.

THE CHAIRMAN: Well, you're still holding office as a minister but not as a member of the Legislative Assembly, because the Legislative Assembly once it is dissolved does not exist you see?

HON. W. MCKEEVA BUSH: No, but that's technical.

HON. D. KURT TIBBETTS: I understand.

THE CHAIRMAN: Okay. So there are no — after a dissolution there are no members of the Legislative Assembly. Ministers, however, continue to hold office as ministers, right through until after the general election when the Governor appoints a Premier and the Premier advises the Governor who the other ministers are to be. They are appointed and some — they may be the same but there may be some different. This is to ensure that the government —

HON. D. KURT TIBBETTS: It only five elected ministers.

THE CHAIRMAN: Executive government can continue through the period.

HON. V. ARDEN MCLEAN: But, Ian, the reason you become a minister is through the process of being elected to the legislature.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: I'm almost but not quite sorry that I brought it up. I'm just wondering if there's any type of solution to that.

HON. W. MCKEEVA BUSH: But —

HON. D. KURT TIBBETTS: I just don't think that it's fair, sir. All I'm saying is I don't think it's fair for elected members of the Legislative Assembly once the House is dissolved to — to not be remunerated because they still continue on.

THE CHAIRMAN: If the question is remuneration —

HON. D. KURT TIBBETTS: Yes.

THE CHAIRMAN: This arose in the BVI and we've got a very simple solution.

HON. D. KURT TIBBETTS: I thought you would have smelled that from long time.

[laughter]

THE CHAIRMAN: If you — if you're prepared to pay for it I'll read out Section 67 (2) of the BVI Constitution. It says — well, 67 (1) first: **Every elected member of the House shall vacate his or her seat in the House at the next dissolution of the House after his or her election.** Then at (2): **Notwithstanding that a member of the House of Assembly has vacated his or her seat by virtue of (1) every such member shall be entitled to continue receiving the benefits and privileges of a member until the polling day for election for a new House.**

HON. D. KURT TIBBETTS: As is done in the UK.

THE CHAIRMAN: No. Oh, no. We don't pay for members who've — are no longer members. No. No. No. No. No. No. No.

[inaudible comments]

THE CHAIRMAN: **Provided that such benefits and privileges shall cease if the member fails to win a seat at the general election.**

HON. W. MCKEEVA BUSH: Right.

THE CHAIRMAN: So if you would like that to be put in and you're prepared to pay for it out of your budget and the public are prepared to support the idea, fine, we'll put it in.

HON. D. KURT TIBBETTS: Well, I mean you're not talking about...

THE CHAIRMAN: Huge amounts.

HON. D. KURT TIBBETTS: No.

HON. W. MCKEEVA BUSH: It's not a million dollars. It's not a million dollars.

THE CHAIRMAN: All right.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, can I suggest that that is a matter that can be dealt with separately and need not be dealt with in the Constitution.

THE CHAIRMAN: Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: It wouldn't affect the current elections.

THE CHAIRMAN: I would be very happy to do that.

HON. ALDEN M. MCLAUGHLIN, JR.: I don't think any of us who are about to face an election really want to have that as an issue to deal with.

THE CHAIRMAN: You're quite right. You can deal with it by ordinary law.

HON. ALDEN M. MCLAUGHLIN, JR.: Not right now.

THE CHAIRMAN: You can deal with it by ordinary law.

HON. ALDEN M. MCLAUGHLIN, JR.: Let's defer the evil day.

HON. W. MCKEEVA BUSH: Do it by proclamation.

MR. EDDIE THOMPSON: Mr. Chair? Mr. Chair?

[inaudible comments]

THE CHAIRMAN: Let's get back to the business at hand. We've concluded that —

Yes, Mr. Thompson.

MR. EDDIE THOMPSON: One observation. I was just speaking to the HE, and a private citizen working for a law firm or any other large firm usually there is requirements that they would have to vacate their posts upon nominating — or running — announcing their attempt to run for office. And it would be the same for the civil service is it not?

THE CHAIRMAN: Yes.

HON. W. MCKEEVA BUSH: No.

MR. EDDIE THOMPSON: So there it would be a disadvantage.

HON. W. MCKEEVA BUSH: To who?

MR. EDDIE THOMPSON: Well, to the potential candidate.

HON. W. MCKEEVA BUSH: No.

MR. EDDIE THOMPSON: If you are receiving salary is it not?

HON. W. MCKEEVA BUSH: No. You see, the one thing there, Mr. Chairman, is that the standing member or current member is expected by the public to continue serving them. I can't vacate my office. I have to find money to pay for it and be there with all the trappings that exist and have — and is expected to the public for them —

HON. D. KURT TIBBETTS: There is a difference.

HON. W. MCKEEVA BUSH: There is a difference. There is a difference. And all of that.

MR. ROLSTON M. ANGLIN: And not only that, Mr. Chairman, firms across the Islands have very different policies. Some put people out and still pay them. People do very, very different arrangements.

HON. W. MCKEEVA BUSH: So hitherto for, the person that has been disadvantaged has been all like me.

MR. EDDIE THOMPSON: I do agree that there is varying policies, some which you don't have to resign, but it was more to the point of civil servants.

THE CHAIRMAN: I don't mean to get into the multistory car park. Well, I'm not really, but we have to get into the car park. We're not into the car park yet. I remind everybody we're not even into the parked issues. We're still dealing with the Covering Order, and we're getting distracted down byways which I don't think we really need to go down. Because unless we're very careful we'll have to find another car park to put these byway issues in. So...

HON. D. KURT TIBBETTS: Easy now.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman —

HON. W. MCKEEVA BUSH: We only have one.

THE CHAIRMAN: Can we finish with the Covering Order and go to the car park?

HON. ALDEN M. MCLAUGHLIN, JR.: Right. Can I just say two things that are completely unrelated?

One is — there is just an additional point that members of the Legislative Assembly are subject to be recalled by the Governor if there is any emergency during that period as well. But as I say, I think that those are issues that — and they prey on all our minds who are in the public service — can be and ought to be dealt with separately than the Constitution. We can look at it as a policy matter within government and address it.

But the second matter is that I've cancelled my speaking and ribbon-cutting engagement and sent Emily Alfonso to do it. So I'll carry on as long as everybody has strength.

THE CHAIRMAN: That's very generous of you.

HON. ALDEN M. MCLAUGHLIN, JR.: Good.

THE CHAIRMAN: Thank you.

Well, shall we — unless there's anything else... unless there's anything else, the first... I think the first point I have in the car park... first point I have in the car park is... you will — you will correct me if I miss any out — is Section 30. I'm not aware that there are any other parked problems in the Bill of Rights, but when we come to Part II this first one is Section 30. Now, that is one which I have reserved for my minister to consider. There's no point discussing this any more. This is the question of consultation about the appointment of the Governor.

The next — the next one is Section 32 (2). Now, I'm sorry, I'm trying to catch up. There was a piece of paper that was circulated which I haven't had a chance to read yet. Here it is. No, it's not, that's 33 and 34.

32 (2) this was the suggestion of the Government yesterday to insert after “any other law” on the very bottom line of page 32 **in the best interest of the Cayman Islands and not prejudicial to the interests of the United Kingdom.** I think that was the thought.

HON. ALDEN M. MCLAUGHLIN, JR.: Her Majesty.

THE CHAIRMAN: Well, I know you said Her Majesty, but there's a... what I think we established was you really meant Her Majesty's government in the United Kingdom as opposed to Her Majesty as Queen of the Cayman Islands. I think that's what you said.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, I'm trying to make a distinction, but the other — well, the preceding section and the two — and the balance of that section and (3) all refer to Her Majesty. So I'm not sure why there would be this distinction in relation to this particular point.

THE CHAIRMAN: Well, the problem is that Her Majesty — it depends what the context is. **Such functions as Her Majesty may be pleased to assign to her, to him or her** is Her Majesty advised by British ministers. Okay? So that's Her Majesty. Although she's the Queen of the Cayman Islands as well as in the UK, on that she is being advised by the UK ministers.

The context of this amendment you've suggested is quite different because what, as I understood it, was being suggested was that the Governor shall be obliged to act in the best interest of the Cayman Islands, but at the same time not prejudicial to the interests of the UK when we talked it through. If you simply said best interest — “not prejudicial to the interests of Her Majesty” it is ambiguous whether you mean Her Majesty — the interest of Her Majesty in the context of the Cayman Islands or the UK or both... probably means both actually. But if this is meant to be a balancing amendment recognising that there are UK interests as well as Cayman Islands interests, then it has to refer to the UK.

But in any case — but in any case — I have to tell you that I cannot accept that amendment today or tomorrow. We'd have to take that back to London with us to consider further. And the principal reason — although I do understand the spirit in which it was suggested, I think it's very difficult. We struggled for quite a long time last evening in our delegation to see how it could be worded in a possibly acceptable way — taking account of the House of Lords judgment that Jeffery referred to from which it was inspired — and every formula we came up with we knew you would not accept. Because what the House of Lords was saying in that case was that in the context of an Order in Council being made for an Overseas Territory, and the Queen making Order in Council is advised by British government ministers who must take into account the interests of the territory and weigh them against the interests of the UK. And if the UK interests are deemed to be overriding, then it is lawful to make the order in favour of UK interests rather than the territory's interest. That is an inevitable consequence of the UK being the sovereign power. Now, that was the difficulty.

It is not a question of them being equal. It's a question of as a matter of constitutional law confirmed by the House of Lords the UK's interests can, when the chips are down, override.

Now, if you want to write into a constitution that the interests to the Cayman Islands may be subordinated by the Governor to the interests of the United Kingdom, that's fine with us.

HON. ALDEN M. MCLAUGHLIN, JR.: I don't like how that sounds.

THE CHAIRMAN: You don't like — and we knew you wouldn't like that. So — and moreover, if one writes anything in like that about how the Governor should — in whose interests the Governor should act in

balancing it, that is an additional invitation to judicial review of every action the Governor takes, and we thought that was a very dangerous route to go down. So, this is why we oppose this.

If you persist with it, or want us to consider it further it will have to be done in London I'm afraid. And there's no — I don't think there's any point in discussing it further now because you're not going to persuade us, on our own authority, to accept something like that.

HON. ALDEN M. MCLAUGHLIN, JR.: But I thought you had — sorry, sir, but I thought you had proposed another version.

THE CHAIRMAN: No. We haven't proposed another version. We thought about it and discussed it last evening at great length.

HON. ALDEN M. MCLAUGHLIN, JR.: Oh. Because you mentioned the UK government. I thought that was a...

THE CHAIRMAN: No. What I read out was what I thought was the —

HON. ALDEN M. MCLAUGHLIN, JR.: That we actually intended.

THE CHAIRMAN: Yeah. Right. Exactly. And we thought of various other formulae, but all of them would have made clear that the UK interests may prevail, and we knew and were 100 per cent certain that you would not like the sound of that, and so we gave up.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, what's wrong — sorry, sir, but sometimes I find it difficult to understand some of these things, these concepts.

So, what's wrong with a not prejudicial to the interests of the UK or Her Majesty's government? Doesn't that give you —

THE CHAIRMAN: No.

HON. ALDEN M. MCLAUGHLIN, JR.: — the sort of comfort you need —

THE CHAIRMAN: No. It's too — it's too equal. And in the reality — this is why — this is why some things are better not said. This is why some things are better not said until they're taken to the court, and the House of Lords will then analyse it and will tell you that the UK's interests may prevail. But until you go and take a case you don't get that actually rammed down your throat. But, you know, if you're going to insist that the Governor must act in the best interests of Caymans, which of course Governors are told to do when they go to a territory.

HON. ALDEN M. MCLAUGHLIN, JR.: Told.

THE CHAIRMAN: But they're also told — they're also told that if the chips are down they may be instructed to act in the interest of the United Kingdom over and above those of the territory. Now, that's a hard thing for you to swallow, but it is... it is the reality.

Now, if you want to expose all of that on the face of the Constitution that's your privilege, but I would advise, you know, to be cautious about that.

HON. D. KURT TIBBETTS: So you are saying like the old man said: I would give my life for you until it's actually threatened.

THE CHAIRMAN: Exactly.

HON. D. KURT TIBBETTS: Gee.

[laughter]

[inaudible comments]

THE CHAIRMAN: I don't believe in pulling punches when it's necessary. I mean, you know... go on. Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: I was saying we'd like to try again. It's not a point we want to leave easily. It's very, very important as much from a perception standpoint as it is from the reality of this.

HON. D. KURT TIBBETTS: Not here but there.

THE CHAIRMAN: Okay. So that's —

HON. ALDEN M. MCLAUGHLIN, JR.: Well, maybe in the morning.

THE CHAIRMAN: Maybe in the morning. All right.

So, the next one we have is 33. And I see there's a paper you've put round on 33 and 34 which as I said I haven't had a chance to read yes but I'll look at it now. Delete in the formulation of policy “and” — yes, we've done that already. That's agreed. **If this is to be the only section dealing with consultation: removing any reference to consultation in Section 55, then the last part of 33 (1) could read: (a) insofar as is reasonably practicable to do so; (b) unless the matter is not materially significant such as to require such consultation; or (c) Her Majesty's service or national security would sustain material prejudice (BVI Section 42 (a)). Delete 33 (c).** Ah! Delete 33 (c)? 33 (2) (c) is that what you mean? Yeah.

Well, where we had — let me tell you where we had ended up in our discussion on this very point.

In Section 55, (2) ended up **subject to... the Governor shall in respect of external affairs as far as is practicable act in consultation with the Cabinet**. We thought like you that it would be better to say everything about consultation in 33. So we would delete Section 55 (2), and in 33 (2) (c) we would say **the special responsibilities of the Governor set out in Section 55 other than external affairs**. That would produce the same result that the Governor would be obliged to consult the Cabinet about external affairs. Okay?

And the reason we didn't go any further is as follows:

As I said yesterday, there is no way that UK government will agree to an obligation on the Governor to consult Cabinet about a special responsibility to do with public service appointments. Absolutely no way. As far as internal security and police are concerned, that is a matter which, as I argued yesterday, the Governor would be sharing responsibility with a National Security Council subject to resolution of the text of that section. So, no need to put an obligation on the Governor to consult the Cabinet about those things. It's merely duplication.

That leaves — and the one about administration of course we deleted, so that leaves only defence. And defence we came to the conclusion after trying to imagine all sorts of scenarios, bearing in mind that we're not talking about not defence, i.e. all the activities of the British government in defending its territories around the world. We're talking only here about actions of the Governor in the Cayman Islands in the field of defence, that your concern was to be informed and that that was covered by the amendment to (3) of 33: **The Governor shall keep the Cabinet informed concerning the general conduct of all matters for which he or she is responsible**. That would cover defence as well as all the other subjects.

And it is a step further to require the Governor to consult the Cabinet about defence questions rather than to inform them. It's a step further. Even though the Governor will not be bound by any advice the Cabinet may have to give, but nevertheless to consult. Now, that's — that was our thinking is where we ended up with the suggestion that 33 (2) (c) should say: **the special responsibilities of the Governor set out in Section 55 other than external affairs** with the result that the Governor is obliged to consult Cabinet about external affairs but none of the others.

But under subsection (3) the Governor is obliged to inform the Cabinet about the general conduct of all of the matters, all of them - defence, external affairs, internal security, the police and the public service matters. So that was a deal that we thought was reasonable and — well, that's our position as it is.

HON. ALDEN M. MCLAUGHLIN, JR.: I think we're generally happy with the result, but it sounds very convoluted in terms of presentation. I mean, it would not be readily apparent from one who read it that that was the effect. I mean, you really have to do the analysis to conclude what areas it is that the Governor is required to consult, where it is he's required to inform, and then the bit about external affairs. I don't know if we can — but the result is fine. I mean —

THE CHAIRMAN: Yeah, I'm not sure. I mean, I think it — I think it's... by doing it all in Section 33 that is much clearer anyway. And I think by saying 33 (2) (c) **special responsibilities other than external affairs** that's pretty clear too.

HON. ALDEN M. MCLAUGHLIN, JR.: Shall I say this, sir?

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: When we see the new draft perhaps I should defer my sort of condemnatory statement until I've seen it.

THE CHAIRMAN: Okay. Well, I'm encouraged to hear that the result is... I'm encouraged to hear that you're happy or at least content with the result even if not over the moon.

Then Section 34 your paper says — Section 34 (2) has already been discussed. Good governance is considered too broad. Section 34 **(3) this subsection as currently drafted permits a member of the Cabinet to record his or her advice, but we feel it is equally or indeed more important for the Governor to record his or her reasons for objecting such advice with any legal advice upon which that rejection is based. The subsection would then read: Whenever the Governor acts otherwise and in accordance with the advice given to him or her by the Cabinet his or her reasons shall be recorded in the minutes together with any legal advice, and any member of the Cabinet may require that there be recorded in the minutes the grounds of any advice or opinion in which he or she may have given on the question.** This is recording in the minutes. Yes.

HON. SAMUEL W. BULGIN: Mr. Chair, can I just ask one clarification on that?

THE CHAIRMAN: Yes. Yes, of course, please do.

HON. SAMUEL W. BULGIN: Clearly there can't be any objection — well, I shouldn't say there can't, it's a matter for members whether they should be — they should say the legal advice. The point is, is it the only

— what if there are other advice other than the legal advice, or are they only interested in the legal advice?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I think we need to be a little clearer in the drafting because the legal advice referred to in the third line is not the same advice referred to in the penultimate line. The advice in the penultimate line is the advice that any ordinary member of Cabinet, not the Attorney General, may give to the Governor in the usual way. But the fact that isn't clear to you means it isn't clear at all.

PROFESSOR JEFFREY JOWELL: I think the purpose of the draft, Chair, is to make the point, Chair, that it is perhaps more important here for the — or just as important for the ministers to vent their frustration by recording in the minutes the advice they gave to the Governor which was rejected, in the spirit of openness and transparency for the Governor to say why he rejected the advice of the ministers, that's all, with all that legal advice that he may have received or may not have received.

THE CHAIRMAN: [inaudible – microphone not turned on] hone in on the legal advice. I mean I have the same question as the AG. There may be all sorts of advice that is given.

PROFESSOR JEFFREY JOWELL: Well, he'll give his reasons on the other advice. 'I rejected your advice, Cabinet, because I feel that A, B, and C, policy matters'. And also, perhaps, if he did, 'I received advice from my attorney or somebody else to the effect that this is wrong in law', and this sort of seeks the publication of that advice. But as the Attorney says, there may be more than one bit of legal advice, in which case this may be a bit cumbersome.

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: But the essence of this provision really was to require...

THE CHAIRMAN: Reasons.

PROFESSOR JEFFREY JOWELL: Reasons from the — reasons, that's all.

THE CHAIRMAN: Well, I think if it deleted "together with any legal advice" I think we could probably live with a requirement to give reasons because that seems to me respectable. But honing in on legal advice I think is a bit...

PROFESSOR JEFFREY JOWELL: That's fair enough.

THE CHAIRMAN: Yeah.

I'm not sure... in any case, dear Susan, or when I was doing Susan's job, or any of our successors would be very happy about any advice we had given winding up in the minutes of the Cabinet here, in any case. But reasons — a requirement to give reasons which may allude to legal advice possibly in anonymous terms might be, you know... all right. Well, I think we can go with that.

That leaves the question of (2) unresolved. As I understand it, you don't have a problem with 34 (2) (b), but you still oppose 34 (2) (a). And yesterday you proposed **if having taken the advice of the Attorney General it would be inconsistent with this Constitution** instead.

I thought about that one, and actually I thought that it was unnecessary to say such a thing because in Section 32 (2) the Governor is always required to act in accordance with the Constitution and any other law. So, the Governor even if advised to do so cannot act contrary to the Constitution even if advised by the Cabinet. So that would be the answer in that case. It doesn't need to be stated.

The real battleground is whether 34 (2) (a) stays in or goes out. Yes? And we can't solve that I'm afraid either today or tomorrow. It will have to be a point reserved for the last round.

HON. ALDEN M. MCLAUGHLIN, JR.: But just to make absolutely sure that we've got it right.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: That provision, as we have now redrafted the others, that provision would relate only to matters within the Governor's special responsibilities, and not generally to the exercise of his functions.

THE CHAIRMAN: Which one —

HON. ALDEN M. MCLAUGHLIN, JR.: In other words... because as we have, I understand the way we redrafted it, the formulation of policy is a matter for Cabinet, not a matter on which we are advising the Governor, this particular provision wouldn't relate to that exercise of the Governor's functions.

THE CHAIRMAN: No, this — as we analysed it yesterday, this provision applies only to the limited cases where the Constitution or any other law confers a function on the Governor a power or a duty. Well, it's a power, not a duty, because if it's a duty there's no choice. But if it's a power imposed on the — conferred on the Governor, which is not expressed to

be exercisable in his discretion or judgment or after consulting some other person, then the general rule is the Governor must do it on the advice of Cabinet unless there's a reason prescribed in Section 34 to allow him to reject that advice. Now, 34 (2) (b) would relate to the special responsibilities. That covers most of the ground. 34 (2) (a) is broader by referring to good governance.

But the actual occasions on which this might be invoked are prettily limited because if you analyse it, those cases — under the — I'm not talking about powers under ordinary laws because I don't know the extent of them, but under the Constitution they're pretty limited. And the ones we honed in on yesterday were a power to dispose of Crown land, that's the power of the Governor normally on the advice of Cabinet; the power to constitute offices; the power to fix an election date, that's another one we've come across. But there are very few. And I suppose taking that last one you could have a situation where the Governor was advised by the Cabinet to fix an election date in two days, and the Governor said 'I'm sorry, that's not good governance. You need to have proper time for the electorate to form' — you know, it's a silly example but that's possible.

Now, we might be arguing — you might say we're sort of dancing on a pinhead here and arguing over fairly unusual examples, but I'm not so sure. I mean, there could be — there could be cases that we haven't foreseen.

Suffice it to say — I know what your argument is perfectly well, and we have enough to go back home to brief our minister about it. But I think we will need to keep a reserve on your preference to delete 34 (2) (a) and take it to London. It will have to be in the list of unresolved points, okay?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, in relation to (b) we had suggested that we insert the word “adversely” between “would” and “affect” midway in that sentence.

THE CHAIRMAN: **If in his or her judgment such advice would adversely affect...** I'd forgotten that. Is that in your... no.

HON. ALDEN M. MCLAUGHLIN, JR.: No, it's something we suggested yesterday.

THE CHAIRMAN: We didn't like it yesterday. I'm sorry. We have failed to discuss it. It's one of the things we overlooked discussing. Can you leave that with us? It will be a morning one.

HON. ALDEN M. MCLAUGHLIN, JR.: I'm going to recommend a different place for dinner tonight, sir.

THE CHAIRMAN: Right. Would adversely...

PROFESSOR JEFFREY JOWELL: Could we just explain the word “adversely”? All we're seeking there is to say this. At the moment it looks as if the Governor can refuse to accept any advice simply on the ground that it impinges on his jurisdiction, for no other reason, not — but if you put in the word “adversely” there's a... it impinges on jurisdiction in a way that might impede on his duties in some way.

THE CHAIRMAN: Yes. I think it's all right actually. I know what the meaning is. I mean I know it would be quite unreasonable for him to reject advice just for the sake of ‘I'm standing on my dignity’.

Susan was suggesting to me to pose to you the question whether instead of (a)... it said: **the Governor may act against the advice given to him or her by the Cabinet: (a) if so instructed by Her Majesty through a Secretary of State.** In other words, there would be — you know there might be an exceptional circumstance where the Governor was instructed not to accept advice.

HON. ALDEN M. MCLAUGHLIN, JR.: I think we could live with that, sir, because then there would be another judgment involved as well so... yeah.

THE CHAIRMAN: Yeah. Well, if we went with that then we've solved this point I think.

HON. ALDEN M. MCLAUGHLIN, JR.: And you gave us the “adversely” as well?

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: Ah, brilliant.

THE CHAIRMAN: So (2) would read as follows: **The Governor may act on advice given to him or her by the Cabinet: (a) if he or she is so instructed by Her Majesty through a Secretary of State... or it should actually say he or she is instructed to do so... is instructed to do so by Her Majesty through a Secretary of State; or (b) if in his or her judgment such advice would adversely affect any of the special responsibilities of the Governor set out in Section 55.**

Then there would be the revised (3) in the paper: **whenever the Governor acts otherwise and in accordance with the advice given to him or her by the Cabinet his or her reasons shall be recorded in the minutes and any member of the Cabinet may require that there be recorded in the minutes the grounds of any advice or opinion which he or she may have given on the question.**

Okay? Excellent. Thank you.

HON. ALDEN M. MCLAUGHLIN, JR.: Good progress, sir.

[pause]

THE CHAIRMAN: Good progress.

What's the next one on our list? Ah, yes. I think according to our list you were thinking about whether there needed to be said in Section 35 (1) something about whether a Deputy Governor should be a serving or former public officer. I don't know whether you've come to a conclusion about that.

HON. D. KURT TIBBETTS: Forgive me, Mr. Chair. We are dealing with, sir?

THE CHAIRMAN: 35 (1).

HON. D. KURT TIBBETTS: Yes, sir.

THE CHAIRMAN: And you may remember that yesterday —

HON. D. KURT TIBBETTS: Yes, I do.

THE CHAIRMAN: Yeah. There was discussion about —

HON. D. KURT TIBBETTS: Right.

THE CHAIRMAN: — limiting the...

HON. D. KURT TIBBETTS: The question yesterday was simply that we didn't want the Deputy Governor's appointment to be one which could have been made from outside of the public service.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: The question arose, sir, during that time whether we wanted to limit public service to just core central government civil servants, or whether it could have included persons, for instance, who had been civil servants for a fairly long period of time but who had transferred to an authority, simply because over the last several years many of what are now known to be as our public authorities were part and parcel of the civil service itself but since have been hived off, for instance, the Health Services Authority, the Civil Aviation Authority and such the like.

The main question at hand was that the way it was originally worded it could have been someone who was from outside, and I think we wanted to make sure that that was not the case. It was the appointment — the way the appointment could have been made was in a generic fashion almost the way it's worded.

And we had the other point that we wanted to conquer, and I certainly don't have a great difficulty, or any difficulty at all, for the Deputy Governor's appointment to include these persons who had been civil servants but are now with public authorities. And the definition doesn't — when you define a public official, it doesn't include these people. So I don't — I'm not sure of the terminology to be used.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: But, first of all, are you in agreement?

THE CHAIRMAN: That's why — yes.

HON. D. KURT TIBBETTS: I mean are you in agreement that it shouldn't be that anyone outside could be appointed?

THE CHAIRMAN: No. First of all, we recognise that by saying being a Caymanian. So the person has to be a Caymanian first of all.

HON. D. KURT TIBBETTS: No, but I don't — okay. Okay. Outside meaning outside of the service.

THE CHAIRMAN: No, outside the service.

HON. D. KURT TIBBETTS: Yes.

THE CHAIRMAN: Well, that's why I suggested yesterday putting in instead of “such person” we said **there shall be a Deputy Governor who shall be such person**. Instead of “such person”, saying **a person who has — who is or has held public office**. Okay? Is or has held public office. This is to take out of the person who was a public servant and who has gone into the private sector or gone into one of the statutory bodies.

HON. D. KURT TIBBETTS: But one of the problems that that brings with it, sir, is that that would include retired people.

THE CHAIRMAN: Yes. Retired public servants, yes.

HON. D. KURT TIBBETTS: And I'm saying to you that I would need to be persuaded that retired public servants should be included. In other

words, unless I don't make it very clear, the people that may have worked in the service for quite a while and transferred to the public authorities, I don't consider them to be retired public servants.

THE CHAIRMAN: No. Well, I would simply caution — being a retired public servant myself — that... is it wise to rule out of consideration such persons? Is it wise to, because you may find that the very best candidate you come across is someone who is retired, quite recently retired but after a lifetime of service.

HON. D. KURT TIBBETTS: But, sir — but, sir, there is a policy in government... prior to the Chief Secretary that we have now, for instance, which post will be, I call it, renamed constitutionally the Deputy Governor, and the Chief Secretary will no longer... the Chief Secretary's post will no longer exist. The former Chief Secretary was made to retire at age 60. So, if we change this that change that whole thing.

THE CHAIRMAN: Well, the result, of course, is that any person who is appointed as Deputy Governor is appointed to a public office. So in the result you have to find somebody unless you make special exception for that person that you have to appoint someone who is within the age limit of the public —

HON. D. KURT TIBBETTS: Yes, sir, and I'm saying to you that the way the system is supposed to work now is that there is supposed to be upward mobility and continuous planning which allows for the natural progression of these people within the public service.

I am not a — I have not been in the civil service, but I would feel uncomfortable just leaving the requirements for the post to be a Caymanian who has or has held public office. I would think that that's opening it up a bit far. I mean... say something, please.

GOVERNOR STUART JACK: Well, if you're concerned about the age limits, I mean you could add that as well, or you can cross-reference to the — “has not yet reached the retirement age applicable to public officers” if that is what you're concerned about.

I think the idea of what the Chairman has put forward is just to slightly widen the pool, but still keep it within those people that have sufficient experience of the civil service, to be able to head the civil service with the confidence of the civil service.

HON. D. KURT TIBBETTS: So — forgive me, Mr. Chair. But, so from your perspective, Governor — I just want to make sure I understand very clearly what you're saying — we could conquer the business of beyond retirement age to make sure that they're within that, but you're saying that we should not have a discomfort if someone has left the service and

is under 60 that the Governor in his wisdom could pull that person back and say, 'I want you to be the Deputy Governor of this country'?

GOVERNOR STUART JACK: If that person wants to apply for the job, yes. You can't compel anybody to do that.

HON. D. KURT TIBBETTS: No. No. No. No. No. I don't mean compel, but I mean that the way the constitutional arrangement is that it would allow for that to happen, if that were to happen.

I don't know what others have to say, but everything in me tells me I don't like it. That's all I'm saying. I ain't going to fight a lone-ranger battle, but I don't like it.

As it is now — as it is now, how is the Chief Secretary appointed?

GOVERNOR STUART JACK: As is now, there is no prescribed system for appointing the Chief Secretary, I mean beyond what's in the current Constitution which doesn't spell out anything in detail at all. So it's appointed by the — at Her Majesty's pleasure, or whatever the phrase is. I mean it has to have the agreement —

HON. D. KURT TIBBETTS: And it's just a system —

GOVERNOR STUART JACK: — of London.

HON. D. KURT TIBBETTS: It's just the system that causes what we know to happen.

GOVERNOR STUART JACK: Yeah, but well there's just been that tradition. But, of course — yeah, there's been that tradition here in recent years, but it's not set out that it has to be a civil servant.

HON. D. KURT TIBBETTS: Sir, His Excellency, Mr. Governor, sir, that is not recent years.

GOVERNOR STUART JACK: No, no, no, no. No, no.

HON. D. KURT TIBBETTS: That's been as long as we've known that we had one.

GOVERNOR STUART JACK: No, no, the — okay, I accept that. Absolutely. That is the current tradition here, but it's not set out anywhere.

HON. D. KURT TIBBETTS: I understand that.

GOVERNOR STUART JACK: But what we're trying to do is we're trying to set it out in a way which meets your point, which I think is absolutely valid, which is the person has got to have experience of the public service, and likely to have the confidence in the public service. But I'm just saying you could have a situation where there are very, very few candidates and you might want to — and some of the —

HON. D. KURT TIBBETTS: All right. Okay.

GOVERNOR STUART JACK: Some of the candidates are temporarily, if you like, outside the civil service.

HON. D. KURT TIBBETTS: Okay.

HON. EDNA M. MOYLE: I hope not. No.

[inaudible comment]

HON. D. KURT TIBBETTS: Mr. President — Mr. Chairman, no, I'll finish with Mr. President now, for the time being.

Mr. Chair, I accept that the present arrangements are not spelled out constitutionally, but tradition prevails. I still am firm in my belief that there should be a specific requirement that that — that the individual should not be outside of civil service retirement age.

HON. W. MCKEEVA BUSH: Suppose you have a situation that you can't find somebody?

HON. D. KURT TIBBETTS: But I'm saying to you, sir, that the civil service has a practice that anyone who is 60 should retire.

HON. W. MCKEEVA BUSH: Yeah.

HON. D. KURT TIBBETTS: There have been occasions, and continue to be occasions, where people are rehired on a contractual basis, but they retire at 60. So, how could it be deemed to be fair where you would hire a Deputy Governor outside of the pool that's available who are under retirement age?

HON. W. MCKEEVA BUSH: Suppose you don't have somebody appropriate in that pool?

HON. D. KURT TIBBETTS: Listen to me now. Remember, that Deputy Governor is not fulfilling much of any different job description than what the Chief Secretary is today, you know. It is not like you're looking at something that is brand new for the country.

HON. W. MCKEEVA BUSH: But you still have people that are unsuitable for it.

THE CHAIRMAN: I suggest — I suggest that... I was going to suggest that you come back tomorrow morning with a suggested change to 35 (1), reflecting how you would like to see it because I think we could go on round this course for a very long time without actually making concrete what it is the concern that's been expressed. I made my suggestion, but it obviously didn't quite fit the bill. So, can we mark that one for tomorrow's car park?

HON. D. KURT TIBBETTS: Okay, sir.

THE CHAIRMAN: The next one I hope is easier and that is on page 35. And we, for our side, agreed to redraft, to get away from something called the Governor's Deputy. And we did. It's quite simple and I'll read out the changes that would produce, I hope, an acceptable result. The heading to Section 37 would be changed to read Temporary Exercise of Certain Functions of the Governor. And then if you could follow me through 37 (1) I'll read out — read it out: **Whenever the Governor: (a) has occasion to be absent from Grand Cayman but not from the Cayman Islands; (b) intends to be absent from the Cayman Islands for a short period; or (c) is suffering from any illness which he or she believes will be of short duration, the Governor may acting in his or her discretion and by instrument under the public seal appoint the Deputy Governor or if the Deputy Governor is not available any other public officer in the Cayman Islands who is a Caymanian during such illness or absence to perform on his or her behalf such of the functions of the office of Governor as may be specified in the instrument.** So, all references to deputy have gone.

And then (2) would read: **The power and authority of the Governor should not be affected by an appointment under this section and the person so appointed shall comply with such instructions as the Governor acting in his or her discretion may from time to time address to him or her.**

So, the substance is the same, but all reference to a deputy, a Governor's Deputy has been expunged. Is that good?

HON. ALDEN M. MCLAUGHLIN, JR.: I didn't hear.

THE CHAIRMAN: Which one? I was just saying all references to a Governor's Deputy have been expunged, but the substance is the same. This is to avoid the confusion. So if you're happy with that...

HON. ALDEN M. MCLAUGHLIN, JR.: I'm happy with it.

THE CHAIRMAN: Very good.
The next one on our list.

MS. JULIANNA O'CONNOR-CONNOLLY: Mr. Chairman?

THE CHAIRMAN: Yes.

MS. JULIANNA O'CONNOR-CONNOLLY: Just a clarification, sir. On 37 (1) (c) where it refers to: **is suffering from any illness** —

THE CHAIRMAN: Yes.

PROFESSOR JEFFREY JOWELL: — **which he or she has reason to believe will be of short duration...** because of the — any illness... I'm not quite sure whether or not we're envisioning the Governor having a capacity to make that conclusion that it will be a short — you see what I'm saying? Does it include like a mental illness when you say “any illness”?

THE CHAIRMAN: Suffering from any illness which he or she believes will be of short duration.

MS. JULIANNA O'CONNOR-CONNOLLY: I understand the intent, I'm not quite sure of the —

THE CHAIRMAN: I don't know. If it's...

MS. JULIANNA O'CONNOR-CONNOLLY: I guess what I'm asking should the onus be on the Governor to make a decision that he's ill for a short period of time or a medical pract — I don't know.

THE CHAIRMAN: Well, I think you have to — I think you have to leave it to the judgment of the Governor with his medical advisors as to whether it's going to be of short duration.

The next one we have on our list — the next one we have on our list is Section 48 (3), where we have a note that the Cayman Islands delegation was going to redraft this... to redraft this subsection, Section 48 (3) to allow all members of the Legislative Assembly to attend... members of Assembly to attend Cabinet meetings every so often. But we left the — we agreed that you would draft something to reflect that idea.

HON. ALDEN M. MCLAUGHLIN, JR.: We haven't done — we haven't done it, sir.

HON. W. MCKEEVA BUSH: The Government change its mind or...

THE CHAIRMAN: Are you changing your mind on the substance or..

HON. ALDEN M. MCLAUGHLIN, JR.: Not at all. Just matters of more gravity, sir, to precedence and it slipped me. But we'll work on it now, and between now and the morning we'll have it, sir.

THE CHAIRMAN: All right. Thank you.

Right. The next one — the next one is Section 53. The next one is Section 53.

[inaudible comments]

THE CHAIRMAN: The one is Section 53 (1), Performance or Functions of the Premier, and we suggest instead of (1) and (2) the following. I'll read it out slowly: **If the Premier is unable due to illness or absence from the Cayman Islands to perform the functions of his or her office the Governor shall authorise the Deputy Premier go perform those functions.**

(2) in the absence or illness of the Deputy Premier the Governor shall authorise another minister to perform the functions of the office of Premier, acting in accordance with the advice of the Premier or if it is impracticable to obtain the advice of the Premier, acting in his or her discretion.

That should cover all the bases of both the Premier being absent or incapacitated and the Deputy Premier also being in that situation. So there's an automatic authorisation of a Deputy to substitute for the Deputy Premier, and in the absence or illness of the Deputy then the Governor must authorise another minister. And the way — why we've chosen to say that “the Governor shall authorise” is that it seemed to us vital that there needs to be a piece of paper which actually authorises Mr. ‘X’ or Mrs. ‘Y’ to perform the functions of Premier from the point of view of legal certainty, because otherwise, you know, there may be argument at a later date about who was performing the — who was lawfully entitled to perform the Premier's functions at any particular time. So that's the way — that's why we've drafted it in that particular way.

HON. D. KURT TIBBETTS: May I, Mr. Chair?

THE CHAIRMAN: Yeah, sure.

HON. D. KURT TIBBETTS: Just to quickly explore, to satisfy our minds because it seems — it seems pretty good, but just to ask you this now.

Depending on the period of time that this may occur because this is not now like how we're talking about the one we did before with the

Governor for the short period or the long period. This is for however and whenever when it comes to the Premier.

In the third instance where if it's not practical to hear from the Premier or the Deputy Premier...

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: Say it to me again, please.

[inaudible comment]

THE CHAIRMAN: No. **In the absence or illness of the Deputy Premier the Governor shall authorise another minister to perform the functions of the office of Premier.**

HON. D. KURT TIBBETTS: Okay.

THE CHAIRMAN: **Acting in accordance with the advice of the Premier or if it is impracticable to obtain the advice of the Premier, acting in his or her discretion.**

HON. D. KURT TIBBETTS: Okay. My only question about that is, then, you're going down the line with the tumbling blocks.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: The Premier is out of action.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: So is the deputy.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: What about the remainder of the elected Cabinet?

THE CHAIRMAN: Well...

HON. D. KURT TIBBETTS: I only ask the question because if you have a government that would by necessity involve an elected Cabinet consisting of the Premier, a deputy and however many others, and then their back bench. And if in the third instance the Governor is going to act in his own discretion, then it leaves the remainder of the Cabinet and the back bench of the Government totally out of the picture.

THE CHAIRMAN: You mean in terms of consultation?

HON. D. KURT TIBBETTS: Who it should be, yes.

THE CHAIRMAN: Okay. Well, I could change the end of it to read **if it is impracticable to obtain the advice of the Premier acting after consultation with the Cabinet.**

HON. D. KURT TIBBETTS: Yeah.

THE CHAIRMAN: So — and I say “after acting in consultation” because they might not actually agree on who it should be, and he would then have to make a decision. So that's why I say acting after consultation. We don't —

HON. D. KURT TIBBETTS: That's right.

THE CHAIRMAN: We don't want —

HON. D. KURT TIBBETTS: Yeah, because it is presumed —

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: — that the Cabinet would speak to their other back bench members.

THE CHAIRMAN: Yeah, “acting after consultation with the Cabinet”.
Okay. Good. I think we've sorted that one out then.
The next one is —

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, before we go on, we had mooted the possibility of a section which sort of set out the functions and role...

THE CHAIRMAN: Oh, yes.

HON. ALDEN M. MCLAUGHLIN, JR.: Responsibilities and authorities of the Premier. Did that find favour —

THE CHAIRMAN: Well —

HON. ALDEN M. MCLAUGHLIN, JR.: — with you, or is that on the to-do list?

THE CHAIRMAN: No, it's not actually. No, I think... well, did you have in mind a discrete section, you know, a special section? I think all it

could really say in short terms is — it's rather equivalent to the section on the Governor.

HON. ALDEN M. MCLAUGHLIN, JR.: Right.

THE CHAIRMAN: That was the idea. All it could say is something like: **the Premier shall have such functions as are prescribed by this Constitution and any other law**, something like that, and you could go on to say: **and shall exercise his functions in accordance with this Constitution and any other law** because as I understood it, your concern was to convey to the public that this is not a new creature to be afraid of as a potential dictator.

HON. ALDEN M. MCLAUGHLIN, JR.: Right.

THE CHAIRMAN: This is — this is an office with limited powers and must act lawfully. Was that the idea?

HON. ALDEN M. MCLAUGHLIN, JR.: Right. So we can do that?

THE CHAIRMAN: We could — I could — we could — I could draft something and show you tomorrow. We could read it out tomorrow and insert it in an appropriate place.

[pause]

HON. W. MCKEEVA BUSH: Mr. Chairman? Mr. Chairman?

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: When do you propose to stop, sir?

THE CHAIRMAN: Well, I think we're rattling on quite well. If you prefer to wind up now, McKeever —

HON. W. MCKEEVA BUSH: I — well, I will have to leave. Two of us will have to leave, and three will — three members will be here.

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I'm conscious of all of that, and I really should have gone myself, but I am really concerned that we have to press on because if we don't we run the risk that we won't tidy this up by the time the curtain falls at 11:30 tomorrow. And I think we all have a real interest in being able to say that we have a document that we generally agree with save for these

particular points rather than having to stop before the whole thing is done.

THE CHAIRMAN: I think we're doing well in terms of our list of points.

HON. ALDEN M. MCLAUGHLIN, JR.: Right. There are some important points still as between us and the Opposition which we are all keen to resolve.

HON. W. MCKEEVA BUSH: And you were trying to get them clear tonight?

HON. ALDEN M. MCLAUGHLIN, JR.: Well, as many as we could.

HON. W. MCKEEVA BUSH: Well, I have a meeting so I have to get to that. Two of us will have to leave and...

THE CHAIRMAN: Would it be — as a compromise would it be — do you have to go now, McKeeva? If we... there are one or two points on our list which are pretty minor. If we stayed away from any of the, as it were, sensitive points we —

HON. D. KURT TIBBETTS: Top floor of the parking lot.

THE CHAIRMAN: Yeah, exactly. Top floor of the parking lot. And come back to those in the morning, would that be better? And then — for example, one of the ones on our list is whether the word “insane” is still appropriate, and the AG was going to help us with that.

HON. D. KURT TIBBETTS: The top floor of the parking lot, Mr. Chair, are, just going from memory, probably three, maximum four points.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: We could very likely tidy up all the rest which are not really...

HON. ALDEN M. MCLAUGHLIN, JR.: Really controversial.

HON. D. KURT TIBBETTS: Controversial issues.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: And really is all a matter of tidying up. We don't have a problem with that.

THE CHAIRMAN: Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: Yep.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: But before you go on, sir, could I just ask you one question with regards to logistics?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Because there may be something that I'm not remembering.

In this same issue when we speak to 53, I think it was, with the Premier being unable and then if the Deputy Premier and... if that were to occur as unlikely as it might be, for instance, that either the Premier or the Deputy or both were to be for an extended period of time incapacitated, whether it be from illness — more likely that would be what it would be from — what's the natural consequence of that? Does everything continue on with that gap or those gaps there or what?

THE CHAIRMAN: Yes. Well...

HON. D. KURT TIBBETTS: Where's the line drawn?

THE CHAIRMAN: Well, there is a fallback, you see, in 53 (3). If you look at 53 (3)...

HON. D. KURT TIBBETTS: Yeah.

THE CHAIRMAN: In cases for this it says: **whenever a minister** — well, it's a minister other than the Premier, but **whenever a minister other than the Premier is unable by reason of illness or absence from the Islands or absence from his or her duties to perform the functions of his or her office the Governor acting in accordance of the advice of the Premier may appoint a person who's an elected member of the Legislative Assembly.**

HON. D. KURT TIBBETTS: There you go.

THE CHAIRMAN: To be a temporary minister —

HON. D. KURT TIBBETTS: Subsection (3) of the same 53 speaks to the temporary minister.

THE CHAIRMAN: Okay. **Or assign performance or function of that minister to another minister including the Premier.** So —

HON. D. KURT TIBBETTS: Got you.

THE CHAIRMAN: So the position of ministers other than the Premier is catered for here.

Lengthy period of illness of a Premier, I guess one has to consider whether the Premier should consider resigning if he can't carry on.

HON. D. KURT TIBBETTS: But should that be something in the Constitution?

THE CHAIRMAN: No.

HON. D. KURT TIBBETTS: Or should that be something that is handled within the party?

THE CHAIRMAN: I think so. I think the latter.

HON. D. KURT TIBBETTS: Okay.

THE CHAIRMAN: Because otherwise you'd have to think of —

HON. D. KURT TIBBETTS: With you.

THE CHAIRMAN: — specifying a period —

HON. D. KURT TIBBETTS: Okay. That's fine.

THE CHAIRMAN: Well, steering clear of the sensitive points, the next one is in our list is... well, is to do with the National Security Council, 58 (3), but that's a substantive point which I said we'll have to reserve until London. So there's nothing we can do to solve that here.

The next one is the name of the... what's this?

HON. ALDEN M. MCLAUGHLIN, JR.: We better leave that one as well.

HON. D. KURT TIBBETTS: Which one? The name of what?

THE CHAIRMAN: The question of whether the Leader of the Opposition... what relationship the Leader of the Opposition has with the National Security Council. You want to come back to that tomorrow; is that what you're saying? Yeah?

HON. ALDEN M. MCLAUGHLIN, JR.: Well, I'm not sure we can deal with it without Mr. Bush being here.

THE CHAIRMAN: No. No.

HON. ALDEN M. MCLAUGHLIN, JR.: That's all I'm saying.

THE CHAIRMAN: The next one is the —

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Deputy?

HON. D. KURT TIBBETTS: You see that look?

[inaudible comments]

MR. ROLSTON M. ANGLIN: If you all are going to give into our request we can tell the Chairman [inaudible – microphone not turned on]

HON. D. KURT TIBBETTS: You should have never shaved that moustache. You look different.

[laughter]

THE CHAIRMAN: The next one is the name of the Legislative Assembly, which you —

[inaudible comments]

THE CHAIRMAN: The name of the Legislative Assembly, Parliament or Legislative Assembly, which you parked for the time being. Do you want to come back on that later or...

HON. ALDEN M. MCLAUGHLIN, JR.: I mean it's our proposal so...

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: So, let's hear what they have to say.

HON. D. KURT TIBBETTS: Here's a question. Here's a question to you all. There were two different points. There was the question raised of whether it should be Premier or Chief Minister, and then it was a question of Parliament or Legislative Assembly. Which one do you all feel most strongly about? All of the above or one of the above or what?

MR. ROLSTON M. ANGLIN: Mr. Chairman, just to reiterate very briefly —

HON. D. KURT TIBBETTS: Because I didn't hear any argument about the Premier as we went along. I'm just saying.

MR. ROLSTON M. ANGLIN: Right. And just to reiterate from our original position, we preferred Chief Minister and Legislative Assembly.

HON. D. KURT TIBBETTS: Right.

MR. ROLSTON M. ANGLIN: However, in terms of the two issues —

HON. D. KURT TIBBETTS: Right.

MR. ROLSTON M. ANGLIN: — the one we obviously feel most strongly about is the one articulated yesterday by Mr. Bush —

HON. D. KURT TIBBETTS: So —

MR. ROLSTON M. ANGLIN: — is as to the name of the House.

HON. D. KURT TIBBETTS: So everybody can feel comfortable, why don't we leave one of them and then do the other because nobody is — it's whatever it is it is.

MR. ROLSTON M. ANGLIN: Right. But we never discussed the issue of Premier yesterday.

HON. D. KURT TIBBETTS: That's why I'm saying to you we were presuming that nobody had a problem with that. Is that correct?

[inaudible comments]

MR. ROLSTON M. ANGLIN: Certainly as I said, Mr. Bush didn't speak on it, I didn't speak on it, no one spoke on it yet. I mean we —

HON. D. KURT TIBBETTS: We're fine with that.

MR. ROLSTON M. ANGLIN: — we spoke on the House, on the name of the House.

HON. D. KURT TIBBETTS: So there is no question about that, then, so we agree on the Premier.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: I just didn't know from their original position whether they were going to come back to that during the process.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: I just didn't know that.

THE CHAIRMAN: Can I — I'm sorry, but can I call a comfort break. Five minutes. But literally five minutes.

RECESS

RESUMED

THE CHAIRMAN: Can we just spend a few minutes... can we just spend a few minutes logging the points that we know we'll have to take to London and some less controversial points?

I — my reading is that the issue of the name of the Legislative Assembly, whether it should be changed to the Parliament of the Cayman Islands is one which I can't agree to this week. And if the Government of Cayman Islands wants to press that proposal we shall have to mark it up as one for the final round.

HON. D. KURT TIBBETTS: Mr. Chairman, everybody will have their views object it, but I do not believe that the views are that strongly held that we should be with a diverging view on it. And if retaining the Legislative Assembly is what does the trick so that there's no argument, then I think that's what we should do.

THE CHAIRMAN: Well, that is the preference of the Opposition I think anyway, isn't it?

[inaudible comment]

THE CHAIRMAN: Okay. Well, we'll take it that that is no longer an issue.

HON. D. KURT TIBBETTS: Bearing in mind, Mr. Chair, that we don't get any last-minute changes with other things that we have agreed on.

THE CHAIRMAN: All right. I noted that.

The next one on our list... I'm afraid we have to go back because we missed one off or list. It's in Section 50 and that's the question of

term limits for Premier. But that is one of your interparty arguments which you may want to leave till tomorrow morning.

Okay. Okay, so the next one on our list is Section 62 (1) (b), and this is the question of whether the words following “holds or is acting in any public office”, all the words after that whether they should be deleted or retained. This is the point — this is the Clifford clause isn't it?

And what is the — what is the — what is the view today by comparison with what it was yesterday?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, we have the very clearest representation from the public service that this is entirely unacceptable, and in those circumstances, we certainly can't agree to it. This one would truly be a deal breaker.

THE CHAIRMAN: Okay. And what is the view of the Opposition on this? Is this the.... to be perfectly honest —

MR. ROLSTON M. ANGLIN: Mr. Chairman, perhaps that might be one that might require just a short discussion in the morning and perhaps we might get somewhere.

THE CHAIRMAN: Okay. Okay. So, that's for the morning.
The next one is “insane”.

HON. D. KURT TIBBETTS: Is what?

[laughter]

THE CHAIRMAN: This is the question in 62 (1) (d) of whether it is still appropriate to use the word “insane”, and I think the AG was going to help us with that by reference to modern legislation.

[inaudible comments by the Attorney General]

THE CHAIRMAN: Can you put the microphone on, Sam?

HON. SAMUEL W. BULGIN: Sorry. The Public Health Law would still recognise the issue of insanity, and certainly in a number of our laws — the Penal Code and so on — we still retain the expression “insanity” as really infirmity of the mind, but the forensic expression is still insanity.

THE CHAIRMAN: Well, we better leave it as it is then, I think. Yeah. Thank you.

The next one is — looks as if — the next one 65, that I think is probably one for the morning because that's an intraparty disagreement about the Speaker, whether to be in or out or either or. Okay?

People-initiated referendums is the next one, where we have a text. Where is it? Here. The next one on our list is Section 70, Proposed Referendum, Section 70 which was circulated today, and I hope very much we can tick this one off.

The only comment I had on it on reading it through was a matter of drafting only where it says **the law enacted by the legislature shall make provision to hold a referendum amongst persons qualified as electors in elections to the Legislative Assembly**. And then in (2) (a) it says **qualified as elections electors to elections**. It should be **in election to**. And the same one occurs somewhere else — no, it doesn't — oh, no, it's the very last line, same thing happens: **qualified as electors in elections to the Legislative Assembly**.

I should have been courteous enough to ask my colleagues whether they had any... Michael, would you like to comment?

MR. MICHAEL BRADLEY: Sorry, I'm just querying (3), Mr. Chairman. It says: **a referendum under this section shall be binding on the government and the legislature**. Do we need to go further and say: **and the legislature shall proceed to — by bill to implement?** If you just said binding and put a full stop there, it's binding but there's no law in relation to it. And you may need a legislative measure.

HON. ALDEN M. MCLAUGHLIN, JR.: But either way, if — it's not a big point with me, but either way, if the legislature does not proceed to pass the bill, to promote and pass the bill, they're in breach of the provision of the Constitution. So, if it is binding on the legislature and they don't act, they're in breach. But if that makes it clearer and everybody happier, I'm okay with that.

MR. ROLSTON M. ANGLIN: Mr. Chairman, just one quick point on (1) where it says that: **these matters do not contravene any part of the Bill of Rights, freedoms and responsibilities or any other part of the Constitution**. So, we're saying that if the public wanted to hold a referendum on a specific part of the Constitution to show their approval, disapproval or desire to amend that they cannot?

HON. ALDEN M. MCLAUGHLIN, JR.: No. That wouldn't contravene — that would have to — the referendum would have to call on the government —

HON. D. KURT TIBBETTS: To request.

HON. ALDEN M. MCLAUGHLIN, JR.: — a change to the Constitution.

HON. D. KURT TIBBETTS: And that's not a contravention.

HON. ALDEN M. MCLAUGHLIN, JR.: Right.

HON. D. KURT TIBBETTS: Mr. Chair?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: There is something that eludes me, and I have talked to my colleague about it but it still eluding me.

Subsection (2) (a), or 70 (2) (a): **there shall be presented to the Cabinet a petition signed by not less than 20 per cent of persons — and we're going to talk about that for one minute — qualified as electors in election to the Legislative Assembly.**

Does — does that mean people who can vote or people who are qualified to be elected to the Legislative Assembly?

THE CHAIRMAN: No, qualified as electors. Qualified —

HON. D. KURT TIBBETTS: So why does it say “in election to the Legislative Assembly”?

THE CHAIRMAN: Well, I think it's... I think it's just spelling out what the reference to the electors mean. But it's your draft.

HON. D. KURT TIBBETTS: I understand that. I understand that. But I think — but something in me tells me to make sure, because it is a fact that there are people who can vote but cannot be elected to the Legislative Assembly.

HON. ALDEN M. MCLAUGHLIN, JR.: That's not the point.

THE CHAIRMAN: I'm wondering whether it oughtn't to refer to 91. Yes, it might be easier if it said... if it said: **in each of these places a referendum amongst persons qualified as electors under Section 91.**

HON. V. ARDEN MCLEAN: Or just electors because it's in Cayman anyway.

THE CHAIRMAN: Well, yes, but just for clarity you refer to Section 91, then you know exactly what you're talking about.

So should we change all those references, qualified as electors —

HON. D. KURT TIBBETTS: I just don't want it to go in there like that and it causes a problem.

HON. ALDEN M. MCLAUGHLIN, JR.: Mister —

THE CHAIRMAN: Qualified as electors under Section —

HON. ALDEN M. MCLAUGHLIN, JR.: Mister —

THE CHAIRMAN: 91.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman?

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: This language is language that we attempted to take from Section 91 of the Constitution so that we're consistent. There's an error in the drafting, but what it should say is **as an elector for elections to the Legislative Assembly**. That's the person who votes. That's the voter as we know him.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: For election —

HON. ALDEN M. MCLAUGHLIN, JR.: For elections.

HON. D. KURT TIBBETTS: Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: Plural.

HON. D. KURT TIBBETTS: All right. That makes a difference.

THE CHAIRMAN: But wouldn't it be — I'm just saying wouldn't it be simpler and use less words if we said **persons qualified as electors under Section 91**?

HON. ALDEN M. MCLAUGHLIN, JR.: That's fine too.

THE CHAIRMAN: Then you refer —

HON. ALDEN M. MCLAUGHLIN, JR.: That's fine too.

THE CHAIRMAN: Then the same thing in (2) (a).

HON. ALDEN M. MCLAUGHLIN, JR.: That's fine too.

THE CHAIRMAN: Yeah. Under Section 91: Qualified as electors under ... yeah. Sorry, Susan.

Can I just make one point before...

In (2) (b)...

HON. D. KURT TIBBETTS: I'm listening to you.

[inaudible comments]

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman?

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: There is another point that has been raised which I think is really valid.

I think that the plan is that people who vote in a referendum would be those people who are registered to vote in general elections.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: Section 91 only speaks to qualification to be registered as an elector. So on reflection, and based on what the Speaker has said to us, I believe that this provision would need to go on to say **and registered as an elector in accordance with the Elections Law**, or whatever suitable language, because you want to confine the people who vote to your register. Otherwise you wind up with whoever's administering the referendum process having to consider whether or not some person who is not registered is qualified to vote in the referendum.

THE CHAIRMAN: I think it could —

[inaudible comments]

THE CHAIRMAN: Yeah, I think you could —

HON. D. KURT TIBBETTS: So that you're qualified to register.

THE CHAIRMAN: I think you could — no, but I think you could deal with it as Michael suggested, by saying **hold a referendum amongst persons registered as electors in accordance** —

HON. V. ARDEN MCLEAN: Under Section 91 of this Constitution.

THE CHAIRMAN: Yes, in accordance with Section 91 —

PROFESSOR JEFFREY JOWELL: May I just say that this provision was taken from Section 69 of the present draft, and the necessary changes will have to be made in 69 as well to — for the sake of consistency.

THE CHAIRMAN: Section 69...

PROFESSOR JEFFREY JOWELL: Yep. That is the provision to hold a referendum.

THE CHAIRMAN: Ah.

HON. D. KURT TIBBETTS: Amongst persons registered as electors. Yes.

HON. SAMUEL W. BULGIN: Can I just, Mr. Chairman, just be mischievous and just raise two things, with your leave?

Mr. Leader, don't look so surprised.

HON. D. KURT TIBBETTS: No. No, no, I'm just waiting.

HON. SAMUEL W. BULGIN: Oh, okay.

Just some observations here. The — the petition — sorry, **the referendum can be triggered by not less than 20 per cent of persons qualified as electors.**

HON. D. KURT TIBBETTS: Registered — that has to change [inaudible – microphone not turned on]

HON. SAMUEL W. BULGIN: That's right. We have about 14,000 people at the moment roughly, so 4,000, that's about 4,000 people can trigger a referendum.

HON. D. KURT TIBBETTS: No. If it's 14,000, it's five twos ten, five eights four, it's 2,800.

HON. SAMUEL W. BULGIN: Well — that's even —

[inaudible comments]

HON. SAMUEL W. BULGIN: That's even worse. I'm just saying that you could end up having a referendum every Wednesday morning.

HON. D. KURT TIBBETTS: So you're suggesting that it be more than 20 per cent?

HON. SAMUEL W. BULGIN: Well, it goes a little worse — it gets a little better than that as well.

You only need more than 50 per cent for the referendum to be binding. I think that's a very low threshold for a binding referendum.

HON. V. ARDEN MCLEAN: Fifty per cent of the electorate, not 50 per cent of those who voted.

HON. SAMUEL W. BULGIN: Well ...

HON. D. KURT TIBBETTS: So that's why I'm saying it's worse yet.

HON. SAMUEL W. BULGIN: Well — and the third point which will get Miss Julie very excited, we're not so sure the Sister Islands combined might be able to trigger a referendum.

MS. JULIANNA O'CONNOR-CONNOLLY: If that were the case we —

[inaudible comments]

HON. V. ARDEN MCLEAN: Yeah, but East End combined wouldn't be able to do it either. Let's get it straight now. If you go by that it's only George Town, West Bay and marginally Bodden Town.

HON. D. KURT TIBBETTS: That could do what?

HON. V. ARDEN MCLEAN: That could trigger a referendum.

HON. D. KURT TIBBETTS: Oh, okay.

HON. V. ARDEN MCLEAN: So if we gonna do that we're putting it down to 500.

HON. D. KURT TIBBETTS: Just — Mr. Chair, on the points we have to change both places where it says “qualified” to “registered”.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: So.

THE CHAIRMAN: I've got registered as —

HON. D. KURT TIBBETTS: Yeah, so what (3) would say based on what the Attorney General has said, just so that we understand that, is that if the registered — if the register is 14,000, more than 7, 000 would have to vote for it. That's what this is saying?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: I don't think that's unfair.

Now, with regards the Attorney General's point about 20 per cent being a low threshold, I don't know what members think but...

[inaudible comments]

HON. D. KURT TIBBETTS: I understood what the minister is saying. I mean, do you all have any views on it with regards to the 20 per cent?

[inaudible comments]

HON. D. KURT TIBBETTS: So do you have any other suggestions? I mean it would be nationally. What? Twenty-five?

HON. V. ARDEN MCLEAN: Gotta be higher than 25, too. Gotta be at least 40 per cent.

[inaudible comments]

HON. D. KURT TIBBETTS: Mr. Chair, can you help us? When I say help us, do you have any experience with matters like this?

THE CHAIRMAN: No.

HON. D. KURT TIBBETTS: Okay.

THE CHAIRMAN: No. I'm sorry. This one I can't help you. This is your idea.

HON. D. KURT TIBBETTS: We understand that.

THE CHAIRMAN: This is your idea.

HON. D. KURT TIBBETTS: We understand that.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: We're just — all we're doing here is that when we're finished with this it's done.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: And we just want to make sure that what we will have in the Constitution is fair for a trigger, but at the same time does not allow frivolity and mischief.

THE CHAIRMAN: Well, I would have thought, objectively, that 20 per cent of the entire electorate, entire registered electorate is quite high, not impossibly high, to make it, you know, just a paper provision. It's something that could probably be achieved, but it's a serious threshold. That's my view. I would have thought 20 is perfectly reasonable, 20 per cent of the entire electorate, because what you have to remember is that, as I'm sure you're well aware, if one is propelled into having a referendum, it costs money and it takes time and trouble and everything.

HON. D. KURT TIBBETTS: We know that.

THE CHAIRMAN: So you don't want it to be too low.

HON. D. KURT TIBBETTS: We were not thinking of it being any lower.

THE CHAIRMAN: No.

CAPTAIN A. EUGENE EBANKS: Mr. Chair, with an issue as important as this, could we flush this out a little bit more in the morning when all the members are here?

THE CHAIRMAN: Sure. Yeah.

All right. We have something — can I just ask a question —

HON. D. KURT TIBBETTS: So — so we're satisfied with everything else?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: The proposed...

THE CHAIRMAN: Text.

HON. D. KURT TIBBETTS: Text and changes we have made.

THE CHAIRMAN: And we have not — we have not added anything to (3) notwithstanding Michael Bradley's question.

HON. D. KURT TIBBETTS: Which was?

THE CHAIRMAN: Well, he was saying should one require the legislature to —

HON. D. KURT TIBBETTS: No.

THE CHAIRMAN: — to do something.

HON. D. KURT TIBBETTS: What we're saying is that — that binding is binding.

THE CHAIRMAN: Binding is binding.

HON. D. KURT TIBBETTS: And there is a universally accepted difference between it being binding and — what the other one is?

[inaudible comments]

HON. D. KURT TIBBETTS: No, that we...

THE CHAIRMAN: Advisory.

HON. D. KURT TIBBETTS: Advisory, yeah.

THE CHAIRMAN: Binding is binding.

HON. D. KURT TIBBETTS: So —

THE CHAIRMAN: And actually when the question was asked —

HON. D. KURT TIBBETTS: And the legislature would be foolish.

THE CHAIRMAN: Yes. To do nothing —

HON. D. KURT TIBBETTS: Not to act.

THE CHAIRMAN: But when the question was asked by I think Rolston about whether a referendum recommending a change to the Constitution would that be contravention of the constitution, the answer was no.

HON. D. KURT TIBBETTS: Right. So we don't have to change that now.

THE CHAIRMAN: But — but — no, we don't change that, but a binding referendum result on a change to the Constitution cannot be carried through by a legislature alone —

HON. D. KURT TIBBETTS: I understand that.

THE CHAIRMAN: — because it would need the UK.

HON. D. KURT TIBBETTS: Yeah.

THE CHAIRMAN: So that's why I suggest not going on to say **and the legislature shall pass a law** —

HON. D. KURT TIBBETTS: Right.

THE CHAIRMAN: Because they —

HON. D. KURT TIBBETTS: Exactly.

THE CHAIRMAN: — have the competence to do that.

HON. D. KURT TIBBETTS: Exactly.

THE CHAIRMAN: So, we'll leave that as it is.

HON. D. KURT TIBBETTS: Yeah. You can explain that to your man that we're happy.

THE CHAIRMAN: Okay. I have one question which is the relationship with the provision in Section 69 because at first I thought that this text would replace 69. But just to be clear, you want to keep the provision in 69 —

HON. D. KURT TIBBETTS: Yeah. This is for 70 that we needed to create the wording for.

THE CHAIRMAN: Yeah, so —

HON. D. KURT TIBBETTS: The only thing changed in 69 is “qualified” is changed to “register”.

THE CHAIRMAN: To register. Okay, so we'll have two referendum provisions.

HON. D. KURT TIBBETTS: One is people-initiated.

THE CHAIRMAN: Yeah. And the other is —

HON. D. KURT TIBBETTS: The other is Legislative Assembly.

THE CHAIRMAN: The existing one.

HON. D. KURT TIBBETTS: Although the people-initiated would still have to be triggered by the action of the LA.

GOVERNOR STUART JACK: Mr. Chairman, as it comes out here, you've got two different kinds of referendum in 69 and in 70. In the case of 70 you've set a figure to establish whether the outcome of the

referendum is binding or not. But for the other kind of referendum in 69 there's no reference to —

HON. D. KURT TIBBETTS: Because.

GOVERNOR STUART JACK: — what is regarded as a binding outcome.

HON. D. KURT TIBBETTS: Because —

GOVERNOR STUART JACK: Is that the intention of people —

HON. D. KURT TIBBETTS: Yes, sir, it is the intention because each time a law is created for that referendum you have in that law what the threshold is because — because the one for the LA.

HON. V. ARDEN MCLEAN: Because it is triggered —

HON. D. KURT TIBBETTS: Yeah, but not only that but you may have depending on the type of referendum it is you may call for a different threshold. That is very possible depending on the nature of the issue.

GOVERNOR STUART JACK: And that would apply also to a referendum in respect of constitutional change, independence?

HON. V. ARDEN MCLEAN: Yes.

HON. D. KURT TIBBETTS: Absolutely.

GOVERNOR STUART JACK: So, again, you want the LA to be able decide what is regarded as a —

HON. D. KURT TIBBETTS: Right.

GOVERNOR STUART JACK: — a decisive vote or not?

HON. D. KURT TIBBETTS: Exactly.

GOVERNOR STUART JACK: I just wanted to be clear on what the intention was.

HON. D. KURT TIBBETTS: No, no. Yes, sir.

MS. JULIANNA O'CONNOR-CONNOLLY: Mr. Chairman, under the Proposal 73 can somebody give me some more clarity as to how this is envisioned to work? Are the words "subject to this Constitution" neutralise the fact that we're not a supreme Parliament? By that what I

mean is how can we as a legislative who have to depend on the assent by the Governor and indeed the UK accept something to be binding when it's outside of our hands as far as to dissent in any event?

HON. D. KURT TIBBETTS: It is binding for the Legislative Assembly to act as to what it can do within its power, meaning take it to the UK. If the UK doesn't do it then there's nothing else we can do. But it binds the LA to act insofar as constitutionally it can.

THE CHAIRMAN: Yeah. That's right.

[inaudible comment by First Elected Member for Cayman Brac and Little Cayman — microphone not on]

HON. D. KURT TIBBETTS: But listen now. Not everything in a people-initiated referendum, Miss Julie, not everything, or not even the majority of things that might occur might have to deal with the Constitution, may be matters that we can control ourselves. In fact, in most instances, I suspect that's what it would be.

[inaudible comment by First Elected Member for Cayman Brac and Little Cayman — microphone not on]

HON. D. KURT TIBBETTS: Okay, so you have an example where a law says that you can't import German shepherd dogs, and a lot of the people want to import them. If they can get the number of signatures required, get more than half of the elected — I mean the registered voters to say yes to it via referendum, then the Legislative Assembly would be bound to change the Animal Law to say you can import them.

MS. JULIANNA O'CONNOR-CONNOLLY: But to take the argument one step further, then, suppose those same German shepherd dogs were endangered species by the UK so that was against our international obligation. To me, like we're setting up the public for some false hope that if they say it is going to be bound it's going to be done, and we don't have the authority to do a whole lot of this stuff.

HON. D. KURT TIBBETTS: Binding is to the powers of the Legislative Assembly. That's where the binding is.

[inaudible comment by the First Elected Member for Cayman Brac and Little Cayman – microphone not on]

HON. D. KURT TIBBETTS: No, I hear you. But all I'm saying is it is binding to the power of the LA and it cannot exceed that. But as

Minister McLaughlin has said, Miss Julie, in truth and in fact the powers of the LA in everything we do are limited because it takes the Governor's assent, and there are a couple of other things that we don't really have full control over that we might well pass a law that doesn't get assented to or that —

MS. JULIANNA O'CONNOR-CONNOLLY: Mr. Chair, just to say this and I'll stop on this point because I don't want to protract it.

I think where my fear is coming from is that for the general public, unless I'm misreading it, when they understand that if more than 50 per cent vote on it and it's binding, they're going to expect the Legislative Assembly to follow through on what they say. And what I'm saying, we're not a supreme or sovereign Parliament, so whatever we pass there have to go through and line up with our relationship and our partnership with the UK under that arrangement.

And I think in my own mind that that is setting us up for direct conflict and confrontation with the UK when we go back to the public and say, 'Okay, we've done all that we can do but it's the UK who's not going to do it'. What I'm trying to find out, are there any other words that can achieve the same thing without setting ourselves up for conflict: (1) with the populace who believe that they have given us a mandate; and then also with the UK is where my concern is coming for whatever it's worth?

THE CHAIRMAN: Yes. Well, I think that —

HON. D. KURT TIBBETTS: And I understand that.

THE CHAIRMAN: Yeah. I understand the dilemma, but I think it's — I think it is one of those things that you have to live with because if you provide — you know if there is a demand for — a public demand for a referendum to change some aspect of the Constitution, you can't change the Constitution here yourself, you have to come and discuss it with the UK, and you know the UK might or might not agree.

But I mean writing this into the Constitution, if we do that, I don't think is actually different from the situation which exists already.

HON. D. KURT TIBBETTS: Right. Exactly. And, Mr. Chair, I understand exactly what Miss Julie is saying. The thing that we need to appreciate with this is, first of all, the electorate needs to be educated continuously, and if and whenever this is to occur by whatever means, if it's through 69 and 70, exactly what it means.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: But the advantage that it gives is that if we don't say binding, then, really, we shouldn't do it at all because it's a waste of time, because it means at no point in time does the electorate have the ability by numbers, if they feel that strongly about it, to tell the Legislative Assembly what they really should do. And the binding — it just needs to be understood by the public that the binding is to the limits of the powers and authority of the Legislative Assembly.

So if we simply were to say “advisory” instead of “binding”, I think that would be a big let down and they would simply say, ‘Well, what's the sense in having it?’ While I understand the difficulties that she's talking about, those are difficulties that we simply have to explain to them, and there's nothing we can do about it as long as we have the relationship that we have and that relationship they want to continue.

THE CHAIRMAN: Yes. So, I think that's right. I think that's something we have to live with. We can't avoid it by language.

I think we are coming to the point where we should break, but...

MR. WILL PINEAU: Just for the record, we just want to put our — mention that we strongly support binding referendum.

Our membership has been speaking about this issue since the 1970s, and have supported this call for a people-initiated referendum, the mechanism by which it operates is left for the elected. But we strongly support that for the record.

THE CHAIRMAN: Thank you.

I think the remaining points on our list which — the remaining points on our list are ones which we'll have to postpone till tomorrow because —

HON. D. KURT TIBBETTS: How many are we talking about, sir?

THE CHAIRMAN: Pardon?

HON. D. KURT TIBBETTS: How many are we talking about?

THE CHAIRMAN: Well, we've got the — the question of the right to vote by the Speaker or not, it's the voting question you know we know we got some way towards; the question of single-member constituencies; a possible text on public debt or not, which you were either going to produce or leave the whole thing aside; and the only other one is Section 122, this is the Order in Council power where you suggested a text to us which we would like to take away and consider. So, there are not many more, but there are quite a few that we have in the — which we've already discussed just now which we know we're going to have to come back to. There are probably about a dozen, I should think.

HON. D. KURT TIBBETTS: As many as that?

THE CHAIRMAN: Well, there are four — according to our estimation, there are four pieces of drafting that your side has undertaken to do. They are the following:

One is a redraft of your proposal relating to Section 32 (2). This is the question of whether the Governor should act in the best interest of the Cayman Islands while not prejudicing the UK.

The second one is whether to write in some qualification for who could be appointed Deputy Governor. This is this public office retirement, all that kind of thing. You were going to do some drafting on that —

HON. D. KURT TIBBETTS: Which one is that?

THE CHAIRMAN: Pardon?

HON. D. KURT TIBBETTS: Which one is that?

THE CHAIRMAN: It's this question about...

MS. SUSAN DICKSON: 35 (1).

THE CHAIRMAN: 35 (1). It's the Deputy Governor, public office, public officer or not. You were going to go away and come back with some language in the morning to reflect your preference.

The third one is Section 48 (3). This is the question of inviting Opposition members to the Cabinet — not Opposition members — members of the Legislative Assembly whether Opposition or on the Government's side.

And the fourth one is Section 116, the public debt. If you still have the proposal that you want to press, you need to draft on that.

[inaudible comments]

THE CHAIRMAN: And we're doing a draft — we're doing a draft on the — we're doing a draft on the Premier, special section on the Premier.

HON. D. KURT TIBBETTS: Right.

THE CHAIRMAN: Okay?

HON. D. KURT TIBBETTS: Yeah, but, Mr. Chair, some how or the other I just don't remember things all the time according to how we said it.

Even though I tried to express my strong feeling about 25 (1), I thought you were going to draft it the way you saw it.

THE CHAIRMAN: No. We asked you to draft it the way you wanted it, because I made a suggestion — I made a suggestion —

HON. D. KURT TIBBETTS: But I think, sir, after the discussions — and I'm very serious about this. I think, sir, after the discussions we had, only one query was whether the person was a civil servant employed at that time, or whether the person could have been a civil servant, a past civil servant. And we all agreed that it was somebody that was below retirement age and all the other things. So, if you just do that the way you see it, we might not find a way to fix that other part and we might just leave it.

MS. SUSAN DICKSON: Can I ask is your concern only that you don't want people past retirement age to be eligible to be the Deputy Governor?

HON. D. KURT TIBBETTS: One was that for me.

MS. SUSAN DICKSON: Yeah.

HON. D. KURT TIBBETTS: And the second one that it was a person who was —

[inaudible comments]

HON. D. KURT TIBBETTS: No, not that. Serving in public service at the time.

MS. SUSAN DICKSON: Okay. So you don't want it to be possible for someone who has, say, worked in the public service for 10, 15 years, then left —

HON. D. KURT TIBBETTS: [inaudible – microphone not turned on] so that arguments have been thrown out saying that the pool may be so limited that you don't want simply disenfranchise those people from being eligible. And also I'm realising — or I have realised all of things in our Constitution [inaudible – microphone not turned on] and it works. So that part I'm prepared to leave as it is, not to worry about that part. But I do believe that it is important that it shouldn't be someone, in my view, should not be someone who is beyond retirement age because that is not the practice that obtains.

MS. SUSAN DICKSON: Okay. So you only want serving civil servants who are not beyond retirement age?

HON. D. KURT TIBBETTS: That they are not serving but they have served and have sufficient experience I'm not going to argue about.

MS. SUSAN DICKSON: So that's okay —

HON. D. KURT TIBBETTS: I just don't want —

MS. SUSAN DICKSON: Okay. As long as they're not past retirement age.

[inaudible comments]

HON. D. KURT TIBBETTS: Thank you very much, Susan.

THE CHAIRMAN: Okay, and — right. Well... and we'll do a draft on the Premier. So — and we'll do a draft on this point as well and we'll meet tomorrow morning at 9:00, and come back to the — 9:00 — and come back to the remaining points, most of which — most of which are differences between the Government and the Opposition, but there are one or two which we have difficulties with. But I'll tell you whether we can move on them or not.

[inaudible comments]

MS. JULIANNA O'CONNOR-CONNOLLY: Mr. Chairman, before we go, could I just seek some clarification on the purpose of Section 76 either from you or the Government because I'm not clear?

THE CHAIRMAN: Sorry, section which?

MS. JULIANNA O'CONNOR-CONNOLLY: The purpose for Section 76, in particular (2).

THE CHAIRMAN: Section 76 (2). Yes. **Any person so summoned shall be entitled to... take part as if he or she were a member in the proceedings in the Legislative Assembly relating to the matter in respect of which he or she was summoned except he or she shall not be entitled to vote.** I think it comes from the...

MS. JULIANNA O'CONNOR-CONNOLLY: Mr. Chairman, to add to it, I'm just saying the modernisation we seem to be moving away from the non-elected members in Parliament. So why are we saying — or keeping this? The reason escapes me as I was seeking for some assistance why we would ever need this archaic provision and what circumstances that it envisioned to be utilised.

THE CHAIRMAN: I don't know. Is this out of date now?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I view this as a helpful section really, giving to the House the ability to summon whoever it thought it needed to assist in whatever matter it was dealing with so...

MR. ROLSTON M. ANGLIN: Mr. Chairman, this is the old 36, Section 36 of the renumbered and revised Constitution that exists presently. And the truth — and in fact if you look at the section **any person shall be summoned to take part as if he were a member in the proceedings of the Assembly relating to the matter in respect**, so in other words, this person can get up and debate, et cetera, et cetera. That's a lot —

THE CHAIRMAN: Oh. Oh, I see. There's a simple — there's a simple answer to that. Just delete (2) because then you're just left with (1) which says **Speaker or other person residing may, blah, blah, summon any person to a meeting of the assembly** even though that person is not a member of the Assembly. Full stop. And obviously they're not a member and obviously they don't have a vote. So we delete (2) then.

Excellent.

According to my esteemed legal advisor, tomorrow there are — she has a list of eight points and five drafts. Is that eight plus five, or eight including five? Okay. I hope that's not too dramatic.

HON. D. KURT TIBBETTS: Are those points between us or between us?

THE CHAIRMAN: No, I think some of them are ones which...

MS. SUSAN DICKSON: Well, some we're not dealing with because the Opposition are not all here.

HON. D. KURT TIBBETTS: Right. And some?

MS. SUSAN DICKSON: And some are... well, for example, one of them you're producing — oh, that's a draft actually. Most of them are between you, but there's one or two are with us.

THE CHAIRMAN: Okay. One of the extra ones — I notice that there's a piece of paper headed Proposed District Council Provision which is new. Is that —

HON. D. KURT TIBBETTS: Which we want the Opposition to be here.

THE CHAIRMAN: Okay. So that's another one.

HON. D. KURT TIBBETTS: Two things, Mr. Chair.

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: Perhaps to be helpful, if that specific list could be shared with the Secretariat, then the Secretariat could just provide it to everybody in the morning so we'd sort of know where we're at and we can keep tabs.

THE CHAIRMAN: Okay.

HON. D. KURT TIBBETTS: And, secondly, just a question because I sense you're closing now. We go from 9:00 to 11:30.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Then we have the final public session at 12:00.

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: Which means representatives from the various organisations — and I hope the Secretariat is listening to that because they might need to be contacted — if they wished to make any final statements. It doesn't have to be long, but everyone should have that opportunity. Which I suspect if that is at midday, then that should probably finish by 1:00. So we need to know if we should organise lunch. I don't want for the Secretariat to organise lunch if everybody's going to disappear. So we need to know.

Should we prepare lunch for the Opposition?

[inaudible comments]

HON. D. KURT TIBBETTS: Yeah, everything is going to be here, but what I'm saying is it might finish around 1:00.

[inaudible comments]

HON. D. KURT TIBBETTS: Mr. Chairman, can you give us an opinion, sir?

THE CHAIRMAN: I think [inaudible – microphone not turned on]

HON. D. KURT TIBBETTS: If we get the snacks but not the lunch?

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: All right. That's what will happen. Yes, sir.

ADJOURNED

FRIDAY, 16 JANUARY, 2009

2008/9 CONSTITUTIONAL NEGOTIATIONS

HELD BETWEEN

CAYMAN ISLANDS DELEGATION AND

THE FOREIGN AND COMMONWEALTH OFFICE

THE CHAIRMAN: Good morning, ladies and gentlemen. We should start because we have limited time available and quite a list of points to touch upon this morning. I think the list has been circulated.

Number one on the list is Section 32 (2) CI Draft Interest of the Cayman Islands. I'm not sure if that draft is ready yet for circulation, but if it isn't we could come back to it when it is ready.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, we haven't attempted to type a draft to pass around because this is one of those difficult ones. But we'd like an indication, really, of what you think about this proposal before we — before we commit it to print. We would leave — the proposal is we would leave Section 32 (2) as it is.

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: And we would insert a new (3) which would say something like this... and this isn't the happiest language but something like this: **In the exercise of his or her functions under (2) above the Governor shall act in the best interest of the Cayman Islands consistent with the interests of Her Majesty.**

So, what that avoids is a problem that Susan identified to me which we accept, is that if we were to try to insert as we've suggested those words before the bit that begins **in accordance with such instructions**, it would create...

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: We see that. It would create a problem for the UK. But putting it as we have, there's no question that the instructions trump everything else. It's just that in carrying out those instructions the Governor should have regard to the best interest of the Cayman Islands consistent with the interest of Her Majesty's government. We believe that should be okay, but we'll hear what you have to say about it.

PROFESSOR JEFFREY JOWELL: Could I just add one word to that?

It also in some way reflects the interpretive obligation under the Human Rights Act although a completely different area. So, in other words, it doesn't imply a hierarchy of interests that one should necessarily trump the other, but it should be interpreted where possible "consistent with" without saying it in so many words. So, it's sort of indicating that there's a sort of partnership there and that we should try to work so that both interests are accommodated wherever possible.

THE CHAIRMAN: Well, I think the best thing to do on this is to leave it with us, and we'll need to confer in a break, I suspect. But thank you for that.

As far as the next one on the list is concerned, UK Draft Deputy Governor, I think that is being typed up as we speak. Is it being circulated now? Excellent.

The piece of paper that's come round has two texts on it, but we're looking at the second one first headed The Deputy Office of Governor. Yeah, okay.

So, Susan, would you like to say a few words on this one?

MS. SUSAN DICKSON: Thank you, Mr. Chairman.

The first part, (1) is the same as the text that's in the draft except for we have removed the reference to being a Caymanian in this part, so that sets out the **Deputy Governor shall be designated by instructions through the Secretary of State**; and then in part — (2) we have put in that **a person shall not be designated as a Deputy Governor unless he or she is Caymanian**; and then in (b) we've tried to take into account the concerns that were expressed by Mr. Tibbetts yesterday. So the way it's drafted now a person would also not be eligible to be designated unless he had held — he or she had held public office for at least ten years and was still eligible to hold public office and would rule out anyone who has passed —

HON. ALDEN M. MCLAUGHLIN, JR.: Retirees.

MS. SUSAN DICKSON: — retirement age. Yes.

MR. MICHAEL BRADLEY: Can I just ask the Minister for clarification. He means Caymanian and doesn't want to widen it to Caymanian status?

HON. ALDEN M. MCLAUGHLIN, JR.: There are — for all intents and purposes, they're one and the same under the law. Now, the law has removed reference, the new Immigration Law, to Caymanian status, so you now have the right to be Caymanian. So, I mean there still remains the distinction that save for persons who are granted status by Cabinet, everyone else who's been granted status may lose it if they commit

serious offences or various other things. But in terms of what they're entitled to and what offices they can hold there's no distinction. So, it's fine.

MR. MICHAEL BRADLEY: I was just looking at the interpretation section where there's two separate different definitions.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, I think we probably should look at that again. I don't think they are necessary anymore except in the sense that people who were granted status before the present Immigration Law their thing would say a "grant of Caymanian status", whereas since then it will say "grant of the right to be Caymanian". But it's — there's no change in substance, it's just a change — I think an important and symbolic change in nomenclature, but no change in substance.

THE CHAIRMAN: On that point, I mean in page 81 where these two definitions are to be found... and I think rather than take time on it now I think if we left with you the task of just checking those before we meet again. You see the two definitions at the foot of page 81. Because in this text the term "Caymanian" is used in some places, and in some places the term "Caymanian status" is used, particularly in connection with qualifications for election and so on. But obviously we want to ensure that they're accurate.

HON. ALDEN M. MCLAUGHLIN, JR.: I think what we would have to check is to see how the new Immigration Law has dealt with persons who were granted Caymanian status under the old law, whether they still have the same or whether there is some...

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: We'll just be careful. So, we take the point.

THE CHAIRMAN: So if we could —

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah, I take the point.

THE CHAIRMAN: By the time we meet again in a couple of weeks, as I hope we shall, you could tell us what would be the up-to-date position.

All right. Well, otherwise, does this solve the problem? I hope it does. Not solve the problem, but at least clarifies — deal with the concerns that the Leader of Government Business expressed yesterday.

HON. ALDEN M. MCLAUGHLIN, JR.: There was just one other point that's been raised with me by the Cabinet Secretary, is when you speak of eligibility, would that be extended to someone who had exceeded the age of 60, had in fact retired but who had come back on a contract?

MS. SUSAN DICKSON: I think it probably depends what your law says, or your rules on... is it General Orders?

HON. ALDEN M. MCLAUGHLIN, JR.: So, if the law allowed them to come back as public servants then, this provision would allow them to be appointed as Deputy Governor? That would seem to logically follow to be.

MS. SUSAN DICKSON: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah.

THE CHAIRMAN: All right. Good. Well, I think that's that one.

Shall we, as a matter of convenience, take point number 4 — we'll come back to 3 — that's the text at the top of this page which is your request that we try our hand at drafting a sentence specifically about the functions of Premier. Actually, the first line should read **the Premier shall have such functions as are conferred by or under — by or under — this Constitution and shall exercise these functions in accordance with this Constitution and any other law and in the best interests of the Cayman Islands** because we assume that you would want to say something like that about the Premier without the complications involved with the position of the Governor. So, that was our suggestion. Would that do the trick you think?

HON. ALDEN M. MCLAUGHLIN, JR.: I'm okay with it, I think.

THE CHAIRMAN: I've said — by the way, I've deliberately said **as are conferred by or under this Constitution** because —

HON. ALDEN M. MCLAUGHLIN, JR.: Extraneous powers, right?

THE CHAIRMAN: Yes. And, of course, important functions of the Premier will be those assigned by the Governor on the advice of the Premier to the Premier himself or herself as ministerial responsibilities, you know. So, that's done under the Constitution so that will cover that. I think it's all-embracing actually **by or under this Constitution**.

Good. Well, if that's satisfactory we'll put that in.

And then if we just pop back to point number 3, there is a draft I see that's been circulated... proposed — yes?

[inaudible comment by the Leader of the Opposition — microphone not turned on]

THE CHAIRMAN: Well, unless you had any point, McKeeva, you want to...

HON. W. MCKEEVA BUSH: I just wonder whether ten years is enough because you might have had the most capable person who only served five years.

HON. D. KURT TIBBETTS: So, you don't mean is enough, you mean too much.

HON. W. MCKEEVA BUSH: Sorry, too much. Yes, too much, because as I say, you wouldn't want to [inaudible – microphone not turned on] and had been able to move through the ranks. I don't know because we are building a constitution for the future, and I think some of these things can be — should be as generic as possible rather than have a stipulation because rules and regulations will change as administrations come along in the civil service. So we don't know who is moving to the top faster. We've got more people qualified in various things. We have our own college.

[inaudible comment]

HON. W. MCKEEVA BUSH: No, I'm just suggesting anything at this point. I'm just wondering whether ten years is not [inaudible – microphone turned off]

[inaudible comments]

MS. SUSAN DICKSON: You could put maybe seven. I only put that in as a suggestion, I mean it was just to put a number in.

HON. D. KURT TIBBETTS: Sorry, Susan?

MS. SUSAN DICKSON: I said I only put ten is as a figure, you know, just a suggestion. Obviously if you thought something different then it could be changed.

HON. D. KURT TIBBETTS: Should we have it in at all?

HON. ALDEN M. MCLAUGHLIN, JR.: Yeah. I think the Leader's point — he's here but I think the Leader's point is that if we're going to lower it to five years, I think we'd hardly want it to be seen that, you know, that

five years in the service is qualification to be Deputy Governor. So, if it's going to be that low perhaps we should take it out.

THE CHAIRMAN: Oh. So, we could just say **he or she has held public office and is still eligible to hold such office** and no period?

HON. ALDEN M. MCLAUGHLIN, JR.: Yep.

GOVERNOR STUART JACK: Sorry, could I ask another question? Do we actually want to say “senior public office”. I don't know what the definition of that is.

HON. W. MCKEEVA BUSH: And by “senior” do you mean someone, what, who is deputy now, who's a chief officer? What? When you say senior because we have several levels of — sorry, we have several levels of seniority in the service. So, are we saying senior but those on the fourth floor, as it stands? But this is what I'm saying. We got to be I think careful with this and think it through a little bit if you're going to put a time period in it because it will — perhaps things will change other times. We do have a college which we are enhancing people now.

HON. D. KURT TIBBETTS: Mr. Chairman?

THE CHAIRMAN: Yes.

HON. D. KURT TIBBETTS: I don't think anybody feels very strongly about a time period, and I do believe that it is better not to have any than to say five years. So, if it is the consensus... I just want to finish off what Mr. Bush was saying because I think we can go beyond that. I think the next point His Excellency brought up was whether we should insert the word “senior”. Was that it?

THE CHAIRMAN: Yes, that was the question.

HON. D. KURT TIBBETTS: Where would it go?

THE CHAIRMAN: Before “public office” in (b). I think the suggestion was that it would say **he or she has held senior public office and is still eligible to hold such office**.

Now, as Leader of the Opposition says, using the word “senior” is pretty vague.

HON. D. KURT TIBBETTS: So let's leave it **he or she has held public office** —

THE CHAIRMAN: Yeah.

HON. D. KURT TIBBETTS: — and is still eligible to hold such office.

THE CHAIRMAN: I think it's preferable because, you know, if you get a question or somebody is appointed and there is a challenge that that person wasn't senior enough.

HON. D. KURT TIBBETTS: What is senior?

THE CHAIRMAN: Yeah. What is senior? So —

HON. D. KURT TIBBETTS: That's another judicial review.

THE CHAIRMAN: Of course everybody knows that the Secretary of State is not going to advise Her Majesty to instruct — sorry, to designate a person who is anything other than senior. So I think it goes without saying actually.

So, it will end up **he or she has held public office and is still eligible to hold such office. He or she** — I think it probably better to say **he or she holds or has held** because you could have somebody who still is holding it. This might suggest that it can only look to the past. So **he or she holds or has held public office and is still eligible to hold such office.** All right?

[inaudible comments]

MS. SUSAN DICKSON: Sorry. I just wonder if you're not going to put in any time limits whether it's worth having this provision at all, because it seems to me that you're now making somebody now who at some time in the past has held public office for, say, six months or three months eligible whereas somebody who has never held public office at all is not eligible —

HON. D. KURT TIBBETTS: You're talking about (b)?

MS. SUSAN DICKSON: Yeah.

HON. D. KURT TIBBETTS: Whether we should have it or not?

MS. SUSAN DICKSON: Whether you should have it because --

HON. D. KURT TIBBETTS: We should.

MS. SUSAN DICKSON: — if you don't have a time period I'm not sure —

HON. D. KURT TIBBETTS: We should. We should.

THE CHAIRMAN: Well, I think you need it because —

HON. D. KURT TIBBETTS: Yes, you do.

THE CHAIRMAN: It has to be someone who holds or has held public office as a minimum you see.

HON. D. KURT TIBBETTS: Because you want to make sure they have held public office.

THE CHAIRMAN: Kurt's point yesterday was that the absolute minimum is that a person has held public office experience you see, so —

HON. D. KURT TIBBETTS: Right. And if you take this out it doesn't have that requirement again.

MS. SUSAN DICKSON: I just wonder — it seemed to me to make sense when it had a time period in it because they had to have experience for ten years, so then you were getting somebody who had experience. But the way it's drafted now without any time period in it, you could have somebody who worked for the public service for three months.

HON. D. KURT TIBBETTS: That's still better than no —

MS. SUSAN DICKSON: — 20 years ago —

HON. D. KURT TIBBETTS: — service at all.

MS. SUSAN DICKSON: Is it? Okay.

[laughter]

THE CHAIRMAN: Okay.

GOVERNOR STUART JACK: Sorry, could I ask a practical question?

If in the future the Governor was — decided to advertise this post, that was the way he was going to go about recruiting, would this in any way prevent the appointing officer — the Governor it would be — in adding further conditions? Because I could see a circumstance where the Governor might want to say **has held public office for a reasonable period of time, has considerable familiarity with the operations of the civil service** and so on and so on, because normally in terms of a selection process you actually give more detail than just this.

THE CHAIRMAN: No, I can't see that it would inhibit that.

GOVERNOR STUART JACK: It wouldn't constrain you from doing that?

THE CHAIRMAN: No.

GOVERNOR STUART JACK: Okay.

THE CHAIRMAN: These are minimum.

HON. D. KURT TIBBETTS: The same thing that obtains for any job that is advertised now, and it doesn't have a constitutional provision in it but it — so I don't see why that would be any different. That should be okay.

HON. SAMUEL W. BULGIN: Mr. Chairman, I hear what you're saying, but I'm not so sure about that because certainly as a lawyer looking at it, if you insert a condition that is not in the Constitution, you say only persons with some seniority, who have held some senior position in the public service need only to apply.

THE CHAIRMAN: No. No.

HON. SAMUEL W. BULGIN: The first thing they're going to say, 'Well, the Constitution has no such requirement so there's nothing to prevent me from applying. Whether I'm selected or not is another issue, but there's nothing to prevent me from applying even if I only had six months service.' So the advertisement — the add itself would be *ultra vires* the Constitution, but the Constitution doesn't have any such requirement at all.

HON. D. KURT TIBBETTS: But may I, Mr. Chair?

THE CHAIRMAN: Yep.

HON. D. KURT TIBBETTS: Because I hear what the Attorney General is saying. But if the Constitution states certain bare minimum criteria for this specific job, and when the job is advertised at any point in time there are other criteria that are added, someone couldn't say that because what the Constitution says you shouldn't add any more criteria to it? I mean every job that is advertised within the civil service.

HON. SAMUEL W. BULGIN: No. What you are doing is using a condition that is not in the Constitution, to exclude certain people from applying. So if you put in it that you had to be a senior public servant to apply — to apply, then the Constitution doesn't say so, and the

question is, 'Well, how dare you exclude me from applying when the basic legal position is that there's no such requirement?' So we need to be careful.

The point is — the point that needs to be made is that this person is going to be the head of the public service.

HON. D. KURT TIBBETTS: Yes.

HON. SAMUEL W. BULGIN: So, it clearly means that it has to be the most — the people who bring some bragging rights to that office.

HON. D. KURT TIBBETTS: Okay.

HON. SAMUEL W. BULGIN: With some sort of a public service experience.

HON. D. KURT TIBBETTS: But is the word "senior" going to solve that problem?

HON. SAMUEL W. BULGIN: I think so. Now, there are different levels of seniority.

HON. D. KURT TIBBETTS: That's where I thought was the problem.

HON. SAMUEL W. BULGIN: And that would give whoever is dealing with the job some flexibility in determining what we think is senior enough and so — but —

HON. D. KURT TIBBETTS: But someone could argue — forgive me, but someone could argue the case the same way. A head of department can say, 'How can you tell me I'm not a senior civil servant?'

HON. SAMUEL W. BULGIN: Well, that is relative. What is senior is relative, but at least it does contemplate some seniority.

HON. D. KURT TIBBETTS: Just so that you understand clearly, it is not that I have a problem with senior, it's just that I thought senior was too generic.

HON. SAMUEL W. BULGIN: Well — but I think it still legally allows flexibility on the part of the Governor and the Secretary of State to say, well, this is the case.

When you apply for the post of Attorney General it says in the Constitution someone who has had like five or ten years' service. You know right away that there's no point applying if you have three years called. In this case, you can have a flood of application because there's

nothing to prevent a clerical officer or junior officer from applying and so on.

HON. D. KURT TIBBETTS: No, no, I understand what you're saying, I was just hoping that there would be some other terminology that would make life — would make it more clear.

[inaudible comments]

HON. D. KURT TIBBETTS: So you're saying he or she holds or has held... I don't think we should argue over that if the legal advice is such the case and we have enough legal people here and nobody's unhappy then.

THE CHAIRMAN: No. Well, obviously I'm happy to defer to the Attorney General on this. I think if it said **he or she holds or has held a senior position in the public service and is still eligible to hold public office** that would do it, I think.

HON. D. KURT TIBBETTS: Mr. Chair, just one quick point for clarification. Does public office include authorities?

THE CHAIRMAN: No. No —

HON. D. KURT TIBBETTS: If it does that's fine because we want to include.

THE CHAIRMAN: No, there's not. No.

HON. D. KURT TIBBETTS: Okay.

HON. CHARLES E. CLIFFORD: Mr. Chairman? Mr. Chairman, is there any reason why we should not define “senior public officer” as being **any officer who holds or has held the position of head of department, statutory authority, government-owned company or above** because I think this is going to be problematic if we don't make some attempt to define it.

THE CHAIRMAN: Well, there's no reason why not. Provided you are clear what you want to say we can do it now. Better do it now because I'm not going to make it up at home and send it back to you.

So, for the purpose of... for the purpose of (2) — a new (3). For the purpose of (2) **senior position in the public service means...** Means?

HON. CHARLES E. CLIFFORD: I was suggesting anyone who holds or has held the position of head of department, head of a statutory authority.

THE CHAIRMAN: Means head of department.

HON. CHARLES E. CLIFFORD: Head of a statutory authority or a government-owned company or above.

THE CHAIRMAN: Head of statutory authority or government company — government-owned company is it?

HON. CHARLES E. CLIFFORD: Correct.

THE CHAIRMAN: Government-owned company...

HON. CHARLES E. CLIFFORD: Or above.

THE CHAIRMAN: Means head of department, from head of a statutory authority or...

HON. D. KURT TIBBETTS: Government-owned.

THE CHAIRMAN: Government owned company, or above. Okay? All right, Sam?

Right. Thank you very much. I think that's that one done.

Then shall we turn to the text on Proposed Attendance of Persons at Meetings of Cabinet.

HON. D. KURT TIBBETTS: What section is that, Mr. Chair?

THE CHAIRMAN: This is the text that's circulated headed Proposed Attendance of Persons at Meetings Provision.

And this looks to me as if it reflects accurately the proposition that was made the other day, although I think there's a typo at the end of the fourth line. I think it should be "with respect to" rather than "respect of".

With respect to (a) matters affecting their district; and (b) making budgetary representations when the Annual Plan and Estimates are being developed.

And this would go — where would it go now... Cabinet — meetings of Cabinet.

HON. ALDEN M. MCLAUGHLIN, JR.: Section 48.

THE CHAIRMAN: Yes, 48. So this is 48 (3) in effect isn't it? Replaces the current text at section 48 (3) on page 39. Is that correct? Yeah, 48 (3). The only...

MR. MICHAEL BRADLEY: Mr. Chairman, (a) is matters affecting their district and (b) is making budgetary representations. Does (b) infer that they can make budgetary representations in respect of matters other than their district?

THE CHAIRMAN: I think the...

[inaudible comments]

THE CHAIRMAN: The only suggestion I would make here... the only suggestion I would make is at the moment it's drafted **the members representing that district**, and of course there are some single members.

HON. ALDEN M. MCLAUGHLIN, JR.: The member or members.

THE CHAIRMAN: The member or members it should be, I think. All right?

HON. V. ARDEN MCLEAN: You're trying to leave me out again, Ian.

[laughter]

THE CHAIRMAN: Yes, I'm conscious of your interest.

HON. V. ARDEN MCLEAN: Thank you. I knew you were looking out for my best interests.

[laughter]

HON. ALDEN M. MCLAUGHLIN, JR.: You see, it's because we're so certain that Minister McLean is going to be in Cabinet for life we didn't think about him.

[laughter]

THE CHAIRMAN: All right. That one's... is everyone content with that one then? Yes?

So the next one is number 5, Leader of Opposition in National Security Council. I don't know whether —

HON. V. ARDEN MCLEAN: Premier, I think. Number 3.

HON. ALDEN M. MCLAUGHLIN, JR.: We did that already.

THE CHAIRMAN: We've done that one. We've done the Premier.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I've had another think about this and wondered whether this arrangement might find a little more favour with the Opposition. And that is... I thought about it actually when we were writing this bit about the proposed attendance of persons at meetings of Cabinet, is if we couldn't develop a similar position which would give the Leader of the Opposition or his designate the right to attend a National Security Council meeting. I think we could say when necessary or at least once every three months, so that if there were matters which he had concerns about that he could ask the chairman whether 'I can come along'.

He wouldn't be a member... in this construct he wouldn't be a member of the council, but he'd have the right, when necessary, or at least once every three months, to go along to that National Security Council, say what his concerns are, or hear. And when necessary — the reason I think that's important is not just from his perspective as Leader of Opposition, but there may be matters which the council wants or feels it ought to impart knowledge of to the Opposition, so that, you know, if we had a situation involving a prison break, or the refugees, or something, there's a facility to invite the Leader of the Opposition along to say, 'This is what's happening and this is how we're proposing to deal with it. What do you think?'

HON. W. MCKEEVA BUSH: Mr. Chairman, national security, in our perspective and from our — where we stand as a small Island, where we are trying to modernise the Constitution should not just be left to three Cabinet ministers and the Governor. The minority has rights. Regardless of how the majority feel about that, they have rights. And the person leading the minority should have and be able to make proper representation at all times.

There are no — from my point of view there are no — from where we planning to go... we're not talking about the old times, we're talking about where we want to go. You don't — you can't — you can't represent just partially knowing and only having an opportunity to be partially involved at the whims and fancies of government. We don't know who will be in Government; what their mindset will be; what kind of situations the country will find themselves in. And we tie ourselves down to a written document from the UK which ties us down because we ask it — put it that way. Then, Mr. Chairman, it can't help democracy, it can't help good governance, and it probably won't help peace or order either.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman —

MR. MICHAEL BRADLEY: Mr. Chairman — sorry.

HON. ALDEN M. MCLAUGHLIN, JR.: If I could just say, I've thought really long about this, and I think the fundamental problem — and I'm not sure how we get past this one if the Leader of the Opposition's view is as trenchant as it sounds — is that it is government that is charged with the responsibility for policy making and implementation. That's the way the system works. It is not the responsibility of the Opposition in that regard. And if we start by imposing the Opposition on the policy-making body, I think only disaster will ensue, because the nature of the Westminster system of government is, some say unfortunately but necessarily, adversarial.

What we're trying to do is to strike some balance here where (a) the Leader of the Opposition, who is representing the entire Opposition, is able to voice his concerns, is able to be briefed about what is happening in government, but doesn't have a role in the decision making. That, I think, reflects fairly the way the system — all around the world systems which have an adversarial form of government actually works. And I don't see how it could work otherwise.

MR. MICHAEL BRADLEY: Mr. Chairman, would there be any merit in making it in this situation the Leader of the Opposition in a position analogous to official members that he would — government is the policy-making body, this is an arm of government making policy. The Leader of the Opposition should be able — should have a right to attend and to participate in the discussions, but not to vote. In other words, he would have a right to know what's going on, to contribute his perception of what is in the interest of national council. Or do you feel it's solely a matter for government, and it's so much a matter of policy that it would be too interventionist for the Leader of the Opposition to have a right to attend, but not to vote?

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Bradley, let's talk reality.

The process is adversarial. The Opposition is the government-in-waiting. The way an Opposition works is — and this is not being critical of this Opposition, oppositions all around the world work this way. They seek to undermine the efforts of the government; they seek to present to the electorate the fact that the government isn't doing what they ought to be doing and that if they were in charge they would do a better job. That's how governments change.

If you — there are bound to be things that are discussed in a National Security Council, especially the kind of creature that we are trying to create, about the operations of the police; what policies in

relation to the police; about how many boats we should buy; whether we should have a helicopter; whether we should have more officers on the force. Could you imagine what the Opposition will do with that information?

HON. W. MCKEEVA BUSH: What are we gonna do with it?

HON. ALDEN M. MCLAUGHLIN, JR.: It's an impossible — it's an impossible arrangement in an adversarial system of government.

HON. W. MCKEEVA BUSH: Mr. Chairman, and that's probably where the rub is.

The Minister keeps talking about being adversaries. We are in a Westminster form of government. We don't have to be adversarial in everything, and that's — that's where that I think we are going wrong in this Constitution, because we are trying to do everything in other territories which have been nothing but adversarial politics. And what I'm hearing from my point of view is that the people don't want that, and that's why I've been trying to work with the government to tweak things so that we get a working — a better framework for working as a government.

Yes, the government is charged with responsibility. The government will have three members on that body. The Opposition member, whether they are someone that would be cantankerous and adversarial we don't know, but certainly he can't do any more there than he would be able to do when the report is made that the government is buying 50 cars. He can't make any more complaint there than he would make when he comes to — when they come to the legislature with the request to buy 50 cars.

So I don't think when you're talking about balance that you have a good balance at all. This is national security. And when you talk about the government having responsibility, the government don't say that when they're looking support for problems. And in the immediate past they've been doing that. They want support because they feel that there are problems that they have. And we have not jumped in the streets and rolled out the cannons. We didn't even go under the grape tree.

Mr. Chairman, maybe that won't be forever, but I believe we need a body, if it is a security council, that can have a different view on it, but one that will not strangle hold the government from policy making, but can only, I believe, make for less adversarial, because if you don't know and you gotta wait for three months after an issue is passed that doesn't make sense. You gotta wait three months, an issue is gone. Something already happened so you gonna only go there to be told that 'This is what we did'. I don't see that that makes good sense and good working for democracy. But I leave it there, Mr. Chairman.

THE CHAIRMAN: I think for my own perspective, and to be fair... I hope it's a fair comment. I mean the text we looked at a few moments ago about attendance by non-ministers at Cabinet meetings is extremely — I mean it's unique, I've not seen anything like this in any other territory. And I think it's a contribution to cooperative, less adversarial politics which is to be appraised. Now, you know, it's an experiment. Whether it will work or not we have to wait and see, but I think it's enlightened.

And it seemed to me yesterday when I sort of threw off the top of my head the suggestion of something similar for the National Security Council that that would match that. Now, if the Government is prepared to accept as a right of attendance by the Leader of the Opposition on this new National Security Council — one can discuss, you know, every three months or whatever — that seems to me also a step in the direction of reducing adversarial politics and contributing to cooperation.

At the same time, the Leader of the Opposition is obviously correct in stating that matters of security, internal security and police are of course interest to everybody and one can't deny that. So it seems to me what we're seeking to do here is to provide a balance, something which, as I say, is enlightened, is more enlightened than other territories have accepted, been prepared to accept. So, I hope we're actually not very far apart from one another.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, we've offered "when necessary" which is not something that's in the other one as well, so that if — as I said if there is something of importance which the Leader of the Opposition feels needs to be brought to the attention of the council, that that facility is available. Obviously this is going to require a certain amount of give and take and discretion so that it isn't abused, so that he doesn't want to turn up at every single meeting. But I think it can work if reasonable people operate reasonably.

HON. V. ARDEN MCLEAN: Mr. Chairman, I guess that's precisely why the Opposition is not in Cabinet, but we're giving them the opportunity to come and make representation on behalf of the people they represent. And I think that is what is being extended here.

Because the National Security Council in England, when they took the decision to advise the Prime Minister to go to war in Iraq, you didn't see the liberals inside there. No one sits on that advisory council other than the labour rights.

Now, it may — we may even be able to extend that further to say he — the Leader of the Opposition may request and make representation to the commission and/or the commission may require when they think it's necessary to request — to ask for his presence to update him on something. And I think that's going extremely far in light of being in a situation in a country — or in operating within a system of adversarial politics.

The government has the responsibility to run the country. It is not that of the Opposition. If they were in the government they would be here. They wouldn't be there.

And I think it's reasonable — and like you said, Mr. Chairman, it has never happened before and it's something that at least we're extending the — I think government should do it, make sure that it involves everybody, but only under the conditions that they can't sit in Cabinet. That's why they're the — the Opposition is the Opposition. You don't sit in Cabinet.

THE CHAIRMAN: Well, the text I wrote down was for a new subsection in 58 is: **the Leader of the Opposition shall be entitled to attend meetings of the National Security Council when necessary and at least once every three months.** I think that was the idea. It may be that that's not as much as the current Opposition would like, but it seems to me a compromise between no attendance at all and permanent attendance, and that seems to me quite good middle ground.

I don't want to back the Leader of the Opposition into a corner — he wouldn't let me do that anyway — today, but my suggestion is that I would put that sentence into the next draft and you can reflect on it in the coming days and see how, you know — see whether you can — I hope you can accept it.

HON. W. MCKEEVA BUSH: I don't want to put — I understand what you're saying, and I hear what the Government is saying as the government. But as I say, we're not building for today, we're building for the future. And I was wondering whether — and I wouldn't want to put the Governor in any spot, but I wonder if he had any view on it.

THE CHAIRMAN: Governor, if you wish.

GOVERNOR STUART JACK: The proposed National Security Council is an attempt to improve the — as I read it is an attempt to improve the advice that's available to the Governor, to have more of an input from the principal community into the matters which still continue to be in this draft reserved for the Governor. So, whether we want to introduce confrontational party politics into that body or not I think is an interesting question. And if the view of the — the general view was that we didn't want to politicise the management of the police more than it already is, would there be more politicisation by having the Opposition inside that group or less politicisation by having the Opposition represented in that group? So I'm not coming down one way or the other, I'm just posing the question what we're actually trying to achieve in this exercise.

HON. W. MCKEEVA BUSH: But you — I thought you said that the purpose, general purpose, is to give His Excellency the Governor advice or help to give him hopefully better advice for him to be able to carry out his functions better, and that should happen all around. If it came from one side, then you're only getting one view from it as well so...

GOVERNOR STUART JACK: I'll just make one more comment and I leave it as a question for people, because I'm not going to come down clearly on one side or the other.

But what is already the situation, and will continue to be the situation, is the duly elected government will be responsible for recommending to the Legislative Assembly a budget for the RCIPS and for any matters related to national security. That will continue to be a matter that has to be dealt with through the normal democratic process. That doesn't change. What does change is a greater input into the policy making of the Commissioner of Police under which the Governor is responsible for. And one just poses the question about whether you want to politicise that process, or whether you want to see that process as being one which should be depoliticised and have it — and how is the best way to achieve depoliticisation or political — non-politicisation for that body if that is what everyone around that table wants.

HON. V. ARDEN MCLEAN: Mr. Chairman, if I may just comment briefly on the Leader of the Opposition's position.

THE CHAIRMAN: Arden, if you could do it briefly because we have to move on.

HON. V. ARDEN MCLEAN: Yes, I will.

THE CHAIRMAN: Thank you.

HON. V. ARDEN MCLEAN: He mentioned that the Governor needs advice and it should come from all around. Well, I don't see anybody in Cabinet giving the Governor any advice other than the government.

THE CHAIRMAN: Right.

HON. W. MCKEEVA BUSH: That's the Cabinet.

THE CHAIRMAN: Thank you.

HON. CHARLES E. CLIFFORD: Mr. Chairman, I know we need to move on, I'll be very brief, but in relation to the text that you proposed I think you said whenever necessary or at least once every three months.

THE CHAIRMAN: And at least once every three months.

HON. CHARLES E. CLIFFORD: Right. So I think the whenever necessary needs to be qualified or made clearer because someone needs to decide when it's necessary, and I think that ought to be the chairman of the council.

THE CHAIRMAN: Well, we could give that judgment to the chairman, who is the Governor. I think that's probably fair because the Governor being politically neutral should be able to take a view. But at a minimum on this proposal the Leader of the Opposition would be entitled to attend at least once every three months, and one could consider whether that's the right sort of frequency.

But shall I put in **when considered necessary by the chairman?**

Okay. Thank you.

Shall we move swiftly on to Term Limits? Section 50 (4), Term Limits for Premier. And I think my recollection is that the Government was moving towards indicating that it would no longer insist on this subsection yesterday.

Alden, would you like...

HON. ALDEN M. MCLAUGHLIN, JR.: Well, Mr. Chairman, we have spent some time debating it, and I believe we all want some consistency in approach to these matters. The Opposition have been pressing very hard to limit the ability of senior public servants to stand for election.

THE CHAIRMAN: So is this — are we on?

HON. ALDEN M. MCLAUGHLIN, JR.: Very quickly, sir.

HON. W. MCKEEVA BUSH: Term limit.

HON. ALDEN M. MCLAUGHLIN, JR.: And on — we believe that that is — that that right is just as important to the exercise of democratic right, as is this issue of term limits and what the Opposition say about that. They say somehow term limits are an infringement on the electorate because it limits their choice.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: I think the two have to stand or fall together, quite frankly, because they are — the same principle I think is generally applicable.

We are very firmly of the view and we have been reassured each evening by public servants that it simply will not be acceptable to limit

the right of public servants to stand for election in the way that is proposed in Section 62 (1) (b).

I don't know whether the Opposition have had a chance to reflect on that, but what I would say to them is if they are prepared to let that go, we will reluctantly back down in relation to the term limit provision which we've been proposing.

HON. W. MCKEEVA BUSH: So be it.

MR. ROLSTON M. ANGLIN: Mr. Chairman?

THE CHAIRMAN: Rolston, yes.

HON. W. MCKEEVA BUSH: So be it.

MR. ROLSTON M. ANGLIN: I'm not going to comment on the parallels that the Minister has tried to draw because we could debate all day whether or not there is a parallel. It seems to me it's a tradeoff. But can I make two comments on 62 (1) (b)?

Firstly, as I always understood it — and I can remember from the 2000 General Election when it was rumoured that the number of public officers were going to be standing in the district of West Bay. I clearly remember from then, when Mr. Bush was a member of the Opposition at the time to then government, him communicating with the then Governor, because as we understood it there was always this unwritten rule that if you were a civil servant and you were going to run that generally people thought you would have some period before you would vacate office. We had always heard this to be six months.

Now, whether or not there is a desire for there to be a break and that the break be put in a Constitution, I think one of the critical factors is that we ought to ensure that the Constitution mandates that we as legislators — or the legislature must enact in — and I use the word “must” enact in legislation a clear transition as to how it out to work. I say that because whether or not it's 12 months, 24 months, or one day, anyone who has a job has — and has to give up a job in order to run ought to have a system that transitions them from their job up to the election. In the private sector generally different firms use different approaches. Some will tell you, ‘Well, you cannot show up at the office any longer but we'll pay you a salary for a period of time’. Some will say you have to resign outright and you're on your own. But at the end of the day each individual firm has rules for their employees as to how they transition them from the time they make a decision to stand for election and inform the employee — employer, sorry, and have a very orderly system. I don't think that we can argue that certainly if you look at 62 (1) (b) just on its own, without any clearly defined support mechanisms

that this will indeed infringe upon the ability of public officers and senior public officers to stand in a general election.

And so, I think history has shown us that this — first of all this is something that doesn't happen very often, and so if we even look back at the last three general elections, for example, just as a sample we will see that.

What I believe we ought to do is that if there's going to be any form of clear transition so that everyone knows where this stands — personally I don't believe it's acceptable to have unwritten rules, one person remembers it's a certain amount of time, other people heard it's a certain — another amount of time. There's nothing clear and the public doesn't know where it stands, civil servants don't know where it stands. You can have one civil servant with high ethics who takes the matter seriously and treats it one way, another one who may have other alternative — motives and operate in a different way. I think the system needs to clearly outline how you transition from being a public officer to standing in a general election.

And so, certainly — certainly — a part of that has to deal with some form of compensation, because I know from experience — from personal experience and experience of others that in the private sector typically — typically, I'm not saying this is across the board but typically — most firms do give some sort of consideration to transition their employee so that the employee isn't just dropped cold. Because let's face it. That would cause for other than persons who have a substantial amount of savings that they would — that would be their one — the one factor that causes the country to potentially lose good representatives, and I don't think any of us would desire that to be the case.

So, that's really the comments that I would have on 62 (1) (b) and how we would need, in my view, that it ought to operate.

Now, how we compare that to 54 we could debate forever whether the two are even comparable. But the key is, in my submission at least, that certainly I can — I can understand why just looking at 62 (1) (b) persons would look at this and say: 'But hold on. What happens if you have, for example, a public officer who would wish to stand for election. How — is it reasonable that they can be expected to survive for example for 12 months potentially without a salary — potentially without a salary. Right?

My personal — and this is my personal view. My personal view is that whatever time period is chosen, if there is one, is that certainly — certainly it's incumbent that come consideration is given to some sort of period, and you tie that in with a consideration to allow people to have a salary during that period of time. And again, I think if we look back at the last three general elections this is not something that's going to cost the country a lot of money because it just doesn't happen a lot and it has not happened a lot. But that's what happens in the private sector, and I

think that for us to not recognise that civil servants ought to be given some — that sort of consideration so that they're not at a distinct disadvantage would not, I believe at least, cause us to give them a favourable — or consideration period that they should be given compared to their peers in the private sector.

THE CHAIRMAN: Thank you.

HON. D. KURT TIBBETTS: Mr. Chairman, I'm very conscious that we need to be moving on and we need to make some decision here.

I certainly appreciate the comments of the member from West Bay, Mr. Anglin. And it is obvious — and I thought many of the same thoughts prior to this — that what is proposed here certainly is untenable for most individuals who are civil servants when it comes to them being able to sustain themselves and their families over this period of time if they have aspirations to run in a general election. So, with the greatest of respect, when the commissioner thought this he certainly wasn't thinking real life, and I guess he doesn't have to worry about those kinds of things.

But I believe, Mr. Chairman, that this was not an issue when we look at everything that should be considered, that should have any constitutional status. There's a Public Service Management Law which is the law of the civil service, and if there are any considerations to be made let us look towards that. Let us take the time out to examine it carefully, to get comments from those who it would affect. But I don't think for us sitting here that we would be doing any service to the country if we are objective in the thought process by trying to inject anything of this nature as a constitutional provision, sir.

THE CHAIRMAN: Thank you.

What I — McKeeva, yes.

HON. W. MCKEEVA BUSH: Mr. Chairman, as I said the other day, yesterday I guess it was, that something needs to be done, we just can't leave the situation. Because if this continues, the situation continues, while the Government has said what they said and they are maybe satisfied, I don't know, but when you talk to the general run of the people in the country — people in the country, and civil servants, because this is not affecting the entire civil service, at best or at most it will affect eight, ten people — people saying — are saying, 'Well, how can you go in now if there is no rules for your top civil servant to play by, and he can be lord, do what he wants behind your back, and then come to challenge you?' What, then, kind of relationship is to be expected from the politicians with trust —

THE CHAIRMAN: Yeah.

HON. W. MCKEEVA BUSH: — of their key people? And that's what it boils down to.

As I said, I don't know what we're going to do. I ain't gonna be bound by my feelings and what I believe is right between the eligibility to stand and term limits. If the Government don't want to support term limits, then they do what they want to do. The people will have a chance to vote on this. And I was only try to help some of them anyway, but — from my point of view, but I am not going to be bound, as I say, by the eligibility and the term limits. If they don't want to support term limits, well, so be it — or want to support it, so be it.

MR. ROLSTON M. ANGLIN: And, Mr. Chairman, just one last point on the — and I want to make sure I understood what the Leader of Government Business said.

62 (1) (b) in our view has to have some constitutional backing because we do not believe that any particular administration should decide whether or not there are going to be rules. In other words, if they're saying that they don't think the rules should be outlined in the Constitution that's one thing, but at a minimum I think the Constitution should provide for there to be rules. If they're saying that they want it to be that the Constitution shall provide that there shall be rules and it be governed by law that's a completely — if that's what he said I didn't understand that to be the case, but if that's what they're saying that's something clearly different.

[inaudible comment by the Leader of Government Business]

MR. ROLSTON M. ANGLIN: I'm just saying, sir, that at a minimum that would be what I believe to be fair in the circumstance.

THE CHAIRMAN: Right. I think we must — my conclusion is that Section 54 stays in the text for the time being, and Section 62 (1) (b) stays in the text for the time being, and they have to go to the final round.

Shall we move on to point 8?

HON. ALDEN M. MCLAUGHLIN, JR.: Just to make it clear, sir, that in that case we'll stand by the term limits provision.

THE CHAIRMAN: Yes. The next draft will include both provisions.

Section 55. This is the question of whether the Speaker can be elected from only persons who are not elected members, or as under the

current Constitution either from within or without. I think that's the point isn't it?

And I think yesterday the Government generously accepted that they could live with staying with the status quo that the Speaker could be either elected from among the members of the Assembly or from among persons qualified to be elected members of the Assembly other than ministers. That's the text of Section 31 (a) (1) (a). That's the provision of the current Constitution. All right?

HON. ALDEN M. MCLAUGHLIN, JR.: Yes, sir. This is a concession we've — or I should say another concession we've made in order to, we hope, get a document that all of us can get behind and say that we're satisfied with.

[inaudible comments by the Leader of the Opposition]

HON. ALDEN M. MCLAUGHLIN, JR.: Unless you wish me to.

HON. W. MCKEEVA BUSH: I don't wish you to do anything but good.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I'm — I hope we're not going to lose the spirit of cooperation which we — has been so evident throughout all through these talks. And we're doing everything on our end to accommodate what we understand the Opposition to want or to have issues with. And I really do hope that even though we have this issue with the public servant's eligibility to stand that we can generally get to the end of these talks with a document with save one or two points that all of us can support.

THE CHAIRMAN: Thank you.

Section 70. This is the 20 per cent issue on referendums, people-initiated referendums. Yes. I think the only point left over from yesterday on this was whether in — whether in the case of a people-initiated referendum the trigger would be a petition signed by not less than 20 per cent of registered electors, or whether it should be some higher percentage or lower percentage. But I think we — I think we arrived at the thought that 20 per cent was about as low as it should go.

But anyway, I don't know whether anyone's had any further thoughts on that. It's not a matter on which the UK delegation has any strong view one way or the other except that I thought that 20 per cent sounded quite reasonable from an objective point of view.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, I wasn't sure — there were a lot of... there were a lot of contributions made yesterday, but I'm not sure I was able to distill from all of that any sort of firm position from the Opposition on the people-initiated referendum point.

HON. W. MCKEEVA BUSH: Well, Mr. Chairman, in this spirit of cooperation, I think we said long time ago that we wouldn't mind the referendum, we saw some value in it. I do not believe that a country can be run on referenda, I just don't see that happening. But as I said, in the spirit of cooperation and — it not gonna kill us to do so except that the proper ratio have to be determined, because you can't have 15,000 voters and, you know, 3,000 people causing you to spend \$600,000 to hold a referendum, and at the end of the day which nothing might come out of. So we have to be more certain about the proportion of people, how it's triggered and so on.

HON. ALDEN M. MCLAUGHLIN, JR.: What our draft, Mr. Chairman, if I can help... what our draft has proposed is that it would take 20 percent of the electorate to trigger the referendum.

Now, what we're aiming to do — and we did quite a bit of research on this around the world in terms of what the numbers use for the trigger — is you don't want to put the numbers so high that it is just — it's just a nod to democracy or to more democratic institutions in your Constitution, but the number is so high no one will ever — or it's highly unlikely anyone will ever be able to utilise it. But we don't want the number so low that there's a referendum every month either. And 20 per cent or thereabouts seems to be the number that is utilised in many jurisdictions. If we want to talk about that, then we're happy to do so.

THE CHAIRMAN: Can I just intervene as a matter of timing?

We are running out of time, and so I would just urge everybody... I don't want to strangle voices, but to try and make points in a concise fashion. I'm not criticising anybody.

But it seems to me a fair proposition. Is 20 per cent a reasonable figure for this trigger, or is there is some different figure? I mean if there's not a strong objection to 20 per cent, I would suggest we go with it.

Rolston.

MR. ROLSTON M. ANGLIN: Mr. Chairman, my only concern is, is that a lot of the jurisdictions that we look at are very different in size and nature than Cayman.

In my mind, knowing this country the way I know it, with the population base that we have, I just don't see where if you have a matter that is of national importance — national importance — given how this community works and has worked that I believe that you're going to have a difficulty raising the numbers in terms of getting people to sign on to a petition. I've seen some petitions go around recently and people get up — from what they reported to me and I trust them — get up close to 1,000 very, very quickly in terms of getting people to sign, and they

weren't matters of national importance, they were matters of personal importance to a couple of people.

I say all of that to say that if we're going to have matters of national importance, I personally believe given the size and the proximity of how we live in this country that 20 per cent may not be a bar that is — or may be a bar that is slightly too low. But let's wait and see.

HON. ALDEN M. MCLAUGHLIN, JR.: How about we try 25? Would that give you a greater comfort? Mr. Chairman, we can go with 25.

THE CHAIRMAN: Twenty-five?

HON. ALDEN M. MCLAUGHLIN, JR.: Yes, sir.

THE CHAIRMAN: Let's go for 25. Good done. Gavel is down.

The next topic which has a matter only of tidying up in Section 75 the voting rules. And the question was raised yesterday about whether the Speaker should have a casting vote or a vote in the context of a vote of no-confidence. And I thought about this and concluded, as I hope I'll be able to demonstrate to you, that the simple solution here is simply to revert to section 35 of the present Constitution, that's to say the present rules which say as follows: **Save as otherwise provided in this Constitution all questions proposed for decision in the Assembly shall be determined by a majority of the votes the members present in voting.** That's the same as 75 (1) in the draft.

Then we'd simply have (2) **the Speaker or other member presiding shall not vote unless on any question the votes are equally divided in which case he shall have and exercise a casting vote.**

Now, the reason why I say that it is sufficient to have those two simple sentences and not to require anything more complicated is that as we agreed yesterday for a vote of no-confidence, two-thirds of the elected members are required. So, there is not a question of inequality of votes. One either reaches the two-thirds threshold or one does not. There's not going to be a situation of half and half.

So we don't need to make any special provision to — you know, as to whether the Speaker should vote a casting vote and a vote of no-confidence because there will not be inequality of votes on the rules we have discussed.

So, I hope if you agree with that logic — which I hope it's logic — we can simply substitute for Section 75 (1) (2) and (3) the current Constitution Section 35 (1) and (2). That's the rules that you're familiar with and have been for decades. And then we would leave in Section 75, of course (4): **the Deputy Governor and the Attorney General shall not be entitled to vote.** Are you satisfied with that explanation? Good.

Okay. We move on to single-member constituencies.

Now, the comment I would like to make here, I know the political sensitivities of all of this, but the position we'd reached yesterday is that... the consensus I think we had reached was that the Constitution — a new constitution would not prescribe single-member constituencies plus the two-member constituency of Cayman Brac and Little Cayman. The definition of constituencies would continue to be dealt with in ordinary legislation passed by the legislature of the Cayman Islands as under the current Constitution.

Then there was an outstanding question whether the provisions in the draft Sections 89 and 90, providing for regular establishment of an Electoral Boundary Commission to review the boundaries should remain in the Constitution or not. And my firm view — we've discussed this in our team — my firm view is that these two sections should remain in the Constitution so that there is constitutional protection for an Electoral Boundary Commission composed of a neutral chairman and one representative of each of the government and the opposition, and that it should meet regularly to review the boundaries and then report to the House.

[inaudible comments]

THE CHAIRMAN: Exactly. Exactly. Because it's a thing that needs constant review. So, if you're content with that I would leave that in.

There is one detail in there that I just wanted to raise very briefly and that is that at the moment the drafting is such that on Section — on page 64 it talks about... it talks about the end result being an order by the Governor which has been approved in draft by the Legislative Assembly which would provide for any revised boundaries. This actually was the system — is the system in Bermuda and was the system that was used when the Cayman Islands Constitution was amended in 2003 to provide for a Boundaries Commission to make recommendations to single-member constituencies.

Are you content that the end result should be an order by the Governor, or would you prefer it to be incorporated into a law? One can do it either way, but the Constitution is to specify which. I don't think it makes any difference in practice because in either case the Legislative Assembly has to approve the draft. So, it's either a draft bill or it's a draft order of the Governor. I don't know whether you have a preference.

HON. D. KURT TIBBETTS: Mr. Chair, I'm going by instincts here, but I'm thinking in order to not only appear but to help to ensure the independence of the commission, if it is something by the Governor although LA has to prove it, that might seem to be, unless others have difficulties with that, perhaps the more seamless way to allow it to happen.

THE CHAIRMAN: Yes. That's what happens in Bermuda and in the other territories. So, if you're happy with that I'm content to go on.

HON. V. ARDEN MCLEAN: I think that's what happens now, Ian.

THE CHAIRMAN: Yeah. All right. Excellent. Excellent.

So can we have a look at — there's a new draft about public debt. Since we've become more efficient, can we take ten minutes to have a look at this draft which we've only just seen? I know that one or two of us would appreciate it.

HON. ALDEN M. MCLAUGHLIN, JR.: Before you do, sir, just — Mr. Chairman?

THE CHAIRMAN: Sorry, Alden.

HON. ALDEN M. MCLAUGHLIN, JR.: Before you do just let me say that we've had a look at Rolston's draft and have actually given him an 'A' star. We think it's a brilliant piece of drafting, sir.

THE CHAIRMAN: Which one is Rolston's draft?

HON. ALDEN M. MCLAUGHLIN, JR.: The one that you have.

THE CHAIRMAN: Okay. Well, we haven't had a chance to take a look yet.

MR. ROLSTON M. ANGLIN: I would like to thank Teacher McLaughlin.

HON. V. ARDEN MCLEAN: He reveres in that you see because his grandfather used to be called Teacher McLaughlin.

MR. ROLSTON M. ANGLIN: That's why I say that.

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THE CHAIRMAN: Thank you for your cooperation. I hope you all now feel more comfortable. I do anyway so...

I think in light of our confabulation amongst the UK team during the break we would need to take this draft text on public debt home with us and consult our financial advisors about it. I think it's actually a step in the right direction to have a text of this sort in the new Constitution,

and we are positive about it as a matter of principle. It's simply a matter of looking at it with some care. So I don't mean in any sense to sound prejudicial against it. In fact we have a prejudice in favour of it subject to clearing it with our experts. So, it will be a point which I — which will have to go to the time round but which I hope will be no more than a technical tidying up point.

And I'm grateful — I should add that I'm grateful to Rolston and Alden for producing it for us today.

[inaudible comments]

MR. ROLSTON M. ANGLIN: Mr. Chairman, we need to thank the Secretariat.

THE CHAIRMAN: We need to thank the Secretariat, too. I'm always happy to do that.

Okay. Right. So the next point is Section 122, Orders in Council. And again, perhaps it won't surprise you to hear that we have concluded that we'll have to take this one home with us also.

The fact is, I would like to say — I would like to say that I appreciate the temperate drafting, if I could put it. It's clever and it's not extreme and it's temperate and reasonable. But it is — it would be a complete innovation in any —

HON. D. KURT TIBBETTS: But you're taking it with you?

THE CHAIRMAN: — in any overseas constitution, and we're taking it with us. I'm not torpedoing it here and now. All right?

HON. D. KURT TIBBETTS: Yes, sir.

THE CHAIRMAN: So, I'm afraid that has to go on the list for London. But the list is not huge even with those two points, and I'll come back to summarise where I think we are on that list.

That leaves the new text on district councils which was circulated last evening and I'm trying to find it. Here we are, Proposed District Council Provision.

My first comment on this text is to wonder why it is necessary — I don't — legally I don't think it is necessary because of course it's — the legislature may make laws for peace, order and good governance for the Cayman Islands. Provided they're compatible with the Constitution and don't contravene the Colonial Laws Validity Act requirements, there is full power to legislate so it's not necessary to say that a law enacted by the legislature may provide for this or that in terms of district councils. It's not necessary to do that.

So I wondered why it was thought necessary or useful to have a specific provision apparently enabling the legislature to do something which it can already do.

Alden.

HON. ALDEN M. MCLAUGHLIN, JR.: Well, based on that, sir, perhaps we need to express — express it a little differently.

I think the feeling on both sides is that we want there to be a constitutionally recognised... but we want concept of district councils as advisory bodies to MLAs to be constitutionally recognised and required.

This is all part of trying to build a better democratic framework and infrastructure so that there is more participation by the community in the work of the legislature through its MLAs. And this was something that was talked about as we all did the rounds during the constitutional modernisation education exercise, so that's why we, I think, collectively feel it ought to find its place in the Constitution.

HON. W. MCKEEVA BUSH: Mr. Chairman, this is — this comes from our findings in the community, and we put it in our document, and we proposed it when we begun this process.

And I have — I do have a problem with what the Government is saying and the way this is drafted because if we are really talking about the empowerment, the Constitution and things that can augment and enhance democracy and involvement, we — the Constitution I think has to provide for it, but not just to say that a law may provide. I think it must be shall provide for it.

I don't know that we should leave the establishment and functions to a law if we really want to have empowerment of people. I feel this — that way about this as I felt about a senate which the Government has rejected.

I think this is what people want. They want to be more involved, but they don't want to leave it to the whims and fancy of a government that may put in place a law or abolish a law. So, if it has constitutional provision it's much harder to take what people feel is a right for them to be involved, and what we're doing is giving them a constitutional right and provision to be in the Constitution.

THE CHAIRMAN: Well, I think if there are going to be such district councils established I think it would have to be done by virtue of a law in order to set out how they are composed and what they can do. So, I don't see a way around that.

The point I — the other point I was going to make is, I mean, it is not... my first remarks should not be taken as saying it is not possible to have a provision, it is just — it's legally unnecessary to because a law can provide for these things anyway.

But as I understood Alden's point, and McKeeva making the same point, that part of the purpose of saying something in the Constitution is to give this emphasis, is to give this optical emphasis. And the one word that seems to me crucial if it's designed to enhance democracy in this text is the word "elected". If it's to enhance democracy, should it not say **the establishment, functions and jurisdiction of elected councils for each electoral district**? Otherwise it could be read as being the intention here is to have some... a law which will simply provide for councils which are appointed by some supremo who chooses whoever he or she wants to sit on it. So, I think if it's designed to show a positive optical message to enhance democracy, one should insert the word "elected" before "councils" in the second line.

HON. W. MCKEEVA BUSH: Mr. Chairman, I am not going to agree to that. Not a matter of democracy. Yes, it is another form of addition to, addendum to the democracy, but, Mr. Chairman, I don't believe that this country need to go into that kind of expense for what we have in mind because that's what it would create. If you're saying that we should have an elected council and then you do that you're having — you're having... no. To me they're going to create more politics that we don't need, and I don't think people want that.

What the people want, the people want a say. And if we give constitutional provision where we say that there must be a council and that the people appointed there give the MLAs their feelings on where — on what affects them — where the road should be and how many roads should be and whether the schools should go there or whether we do need another post office and take into consideration the expenditure for that — I think that's what people want. I don't think —

And you would find some that would want to be elected because they feel like they should have standing equal to MLAs, but if they want to do that then go put their money up and let us turn the spotlight on them. But I don't think a second tier is going to help us.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, we agree. We don't think that what we need or is warranted is essentially local government, you know — a system of local government below the MLAs. What we want, I think all of us, is advisory councils to advise the MLA, not to bind the MLA, because he is the one or she is the one elected. So we're ad idem on this point.

THE CHAIRMAN: How is it proposed then — how it is envisaged that any such councils would be composed if they're not elected?

MR. ROLSTON M. ANGLIN: Mr. Chairman —

HON. ALDEN M. MCLAUGHLIN, JR.: This would all be dealt with, sir, through legislation.

THE CHAIRMAN: But what do you envisage the legislation would say —

MR. ROLSTON M. ANGLIN: Mr. Chairman, what —

THE CHAIRMAN: — as to how the councils would be composed?

MR. ROLSTON M. ANGLIN: What we always envisioned was that the council would always be appointed and appointed by the Premier, Leader of the Opposition and the Governor would have an appointment on the council. And so, we — let's say for a particular district there was going to be seven council persons. Each of those would get three, the Governor, say, would get one, and that way that would be the independent member of the council. Right?

And we went that way because we wanted to ensure that the ruling or governing party, for example, didn't just get to put seven on and say, 'Here's the councilors for the district who duly represent the broad population within the district'.

I am searching, sir, for our discussion paper because I think it did... I'm not sure that spoke to it but it certainly did... yes, here it is.

The district councils would be appointed by the Government, Opposition and the Governor, with the balance of power typically resting in the hands of the Governor's appointees as they are seen as the independent members. So no party loyalty with — with no party loyalty or association. This would be on page 16 of our discussion paper.

HON. W. MCKEEVA BUSH: And, Mr. Chairman, a good point is being raised that later on, if the country finds itself where we have funds to operate a system — a true system of local governance, then we could, you know, graduate to that. But we don't want to do that. We want to be able to give the people the say, but at the same time — and give them constitutional standing, but at the same time keep costs down. And to me that's one of the big things, cost, and less politics too. Less politics.

This senate is — why don't you stick to building roads. You don't know nothing about a senate.

MR. EDDIE THOMPSON: Mr. Chair? Mr. Chair, if I might ask — and pardon me for my ignorance if it's more than obvious, but would this mean then that the general populace would have to go through this council, these councils and so then...

HON. W. MCKEEVA BUSH: You mean that they wouldn't have access to government?

MR. EDDIE THOMPSON: To government on a whole.

HON. W. MCKEEVA BUSH: No, but we would be stupid. Any government would be stupid to bypass their constituents.

MR. EDDIE THOMPSON: It goes back to the question if they should be elected then as opposed to appointed.

HON. W. MCKEEVA BUSH: No.

MR. EDDIE THOMPSON: At the end of the day, the general public has access to the government. It's just much ado about nothing.

HON. W. MCKEEVA BUSH: No, no. I think that you — I think that any representative, the Governor together will appoint people across party lines and they will have good input, but you're not going to bypass your constituents.

MR. EDDIE THOMPSON: So this would be somewhat mimicking single-member constituencies to some extent?

MR. ROLSTON M. ANGLIN: Mr. Chairman, let me elaborate on this point just for two minutes.

What we find typically in our districts is that after a general election... you typically as in any constituency anywhere you have people who are firmly for you, against you and then you have some in the middle that you've won. Right? Now, after an election is all over and you go into running the district for four years, one of the weaknesses that we have found in our districts is that usually — usually — the people that you get most of your input and advice from, just because of the fact that you've had to go out and run and you have a campaign committee, et cetera, are the people who supported you and you often times do not get to reach out and get — not necessarily a relationship, but input from other people as well.

One of the real benefits of this is that it will at the district level ensure that every district as we're trying to build our communities is getting a voice that is truly representative of the entire community. We see this as a key building block for us in terms of community development and interaction with the community.

To answer Mr. Thompson's question, if someone wants to come to my MLA office to see me, they can still come. However, if once we go down this route and you get good strong terms of reference and the councils get up and running and really become bodies that are recognised within the community getting things done, sure people are

going to then go when councils call their meetings and say, 'Well, we think a park would be good on 'X' Street'.

But this is going to be a process. We're not expecting this to happen overnight. We just see it as a good first building block to true community participation and an involvement in a formalised way.

Just to say, Mr. Chairman, this was wasn't — this wasn't dreamt up just overnight. I mean, right now there's a non-profit organisation in Cayman called the West Bay Community Council. That was something that was formed in 2001 or 2002, I can't remember exact time. But it was aimed to try and do this exact same thing because we kept hearing from the public after getting elected, 'Well, how do we really do things better? How do we be better organised? How do we really get our voices to you in a more collaborative and a more formal manner?' This would be a first step.

Now, in three, four, five elections, God spares life, who knows what the public will want? The public may then be at the point where they say, 'We would like a model of local government. Let's think about it.' And then we may commission such a study. But that's down the road. For right now we see this as a good first step. Let's get this built, let's get it functioning and working and then...

THE CHAIRMAN: I think my conclusion on this is that as drafted it is clear that the real — not battleground but the real time when the details need to be sorted out is when a bill comes forward for discussion because it will need legislation to sort it out.

And provided that the text, as it is at the moment, is neutral, which it is... I would have preferred to see the word "elected" before "councils", but I can see that that argument may still need to be carried through. So it's neutral and it does not rule out the option of elected councils. I think my inclination, even though it is not legally necessary to say that, if you both regard it as important for optical reasons is to leave — I would recommend leaving this language exactly as it is and curious as it may seem, because it is not necessary to have it. We simply put it in and it is for later to work it all out in terms of legislation.

If there's any push to change any of this carefully drafted language, I fear that I — we would have to take it back to London because I think we could advise our minister that this is, albeit legally unnecessary it is a thing for a later day. It's a thing for you to sort out at a later day. So let's — are you happy then just to take this language?

[inaudible comment by Leader of the Opposition — microphone not turned on]

THE CHAIRMAN: Well, I don't mind. I think that you need to — if you're going to do it, it doesn't really matter one way or the other.

HON. W. MCKEEVA BUSH: I don't mind what you just said.

THE CHAIRMAN: Okay.
Susan?

MS. SUSAN DICKSON: I just wondered in the heading whether you should call it, perhaps, a community council which was the way that Rolston was referring to it because... well, maybe it's just for us in the UK. District council seems to me to imply something that you don't seem to be talking about, and community council might be better.

HON. W. MCKEEVA BUSH: Ms. Dickson, sometimes we will speak — and I speak for my district — we will speak of the community of Governor Sound and a community of North West Point. So I think district is right, meaning the electoral district.

THE CHAIRMAN: Governor?

GOVERNOR STUART JACK: Sorry, I've just got one point of clarification. Is it envisaged that these committees would have any executive functions at all because potentially if they were to do so that might derogate from the powers of other parts of government and would therefore have to be reflected in the Constitution?

HON. V. ARDEN MCLEAN: Advisory only.

GOVERNOR STUART JACK: Advisory only. Okay.

THE CHAIRMAN: To operate as advisory bodies. That's the...

HON. W. MCKEEVA BUSH: And if you want to put that in the heading, Proposed Advisory District Council.

THE CHAIRMAN: Advisory district council.

HON. W. MCKEEVA BUSH: I don't mind that.

THE CHAIRMAN: I think that would be helpful. Yeah. Advisory — all right. So the — we've done very well.

The very first point on Section 32 (2) we've also — I said we would discuss in the interval which we did, and again without wishing to fire a torpedo today, it's another one we'll have to take back with us to think further about.

HON. W. MCKEEVA BUSH: Mr. Chairman, that's the draft that's coming from the NGO?

THE CHAIRMAN: No, no. That's the draft that Alden read out about, the Governor acting in accordance — acting in the best interests of the Cayman Islands

HON. W. MCKEEVA BUSH: Oh, that one. Okay. It's still, yeah, agreed.

THE CHAIRMAN: — and consistent with Her Majesty. That's the one. And again, the reason for it is that it's novel and we'll need to think it over.

So just to summarise, my tally of points that will need to be —

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: There are two others that haven't been dealt with, one of which the Opposition —

HON. W. MCKEEVA BUSH: Before you finish, though, did we complete 13, Orders in Council?

THE CHAIRMAN: Yes. We're going to have to reserve that.

HON. W. MCKEEVA BUSH: Okay, that's one of them we're talking about. Sorry.

THE CHAIRMAN: Alden, yes.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, there are — there is a proposal for the inclusion in the Bill of Rights of a provision, essentially, in the same terms as that in the Gibraltar Bill of Rights regarding self-determination. There is considerable support for it around the table. The Opposition want to take a little longer to consider the draft, although they don't have an objection in principle to the inclusion of that kind of language. So, that will be a point which we'll have to take to London. I hope we can agree among ourselves on it before we get to London, but to deal with it there.

You want to say something, Mac? Go ahead.

HON. W. MCKEEVA BUSH: Yeah, just to say, Mr. Chairman, that it is something that we would — we would discuss with the NGOs on, and I would take further counsel on it within our party and some other wider advice.

THE CHAIRMAN: All right. Thank you very much. Is it — just to be clear so that we can in considering it —

HON. ALDEN M. MCLAUGHLIN, JR.: It's page 7, sir, at the top of the page of their fundamental — Protection and Fundamental Rights and Freedoms.

THE CHAIRMAN: This is the whereas all people have rights, the very beginning of —

HON. ALDEN M. MCLAUGHLIN, JR.: Correct. There are two paragraphs.

THE CHAIRMAN: Yes. Yes. Fair enough. So we'll note that. And that's a sort of sub point in the Bill of Rights.

Yes, the other?

HON. ALDEN M. MCLAUGHLIN, JR.: And the other point we noticed with considerable regret that you had deleted — well, you had declined to include — let me use that expression — in your draft the provision contained in our Working Draft of September 30. It is Section 109 relating to **further changes to this Constitution by referendum only except where the Premier and Leader of the Opposition formally in writing had declared that they were just minor or uncontroversial amendments necessary.**

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: I can see your objection in one regard, but not generally so...

HON. D. KURT TIBBETTS: Might it have been an oversight?

THE CHAIRMAN: Regrettably it's not an oversight. I was holding my breath — I was holding my breath to see whether you had forgotten about it.

[laughter]

HON. ALDEN M. MCLAUGHLIN, JR.: Uh-uh.

[laughter]

THE CHAIRMAN: No, look. As I think I hinted last time, at the last round, I don't rule out that something along these lines might be achievable, not in the Constitution text, but in a letter. But I would like to... a letter from our minister. We would have to discuss it with her. But you're saying you're still interested in something so we'll put it on the list.

HON. ALDEN M. MCLAUGHLIN, JR.: We — I think if you ask around the table there are fairly strong views in this country — you might have gathered that over the last eight years — about changes to the Constitution.

THE CHAIRMAN: Yeah.

HON. ALDEN M. MCLAUGHLIN, JR.: And one of the undertakings that we gave was that we would press for further changes unless they were minor or uncontroversial to be made only by referendum so...

THE CHAIRMAN: All right. Well, shall I just summarise before —

HON. CHARLES E. CLIFFORD: Mr. Chairman, sorry, before you summarise there's — I just want to bring us back briefly to the proposed wording for Section 116 in relation to public debt.

THE CHAIRMAN: Oh, yes.

HON. CHARLES E. CLIFFORD: I believe, Mr. Chairman, that there needs to be qualification on Section 116 (3) to allow for public/private sector partnerships in circumstances where the government is the borrower but not necessarily the repayer. And we are considering a project right now of such a nature, and there are bound to be others in the future. So I had some proposed wording in relation to (3).

THE CHAIRMAN: All right.

HON. CHARLES E. CLIFFORD: To simply continue after the word “association” to say **but does not include borrowing by the government in circumstances...**

THE CHAIRMAN: Hold on. By the government.

HON. CHARLES E. CLIFFORD: **In circumstances where consequent to a public/private sector partnership...**

THE CHAIRMAN: In circumstances where... sorry, where...

HON. CHARLES E. CLIFFORD: In circumstances where consequent to...

THE CHAIRMAN: Consequent to — sorry consequent to...

HON. CHARLES E. CLIFFORD: To a public/private sector partnership an entity other than the government is fully responsible for the repayment of that borrowing. I mean, its a matter that I think we ought to consider, otherwise it's going to undermine the whole purpose of a public/private sector partnership.

THE CHAIRMAN: Is responsible — sorry, just to get the text. **An entity where consequent to a public/private sector partnership an entity other than the government is responsible for...**

HON. CHARLES E. CLIFFORD: For the repayment of that borrowing.

THE CHAIRMAN: For the repayment...

HON. CHARLES E. CLIFFORD: Of that borrowing or of that debt.

THE CHAIRMAN: The repayment of that borrowing I suppose because borrowing is referred to. Of that borrowing. Okay.

MR. ROLSTON M. ANGLIN: That means that changes 14 (3) (c) of the Public Management and Finance Law.

HON. CHARLES E. CLIFFORD: Well, that could be a consequential amendment, yes.

HON. W. MCKEEVA BUSH: But, Mr. Chairman, do we need to put this in the Constitution or that needs to go in the — or something like that would go in the Finance Law? The law needs updating in any event but...

HON. CHARLES E. CLIFFORD: The concern, Mr. Chairman, is that if we don't extend this subsection in the Constitution, any amendment to the law itself might be deemed unconstitutional.

THE CHAIRMAN: Yeah. All right. We'll have to think on that.

Right. We have little time, but I just wanted to take the last ten minutes —

HON. W. MCKEEVA BUSH: Before you take the last ten minutes, Mr. Chairman, on this thing called “debt” we want to be most careful that we're not putting into the Constitution something that can give us an

ability to borrow and extend ourselves either by guarantees or by outright borrowing where we put ourselves in jeopardy. And I'm not doing that to raise any kind of debate, sir, but we do — we're still building for the future, and I keep saying that. And we might be trying to be as judicious as possible in what we do, but we don't know what going to happen, and hitherto for we've not had serious taxation in this country. But we do know — and if we say we don't know we're making a fool of ourselves — we know what this sort of overextension of ourselves can do because we've seen what has happened in other territories.

So we want to be careful that we're not writing too much into the Constitution, as I said, that gives us that, and I know that we'll have a law that we'll have to go through. But when something has constitutional backing, as we said, it gives — it gives it just that. You go to the public and they, 'You see? The Constitution says I can do this.' For all it's worth, sir.

THE CHAIRMAN: Thank you. Thank you very much.

Right. Right. Last ten minutes. Right. Last eight minutes.

My tally — my tally of points that are reserved for a final round, assuming we're all agreed that we're — the time is to go for a final round, and our view is that there are certainly a manageable number to make it worthwhile, is the following... I have actually only nine points which I think is excellent because it's under a dozen which I thought it might be at one point. My tally is the following:

Number 1 is the Bill of Rights as a whole only because there's a UK government reserve, as I explained before, on the Bill of Rights which our minister will have personally to assess the acceptability of. And there's a sub point of the self-determination issue language. That's point one.

Point 2 is Section 30, Appointment of the Governor, the question of consultation on — by the Premier on the appointment of the Governor. That's point 2.

Point 3 is Section 32 (2) — or (3) as proposed by the Government this morning — the question of whether the Governor should be required to act in the best interest of the Cayman Islands consistent with the interests of Her Majesty. That's point 3.

Point 4 is the question of the powers of the National Security Council, Section 58, and the issue of participation of the Leader of the Opposition. So Section 58 will need to be looked at.

Point 5 is Section 81, the Governor's Reserve Powers of Legislation, taking into account the proposal made the day before yesterday by the Government for an alternative text based on the equivalent section in the new Gibraltar Constitution.

Point 6 is the question of consultation on making of an Order in Council, and Section 122 that I had explained I had to reserve this morning because of its novelty.

The next point, 7, is — which I've combined into one — Section 50 (4), that's term limits for Premier, and Section 62 (1) (b), the question of the ability of people who have been in the public — have held public office to stand for election.

Point number 8 is the new text on public debt, Section 116.

And point 9 is the question of constitutional amendment.

Now is the chance for anybody to say whether I've missed anything out because if there are no other points that is the —

HON. D. KURT TIBBETTS: What is number 8 again, sir?

THE CHAIRMAN: Number 8 is the public debt text.

HON. D. KURT TIBBETTS: Okay.

THE CHAIRMAN: I've included that — I've included the self-determination subset under the Bill of Rights.

If there are no suggestions for others, that is the list which I will read out in the concluding public session.

Arden?

HON. V. ARDEN MCLEAN: You combine the permanent minister — the civil servant and the —

THE CHAIRMAN: Yes. I can make them separate points if you like.

HON. V. ARDEN MCLEAN: — permanent secretary? No, no.

HON. D. KURT TIBBETTS: And the Bill of Rights.

THE CHAIRMAN: Perhaps I — just a moment. Do you think I should make them separate points? Okay, I'll make those separate points so there

[inaudible comments]

THE CHAIRMAN: Ten is still okay.

[laughter]

[inaudible comments]

HON. D. KURT TIBBETTS: Mr. Chair, just to make sure included in the Bill of Rights where you do your reserve thing [inaudible — microphone not turned on]

THE CHAIRMAN: Yes. Yes. Yes.
Good. So — yes, Arden.

HON. ALDEN M. MCLAUGHLIN, JR.: Mr. Chairman, there is just one other point which has just been raised with me by the team from behind, is that in relation to the oaths of office and allegiance there is — there is a proposal which I think has been accepted that the legislators should swear both the oath of allegiance to the Cayman Islands and to Her Majesty the Queen, which I think there's no —

THE CHAIRMAN: Yes.

HON. ALDEN M. MCLAUGHLIN, JR.: No problem with. But that there is no similar provision in relation to the other offices. I can see why perhaps the Governor mightn't want to — or that there might be some reluctance for that to be done on the part of the Governor, but the judicial offices and the offices of the Attorney General and so forth I...

THE CHAIRMAN: At the moment, Alden... I was just looking at the text on page 84, and the oath for due execution of office for all of those who have to take it, which includes the Governor, is **I do swear that I will well and truly serve Her Majesty the Queen Elizabeth II, her heirs and successors and the people of the Cayman Islands in the office of...** So, there is an oath to serve the people of the Cayman Islands.

[inaudible comments]

THE CHAIRMAN: We can't change the oath of allegiance because the oath of allegiance is only to the sovereign, but the oath of office is drafted specifically to require service of the people of the Cayman Islands which seems to me very good.

HON. ALDEN M. MCLAUGHLIN, JR.: Okay. Let me amend my plea or complaint then. It's missing in the oath of — for due execution of judicial office.

THE CHAIRMAN: I see. You mean **and the people of the Cayman Islands** in the office of judge of the Grand Court or whatever **and I will do right to all manner...** Yeah.

HON. D. KURT TIBBETTS: Right.

THE CHAIRMAN: Okay.

HON. ALDEN M. MCLAUGHLIN, JR.: Thank you.

THE CHAIRMAN: I just wanted before we break — I just wanted before we break to say... I just wanted before the break to say that I will say in the public session, just so that I'm warning you, that I hope that... I hope that we all agree that we should move to a final round of discussions in London in the week beginning 2 February. The minister will be available to chair the discussions on the 4th and 5th of February, but it would be a good idea, in our view, if you agree, to meet the day before, on the 3rd of February, with our team to prepare and see whether there are any issues we can deal with without having to trouble her. What I'm thinking about is the less political issues.

We already have a couple which seem to me candidates for technical work: one is the draft text on public debt; text on self-determination if you have come to a conclusion on that; and it may be that by the time we meet again you will have further views about Section 54 and Section 62 (1) (b). But anyway there may be when I have produced revised text, which I shall do as soon as I can and get back to you here I hope by the middle of next week, when you read through you might find some things, you might find some glitches in there that you might need to point out. And we should — we should clear up all of those drafting infelicities and technical points, so that when we come to the Wednesday the 4th meeting with our minister we know precisely that there is a handful of political issues that we need to resolve. We don't need to clutter up the time with technicalities and drafting points.

So, if you're agreeable and have the time to do it, I would recommend a meeting — a preparatory meeting let's call it that — on the 3rd in London and then meet the minister on the 4th and the 5th. We might do it all on the 4th, but she's available on the 4th and 5 isn't that right?

And final point, the text that I would send out I shall do my very best to reflect faithfully what we've achieved this week, and it will be available for publication if you feel you want to do that. We won't impose any conditions about that. So that's what I'll say when we meet in public at 12 o'clock.

Is there any objection to anything I've just said as a foretaste of what I'll say publicly?

Kurt, no problem?

McKeeva, you happy? Happy with that?

HON. W. MCKEEVA BUSH: Very much so. Very much so, sir.

THE CHAIRMAN: Good.

HON. W. MCKEEVA BUSH: I think all you said I certainly appreciate it. We will be there and I wouldn't have to get accused of anything if I gave my document to the public.

[laughter]

THE CHAIRMAN: All right. Good. So with that unless there's anything you'd like to say, Kurt, we can break and reassemble at 12.

HON. D. KURT TIBBETTS: Mr. Chair, just to say that assuming the timetable works as we're hoping, then it would perhaps be good as soon as we get a copy to digest it, and perhaps for us to get together before we come over to London to see where we can get, if there's anything.

THE CHAIRMAN: As between your entire delegation?

HON. D. KURT TIBBETTS: Yes, sir.

THE CHAIRMAN: Yes, I would urge you to do that.

HON. D. KURT TIBBETTS: Yes, sir.

THE CHAIRMAN: I would urge you to do that.

Good. All right. Thank you very much, and I'll thank you all again publicly when we reassemble at 12.

[applause]

HON. D. KURT TIBBETTS: Mr. Chair, just to quickly say, sir, that the Government would like to thank everyone around the table and behind the tables for all of not only the hard work that has been put in, but certainly the manner in which we have been able to participate in these talks.

And I do believe that it is very fair to say that we have travelled a fair distance, even though there is some distance to go, and I think even you might well have already admitted that we are a little bit further on in maybe the expectations, which bodes well for all of us, sir. And I trust that we can get to the finish line in good order and fairly swiftly.

Thanks to you and the team for all of the help.

And I would almost tell a secret about your retirement and your consultancy, sir, but I won't. Thank you.

HON. V. ARDEN MCLEAN: Ian not going any place. Ian not going any place.

CLOSING REMARKS

THE CHAIRMAN: Welcome to the final closing session of this second round of talks on the modernisation of the Constitution of the Cayman Islands.

For the last three days we have had very productive discussions. In my view, my call at the opening session for cooperation was fulfilled to my great delight and relief. I thought the atmosphere in which our discussions took place was excellent, and I value all of the contributions that were made by all parties at the table. In fact, I think we've done better than I expected we would do. There was a real determination to try to solve as many as possible of the difficult issues that were left over from September and October. And I would like to congratulate and thank all participants for the restraint and forbearance which they showed, as well as their determination to achieve what they would prefer to achieve. But any negotiation requires forbearance and understanding and give and take, and there was plenty of that in our discussions, on all sides.

We have virtually discussed and agreed a large number of changes to the Working Draft that was circulated in October, and they covered the whole ground - from the Bill of Rights through to the balancing of the powers of government, to discussion of new institutions, such as a Judicial and Legal Service Commission, Human Rights Commission, and other bodies which will contribute to democracy and a modernised constitution - a constitution which, if ultimately agreed and brought into force, would be, in my view, suitable and beneficial to people of the Cayman Islands and a great improvement on the Constitution of 1972, now 37 years old.

There are, however, a few outstanding issues that we shall have to take to a final round of negotiation in London. And we have invited Cayman Islands delegation to come to London in the week beginning the 2nd of February, when the FCO Minister Gillian Merren is available to chair final round of discussions and to try to resolve the outstanding issues.

Those outstanding issues are the following. There are ten of them.

The first is the Bill of Rights as a whole. And the reason why that is an outstanding issue is that, as I explained in the opening session, our minister in the UK government will have to take a personal, political decision as to whether in its current draft form it would be acceptable in light of the package as a whole, of any draft new constitution as a whole.

There is a sub-issue in that context, which is the question of whether to include in it language on self-determination. That I don't think is going to be controversial, but it is a question which the Cayman Islands delegation is still working on, and we shall see precisely what it is that they would like to have written in.

The second point relates to the appointment of the Governor, and the Governor is of course appointed by Her Majesty, and that will continue to be the case. The question at issue is whether there should be a requirement for the Premier — Premier being the office which would take the place of that of Leader of Government Business under the proposed new Constitution — whether there should be consultation with the Premier before appointment of the Governor. That's point two.

Point three is a question relating to a proposal by the Government of the Cayman Islands on whether the Governor should be expressly required to act in the best interests of the Cayman Islands, which is a novel proposal and therefore one which we on the UK side will need to consider. This is not to say that any Governor of an Overseas Territory, including the Cayman Islands, does anything other than act in the best interests of the territory insofar as possible. That goes without saying. The only question is whether such a thing should be written into the Constitution.

The fourth point relates to the powers of the National Security Council which is envisaged as being established, the main purpose of which is to share responsibility between the Governor and elected ministers on questions to do with internal security and the police. This would be a new institution and therefore the definition of the powers of that institution need some further work. There is also the related issue of the extent to which the Leader of the Opposition should be involved in the work of the National Security Council.

The fifth point relates to the definition of a reserve power of the Governor to enact legislation. This is done in exceptional power which exists in the current Constitution, and we need to consider precisely what circumstances the Governor might exercise that exceptional power.

The sixth point is a request by the Cayman Islands Government that there shall be some consultation locally for the UK government recommends the Queen to make an Order in Council legislating for the Cayman Islands. The language proposed on that is again novel and would require careful consideration by the UK.

The seventh point relates to a provision in the Draft which has long standing. It was discussed as long ago as 2002, when this process of negotiation at any rate began, and that is whether there should be term limits of the Premier, whether the Premier should be confined to serving two consecutive terms or not.

The eighth point is the question whether those who have served in the public service should be able simply to resign and then be elected to the Legislative Assembly without any intervening period, or whether there should be a gap to put some distance between service in the civil service and if elected service in the Legislative Assembly.

Point nine is review of a draft text which would limit the amount of public debt of the Cayman Islands. That is reserved for the final round, principally, because the text only emerged this morning and time is

needed to consider it. I suspect it will be a technical matter to make sure that the language is satisfactory rather than, as it were, a more political issue.

And the final point, point ten, is the desire of the Cayman Islands side to make some provision that any future amendments to any new constitution should, in normal circumstances — in normal circumstances — require approval by referendum of the people of the Territory.

So, those are the ten points we shall need to discuss in London as they stand at the moment.

The format of our final round in London I envisage would be that there will be a preparatory meeting on the 3rd of February, not involving the UK minister, in order to tidy away any technical points that we think we can do, and then a day or two, if two are needed, chaired by the minister who will have to take political decisions as are necessary to try to come to a conclusion.

Before the final round I have undertaken to revise the working text, which was the basis for our work this week, to incorporate all of the changes that we agreed and to do my best to send this revised text out to the Cayman Islands as soon as I can, I certainly hope by the middle of next week. And I would have no objection to that text being published, being made public.

And after, if we are successful in the February final round in London, as I honestly hope we shall be, the step after that will be for me to produce a further revised text which reflects the agreement we have reached, if we are successful in reaching agreement. Again, I would do that as soon as possible, and it would be sent out here for publication and public consultation, as has always been envisaged.

The last thing I would like to say is earnest and heartfelt thanks to Leader of Government Business and his colleagues and advisors. Equal thanks to the Leader of the Opposition and his colleagues, and for all of the representatives of civic society and the Governor and the Attorney General who have all been extremely helpful. And I wanted to pay tribute to the wisdom of including representatives of civil society, which is unique in constitutional modernisation discussions we have had with Overseas Territories. And I think it proved a very good move because all of their contributions were helpful and constructive, and it was very valuable that they were here.

I would also like to thank Barbara Connolly and her team for all their arrangements. They were very tolerant and helpful to us throughout.

And I would like to thank the Secretariat - Susan Bothwell and her colleagues for all their support.

And never forgetting the sound engineers for their help making everything run smoothly.

And if I have forgotten anybody I apologise.

But I am very happy to have spent the last few days here doing this important work, and with further help and cooperation I'm sure we'll see the ship safely into port in a couple of weeks' time. Then it will be for the people to judge whether the work we have done is acceptable or not. I hope they will find it acceptable.

Thank you.

Leader of Government Business.

HON. D. KURT TIBBETTS: Thank you very much, Mr. Chair.

Mr. Chair, after just over three full days of talks I am now confident that a modern constitution is in sight. All sides have worked together, as you have said to produce a document that will provide a framework for the rule of law, democracy, freedom and justice for all our people now and in the years to come.

I wish to express the Government's thanks to the Leader of the Opposition and his team for their engagement in these talks and for participating in the spirit of cooperation which we all share and which is so necessary as has proven for a constitution to be a firm foundation for generations to come.

I'm also very grateful to the NGOs for helping us to articulate the true values of this country which we believe at this point in time are reflected in our draft.

I'm also grateful to you, sir, and your team from the Foreign and Commonwealth Office for your willingness to work with us and all the help that you have given us from your own experience in developing a constitution which is not simply off the peg, but actually we believe as far as is possible tailor made to reflect the particular needs and values of the Cayman Islands. I believe there is now a feeling among us all of great optimism that we will be able to deliver to this country a modern constitutional framework fit for the purpose which will guide Cayman's continued progress and development for many a year to come.

Obviously we must await both the next draft, which you will send to us, as well as the outcome of the final talks with the UK minister. But I want to say here and now that there is broad agreement on all the key features of the proposed Constitution.

The following list, although you in your own way have spoken to them, sir, is by no means comprehensive. I still wish to speak to some of the issues which are some of the more important features of the proposed Constitution which we shall take to London.

The first one is the Bill of Rights which will set out the rights, freedoms and responsibilities of the people of these Islands and their government. The content of the Bill of Rights has been the most difficult, controversial and indeed potentially deal-breaking aspect of the constitutional modernisation exercise. On the one hand, there is the acknowledged need for the United Kingdom to ensure that its Overseas Territories are compliant with its international obligations. And on the

other hand there is the justifiable concern on the part of the people of the Cayman Islands to ensure the preservation of our distinct history, culture and our Christian heritage and its enduring influence in shaping the spiritual, moral and social values of this nation.

I should tell everyone that a great deal of time, effort and forbearance has been invested in reconciling these two goals, and to date I am able to say with increased satisfaction and heartfelt gratitude to the NGOs that are here, that subject again to the final agreement from the United Kingdom as you have said, sir, we believe that we have settled on a text for our Bill of Rights that all the stakeholders in the negotiations are willing and able to support notwithstanding that everyone could not get everything.

The issue of the Governor's powers, while not as emotive as the Bill of Rights, has also been a difficult and sensitive area of the exercise. While wishing to maintain our strong, historical constitutional link with the United Kingdom, we feel that at this point in time the country is now mature enough to manage more of its affairs in accordance with the wishes of its electorate to whom its elected government is accountable. We also feel that accountability ought to be enhanced at all levels, not only on the part of the elected representatives and the Cabinet, but also on the part of the Governor. To that end, we are pleased that new duties of the Governor to consult with and inform the Cabinet have been agreed and some of the Governor's sole powers will now be shared to a greater extent, particularly in the area of external affairs and by means of a new National Security Council in the area of external security.

One of the prime purposes of this constitutional exercise has been to improve the clarity and accessibility of our constitution so that the various powers and duties, the rights and responsibilities can be more easily understood. And to that end it is made clear that the Cabinet has responsibility on behalf of the legislature, and thus the people, for policy making in the Cayman Islands and for directing the implementation of policy by means of a loyal public service. A new Commission for Standards in Public Life will ensure that all parts of government adapt the highest standards of probity and honesty.

There are many other innovations in this draft that we have reached this distance with, such as greater separation of powers between the political and judicial branches of government. Judicial appointments to that end, removals and discipline will no longer be undertaken by the Governor, but by an independent Judicial and Legal Services Commission.

Mr. Chairman, the Attorney General will also be appointed by the Judicial and Legal Services Commission, and since he too, or she too, is not elected by the people, that post will no longer have a vote in the legislature or the Cabinet. The Attorney General will continue, however, to be a member of both the Legislative Assembly and the Cabinet and be the principal legal advisor to both of these bodies. The Attorney General

will also no longer have responsibility for prosecutions, a power which will go to an independent director of public prosecutions.

There will be other changes, all designed to sharpen our democracy, such as a Human Rights Commission to promote understanding of the Bill of Rights, and the opportunity for the people to initiate referendum on matters of national importance.

It has also been agreed that there should be a minister of finance, but the office of Financial Secretary is being preserved in the Constitution as the principal advisor to that minister. This will make it absolutely clear that the advice of a financial and economic nature will remain available to the government at all times.

The number of elected ministers in Cabinet will be increased from five to seven, and correspondingly the membership of the House will need to be agreed — will need to be increased rather from 15 to 18 members, so as to maintain the appropriate balance between the two bodies.

And, Mr. Chair, great progress has been made not only towards the innovation of a new constitutional order, but also in the important fact that while there are still a few points left between us, which I am satisfied that we will be able to resolve, all the stakeholders are now behind the new draft.

Mr. Chair, our country will benefit by this unity. And, certainly, I want to say a very special thank you again to you and your team, a very special thank you again to the Leader of the Opposition and the NGO representatives around the table. Certainly we wish to thank His Excellency the Governor and the Honourable Attorney General for their participation, and all of the other people who have participated or assisted in making these three days be as productive as they have been.

For our part, the Government wishes to express our sincere gratitude to Professor Jeffrey Jowell, who has proved invaluable with his tremendous input in getting us and our heads around the many complex issues.

Mr. Chair, just before I close I would ask you, as I think it is more appropriate for you to do so, sir, where I mentioned regarding the constitution of the Cabinet and the increase in numbers in the legislature and what is envisaged with regards to a commencement date and how all of those things would operate, it would be good, sir, if you could walk those who are listening through what is envisaged, so as to ensure that we are satisfied in our minds that that is the UK's way of thinking, not just ours.

Once again, sir, I want to thank you very much on behalf of the Government, and we look forward to our next round.

THE CHAIRMAN: Thank you very much. I will do as you ask in winding up, but for now, Leader of the Opposition, would you like to take the floor.

HON. W. MCKEEVA BUSH: Mr. Chairman, all participants, ladies and gentlemen, these talks are important to the country, not the most important in view of the many problems we face currently. Nevertheless, sir, we want to thank you and your team for guiding us and all the other participants, civil society, for their views and advice. We especially want to thank His Excellency the Governor for braving the weather and being here with us during these very tedious discussions. We also want to thank the honourable Attorney General for his advice.

Mr. Chairman, the United Democratic Party started on this new process by having consensus with the Government in several areas. There are key points which our position paper still, and must be, our position.

At the end of the day, the public of these Islands will vote for what they deem is necessary for good governance. It is our duty to fully inform them of what is being proposed and its full ramifications on their lives.

Mr. Chairman, we must be ever careful of trespassing on areas that we have no support on from the public. One of those, I believe, is giving the government right to change the membership of House and Cabinet by enacting a law rather than the normal constitutional provisions. These would be tested during referenda. Mr. Chairman, to us there are other important matters, such as in what time frame can a public servant run for electoral politics. And we intend to have a discussion with the Civil Service Management Council, if that is permitted, to see what can be done to engender trust and maintain the integrity of the public service and the electoral process.

There are sections, Mr. Chairman, that with minor amendment can augment and enhance the workings of government and the operation of the Legislative Assembly. We — that is the Cayman delegation — have found these and made the necessary recommendations, such as LA members' attendance at Cabinet meetings, which says that we can attend Cabinet meetings every three months for the purpose of making representations on matters affecting our districts, and making budgetary representations when the annual plan and estimates are being developed. As I said, Mr. Chairman, this will enhance the working of government.

We are still concerned about the Sister Islands of Little Cayman and Cayman Brac, and we will not support what has been proposed, if that has not been removed. We don't believe that that enhances democracy, and it is not what the people of Cayman Brac and Little Cayman have told us. Again, all this will be tested, hopefully, during referenda.

Mr. Chairman, the Constitution is important to these Islands, and would to God that in the years 2002/2003 had politics had taken a back seat rather than the tripe we had to deal with, so that many important points for the people of these Islands would have had the benefit of those important points that would have enhanced the operation and better

governance of these Islands. Some of that will be changed and thank God we see the sense of it today.

Mr. Chairman, we should ever be careful as legislators not to jump at every whim or fancy because it exists in other territories. With no disrespect to friends in other territories, politics have been the order of the day. And while we can utilise their experience as examples, we are certainly different in many respects, more respect than not.

I have listened carefully to the people of these Islands, and again I say, while the United Kingdom want modernisation, people here are wary of politics that encroaches more and more on the serenity and peaceful nature of these Islands. More politics will not help us, and a document that reposes more and more power in the hands of politicians too quickly when far too many people don't understand why and without requisite experience and knowledge will not help us. Here I believe we are drifting into darker waters and closer to the reef.

I am 53 years young — only 53, Mr. Chairman — and I believe the fifth oldest person presently in the House, but I am the father of the House after only nearly 25 years. I may not be here the next time... God willing I hope to be. I hope to be because I believe I can help to make things better. But the future is uncertain.

The politics of the Constitution that is proposed — and I'm speaking about the hard politics of it — is not going to enhance, but will create cost, more money to be spent by the public and more politics, and this causes us concern.

The people don't want more adversarial politics for the elect people, not an opposition, not a government per se. That is why we believe that involvement by an Opposition in a security council, National Security Council, perhaps without even a right to vote, but there to advise His Excellency the Governor on what the minority sees as problematic can only enhance the future of these Islands and be better foundation for national security.

The people don't want more adversarial politics. And it's the processes we choose at the end of the day, Mr. Chairman, that will make us better or worse. It's not what the UK do, but what we do that matters. If we fail or go too far, posterity will not be kind to us. So, Mr. Chairman, the Constitution, as we all know, is only as good as good men and women who work it.

Mr. Chairman, I hope after we receive a draft of these round of talks that when we reach London if there are other areas that need tweaking or correcting that it will be possible to do so.

Lastly, Mr. Chairman, in the opening round of these talks last year I made the call that there should be a body — a commission, a committee, whatever — but by constitutional provision that has civil society as its members; that has the Government and the Opposition to sit on; to deliberate; to talk to; to look at what Europe is doing and what affects the United Kingdom through Europe; to look at what is happening

in the United States, our biggest trading partner; and to look at what is happening in our region, of course, to examine our own governance. So that means examining our Constitution. We need to do that, Mr. Chairman, so that there is an ongoing process that will educate and stimulate our people. If we do that we will go a long way to empower the people and prepare them for the future.

There is no real push here for political independence; I think that is a minority. But we want to educate our people to ensure they understand what it is when people talk about it. It's always good, Mr. Chairman, for detractors of the Government or of the Opposition if the current House to talk about independence and what we need to do but examples have shown us what will happen. And perhaps we've had the best of both worlds, and as my mother told me when I was going to get married, 'If you make your bed soft or hard it is you who will lay in it.'

I think I probably said enough, Mr. Chairman. I look forward to the meetings in London, me and my colleagues, and hopefully if the Government is bothered by any of the provisions here now or what I have said in any shape or form that there will be discussion for more understanding of where we're at.

Thank you very much, Mr. Chairman.

HON. D. KURT TIBBETTS: Mr. Chair, just quickly. I forgot to say, although I have discussed it with some of the members around the table, that as soon as we have the benefit of the new draft and are able to scrutinise and peruse, then, certainly the Government will set a meeting for the stakeholders around the table, for us to get together before we go to London, to see perhaps there may be peripheral issues that need to be discussed. And I want to propose for that meeting to be held — I don't think we'll need more than one day, but to be safe we'll set that meeting for the 29th, which is Thursday I believe, and if necessary we will continue on for Friday. But we will provide more details. So that, sir, is not to only advise everybody while I remember that, but also to spur your good self on to send it back to us as quickly as you can. Thank you.

THE CHAIRMAN: Thank you very much. I think that's very helpful, a very helpful suggestion.

Now, would representatives of the NGOs like to speak? Mr. Thompson first from the Chamber of Commerce.

MR. EDDIE THOMPSON: Thank you, Mr. Chairman.

The Chamber of Commerce and its members on a whole are very aware of the privilege and honour in which it is to be invited here and provide our input, and to that we would like to say thank you to yourself and your delegation, as well as the Attorney General, the Governor, the Government of the day, PPM, and the UDP, the Opposition, for letting us sit here and provide our input.

We were very pleased, as everyone has been mentioning that it was such a progressive session the last few days, and we were dealing with issues, not politics.

The couple of points that the chamber would like to once again reiterate, and that being that we would once again push our request for the document to be written in as simple English as possible. We feel that this is a document that it's the highest law in the land and it should be able to be read by children doing research in school and by the common man on the street with easy interpretation. We are also very pleased to see that most of the points that the chamber has been suggesting over the years be incorporated in among this document. It is something that has been a long road travelled and turning out to be very fruitful in the labour that has gone into it.

And just for the record, we're again thanking you for allowing us to share this document amongst our membership to review. We will be putting the ten points forward which you listed and calling a meeting with the NGO — other NGOs here as early as next week to see if we can get revised input submitted as quickly as possible as well.

We trust that your time here was enjoyable, as I'm very acutely aware of your weather conditions back home, so I certainly hope you enjoyed the warm hospitality of the Cayman Islands. We look forward to continuing working with you and the rest of the delegation here. Once again, thank you very much.

THE CHAIRMAN: Thank you. Pastor Clarke.

PASTOR ERIC CLARKE: Thank you very much, Mr. Chairman. We echo the sentiments of the chamber, Mr. Eddie Thompson, and we feel the last three days will be chronicled in the history of the Cayman Islands as three days of intensive negotiations as we sought to carve out a Constitution that is modern in content, reflective of the domestic will of the people, acceptable by international standards, and simple to the ordinary person.

I do not think that any of us came to the table labouring under any false assumption that this task would have been easy. We may not have completed all of our negotiations, but we have surely closed some holes and narrowed some gaps.

From the perspective of the Adventist Church, we're grateful for what has been achieved and remain optimistic of our ability to arrive at unanimity on fundamental matters in the Bill of Rights that are troubling to the people of these Islands. On these issues we stand by our principled position that on matters that will have the effect of compromising our morals, social and spiritual values we should not negotiate.

We walk away from this round of negotiations satisfied that we have come many steps closer to a document that will set the political,

moral and social agenda for the next generation. The people of the Cayman Islands can feel satisfied that their views have been represented, their concerns documented and their will implemented.

We wish to thank you, Mr. Chairman, for your graciousness, your tact, your patience and skills that was so ably demonstrated over these days, and with great anticipation we await the next round. We trust that the wedding of the Government and the Opposition will prove to be more than a common-law one —

[laughter]

PASTOR ERIC CLARKE: — with the conscious recognition that the best interest of the people's of Cayman will be served.

I want to also thank in addition to all those that have been mentioned by others Mrs. Sherlene Enriquez who has sat with me in this round and in the last round.

And we anticipate that the ten points will be resolved in an amicable way to the delight of all. We thank the Honourable Leader and all concerned for the initiative and bold step just to have the NGOs here. We appreciate and we look forward to great relationships.

Thank you, sir.

THE CHAIRMAN: Thank you very much. Pastor Ebanks.

PASTOR AL EBANKS: Mr. Chairman, thank you very much, and since Pastor Clarke has talked about a wedding, I hope he's planning on presiding. It should be a very interesting ceremony.

[laughter]

PASTOR AL EBANKS: I, too, would like to, first of all, express our sincere appreciation, Mr. Chair, to yourself and your delegates for the professional manner and meticulous and careful and sensitive manner in which you have guided the whole proceedings, not only in September, but particularly again in this our second round of talks.

I also want to really highly commend both the Government and also the Opposition for the professional way in which they have conducted themselves, and the manner in which I believe the people of the Cayman Islands can be duly proud of our representatives in putting forward the position — their own positions, although different, done so very respectfully. And I just want to commend them for the manner in which they have conducted themselves and brought forward their particular positions in these discussions. And again want to express my personal pride in all of them for the way in which these meetings have been conducted and they have brought their points forward.

The Cayman Ministers' Association is particularly honoured, as has been expressed by our other NGOs, as continuing to be a part of these talks and negotiations. And we trust and hope that our presence, although as acknowledged by you may be unusual at these kinds of negotiations, have added value to the talks and also to the discussions.

The Cayman Ministers' Association has been, as the community in Cayman would know, involved in this process over a period of almost ten years, with particular interest in the area of the Bill of Rights. And I want to express again to yourself, sir, and to the entire delegation our delight and pleasure at being able to say that coming out of these second round of talks we are very optimistic to be able to throw our full weight and support around the principal points of discussion that has come forth. And while we obviously await to see the final drafting of the document, have been very encouraged again by the level of support that has been given to that particular difficult section of the Constitution.

And so we are very much appreciative of the efforts that have been made to, maybe again in a unique way, carve out for the people of the Cayman Islands a document that conforms with international standards and the UK's international obligations, but yet fully seeks to preserve the unique character and nature of the people of the Cayman Islands.

So, we thank you, sir. We thank again the Leader of Government Business, his delegation, and we want to thank the Leader of the Opposition and his team, my fellow NGOs, Your Excellency the Governor, sir, it's always a pleasure, and also the Attorney General.

Thank you all very much, and may God bless us to be able to conclude successfully these talks in the next round.

THE CHAIRMAN: Thank you very much. Melanie McLaughlin, Human Rights Committee.

MS. MELANIE MCLAUGHLIN: Thank you, Mr. Chairman.

Hopefully as most persons will be aware, the Human Rights Committee is the national, independent institution that's vested with competence to promote and protect human rights in the Cayman Islands. The HRC, like the other NGOs, remains grateful for the opportunity to participate in these talks, particularly in relation to the proposals regarding the Bill of Rights.

The HRC's objective in these talks remains simply to seek the best protection of rights for the people of the Cayman Islands. In this regard, the Human Rights Committee has been able to successfully advocate and negotiate during these talks for:

- Clearer and more positive rights for our children;
- An aspirational right of education;
- An aspirational right of protection of the environment; and
- The establishment of a Human Rights Commission.

Nonetheless, there are some outstanding areas of concern for the Human Rights Committee in relation to five matters in particular:

Firstly, the drafting and language of the Bill of Rights, this needs significant improvement in order for it to be able to be understood by all persons in the community, including children. The current draft is quite cumbersome and is written in unduly formal legal language. And the Bill of Rights must be written in plain English, in order to have the most value and benefit to our people.

Secondly, the inclusion of aspirational rights of healthcare and housing. The Human Rights Committee believes both these rights should be also included in the Bill of Rights, and these can be implemented in a progressive way similarly to the way in which we were able to do in respect of the aspirational right for the protection of the environment.

Thirdly, the weakened right to non-discrimination. The HRC is gravely disappointed by the proposal to significantly restrict the right of non-discrimination.

The right of non-discrimination as it currently stands also affects and relates to many other groups and types of vulnerable people in our community, including the elderly, children, mentally and physically handicapped persons and women. None of the grounds of non-discrimination, apart from sexual orientation, generated any controversy or public debate. However, in an effort to remove any protection for one group, namely the homosexuals and transsexuals, it is now proposed to limit the right of non-discrimination for all of those other persons as well. This is a retrograde and appalling move.

I have been asked by the Chair, Ms. Sara Collins, to read a personal statement. She unfortunately couldn't be here today, as she is travelling on business:

In relation to the right of non-discrimination, I regret any attempt on our part to move towards compromise on issues which cannot and should not be the subject of 'horse-trading' such as the dignity and right to equal treatment of the citizens and residents of the Cayman Islands in all areas of their daily life. To the extent that the impression was given that any attempt to compromise would be a legitimate exercise, it is important to clarify that the HRC's position is clear, strong and unmoving on this point - that there should be equality for all.

We struggled with the larger question of the importance of this process as a whole and an attempt not to jeopardise the outcome but no process is more important than a single soul, black or white, gay or straight, male or female. No one among us has the right to diminish the lives of our fellow law-abiding residents.

My personal view, held with great sadness, is that we have not done justice in this process because the HRC, and the views it represents, have literally been pushed aside. In the process, it seems that some of us have shown ourselves prepared to do harm to many to avoid doing good for a few.

History will judge us for what comes out of this process. We should be judged, therefore, on an accurate record. I speak for myself and the Committee in saying that we will not support a Bill of Rights which is not built on the principle of equality for all. I speak for myself, and wish it to be on the record, when I say that we should be clear that this includes homosexuals, for all purposes.

I hope this clarifies the position and serves to withdraw any contrary impression that may have been given in an attempt to find compromise during these talks.

While the Government was correct in noting that the UK itself does not, other Overseas Territories such as the BVI have given their people a constitutionally free-standing right of non-discrimination. It is certainly open to us to give the Caymanian people the same protection, and we deserve no less.

The HRC remains firmly of the view that it is ill-conceived and morally repugnant for the Government to constitutionally discriminate against any group of people, much less to do so while sacrificing better constitutional protection which was being given to everyone else in the community.

Fourthly, the inclusion of a right to self-determination. Having stated emphatically that there is no desire by the Caymanian people for independence, the HRC considers it nonetheless prudent to expressly reserve the right to self-determination. This right currently appears in two international treaties which have already been extended to Cayman, namely the United Nations International Covenant on Civil and Political Rights, as well as the United Nations International Covenant on Economic, Social and Cultural Rights. It seems sensible and prudent that we should formally reserve this very important right into our Constitution. And in that regard, we do also look forward to full discussion on the inclusion of the right of self-determination in the coming weeks.

Finally and fifthly, the treatment of juvenile offenders. The HRC is also gravely concerned by the proposal to defer implementation of sections of the Bill of Rights relating to the treatment of juvenile offenders. The Government's obligations to develop proper facilities for juvenile offenders, as well as mentally ill persons, is of vital importance and sorely needs to be addressed as soon as practicable.

The current practices of incarcerating youth offenders, including girls as young as 13, at an adult prison, while making no provision for treatment or education is a disgraceful state of affairs. And the HRC is concerned to ensure that these issues are addressed by government

without undue delay and we will certainly be issuing a separate statement in full on that matter at a later date.

With those outstanding points of concern, Mr. Chairman, I'm happy to confirm that the HRC will continue to give further input on the foregoing points, as part of our ongoing commitment towards bringing positive constitutional change for the people of the Cayman Islands and our future generations.

Thank you.

THE CHAIRMAN: Thank you very much.

Before winding up, I'd like to try to summarise, as the Leader of Government Business asked me to do, the sort of timing of the way ahead. If indeed a draft of a new Constitution is agreed and settled in London in a couple of weeks' time, as I said earlier, the revised draft would be published. And my understanding is that a referendum would be held in May, to test the acceptability of that draft of the people of the Cayman Islands. If it is approved, the next step would be for the foreign office minister to formally to submit it to the Queen to be made in the Privy Council, and that is the method of legal enactment of an Order in Council with a new Constitution.

There is no agreement yet, because it's premature to think of it, as to precisely when that step might be taken. But of course once it is taken, then there would be further steps that would be needed in order to bring it into force.

By the... I was about to say by definition but that's not true. The current intention, as I understand it, is that any new constitution would be brought into force, not upon a dissolution of the Legislative Assembly, but during the next parliamentary term of the Legislative Assembly, that's to say obviously after the next elections, at some point in the future after that. And that means that the Order in Council would have to make some transitional provisions to the effect that until the dissolution of the Legislative Assembly after the next one — that's to say the next one after a new constitution came into force — the Legislative Assembly would continue to consist of 15 elected members, the maximum number of ministers would be 5, and in the interim period a Boundary Commission would need to be set up to review the constituency boundaries, the electoral district boundaries of the Cayman Islands, so as best to accommodate an increase from 15 to 18 elected members. There will be time to do that between the coming into force of a new constitution and the dissolution of the Legislative Assembly after that.

And only at the next dissolution and following the elections — that's to say the dissolution and elections after the forthcoming ones in May this year — only at that point would the Assembly, Legislative Assembly increase to 18 members and the maximum number of ministers increase from 5 to 7.

In addition to that there is provision, to which the Leader of the Opposition referred, that the draft at the moment allows flexibility for further future increases in the size of the Legislative Assembly beyond 18, and a corresponding increase in the maximum number of ministers above 7.

Now, this is — these are provisions which are not essential, but it is the case that in the other territories which have new constitutions, these provisions — or provisions along these lines have been included as a useful measure of flexibility. So that, if the view were taken at some point in the future that it would be right in response to the increase in the amount of government business, or right to respond to broader public representation, the change of population, size, and so forth, to have a larger Legislative Assembly, a larger number of ministers, then it can be done by law, by legislation, without having to amend the Constitution.

There is, however, a vital safeguard written in, and that is that any such law providing for an increase must maintain the appropriate ratio between the number of ministers that may be appointed and the number of elected members. The draft actually at the moment says there must never be more than two-fifths - the number of ministers may never be more than two-fifths of the total of the number of elected members of the House. That is, of course, designed to ensure that we don't get to a situation where the number of ministers increases so much that they by themselves form a majority. There should always be a back bench on the government side to help to keep the ministers to account.

So that is, I hope, a clear enough a summary of how we see the way ahead. And, once again, I'm grateful to everybody here for their wisdom, cooperation, tolerance and kindness. And I think without doubt, on behalf of my colleagues we have found the work hard, stimulating, challenging, but in the end enjoyable and important, to try to make as big a contribution as we can to what I hope will be a successful outcome.

And with that I would like to close the meeting and look forward to seeing you in London in a couple weeks' time. Thank you.

ADJOURNED